

**Bhasker Vs. State of A.P.**

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**Court :** Andhra Pradesh

**Decided On :** Jun-15-2004

**Reported in :** 2004(2)ALD(Cri)177; 2005CriLJ48; II(2004)DMC708

**Judge :** T. Meena Kumar and ;S.R.K. Prasad, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 302; Criminal Rules of Practice and Circular Orders, 1990 - Rule 33

**Appeal No. :** Criminal Appeal No. 393 of 2002

**Appellant :** Bhasker

**Respondent :** State of A.P.

**Advocate for Def. :** Public Prosecutor

**Advocate for Pet/Ap. :** C. Praveen Kumar, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**T. Meena Kumar, J.**

1. This appeal is directed against the judgment of the learned Sessions Judge, Nizamabad, in Sessions Case No. 345 of 1997 dated 30.7.2001, whereby the appellant-accused was convicted of the offence punishable under Section 302 of

IPC and sentenced to undergo imprisonment for life.

2. The case of the prosecution, in brief, is that Smt. Savithri (hereinafter referred to as 'the deceased') was married to the appellant-accused. About 1 1/2 years prior to 25.1.1996 the accused took loan from State Bank of Hyderabad, Sarangapoor for running a pan shop at Navipet, but he did not utilize this amount towards the pan shop and spent the amount lavishly. He was harassing and ill-treating his wife-the deceased to bring an amount of Rs. 5,000/- towards dowry from her elder brother. The deceased approached her elder brother, but could not secure that amount as he expressed his inability to pay the dowry amount. As a result, on 25.1.1996 at about 7 a.m. there was exchange of hot words between the accused and the deceased and the accused poured kerosene on her and set fire to her with an intention to kill her. The said incident was witnessed by PW 2 Ratnavath Raju and his wife Smt. Ratnavath Anju. The deceased was shifted to Government District Headquarters Hospital, Nizamabad. On a complaint given by PW 1 Smt. Rathod Laxmi, sister-in-law of the deceased, PW 10 Sub-Inspector of Police, Navipet Police Station registered a case in Crime No. 18 of 1996 against the appellant-accused under Sections 498-A and 307 of IPC. During the course of investigation, PW 4 the then Principal District Munsif, Nizamabad recorded the dying declaration of the deceased. Subsequently, on 9.2-1996 the deceased succumbed to burns while undergoing treatment in the hospital. PW 7 the then Mandal Revenue Officer, Nandipet, conducted inquest over the dead body of the deceased in the presence of PW 1, PW 6 and others. Subsequently, PW 3 and another doctor conducted post-mortem examination over the dead body of the deceased and opined that the cause of death was due to 70% of the burns, septicemia and shock. On 25.3.1996 the accused himself surrendered before the Magistrate Court, Nizamabad and he was remanded to judicial custody. After completion of investigation, PW 9 Inspector of Police, Nizamabad, laid charge-sheet against the appellant-accused.

3. A charge under Section 302 of IPC was framed against the accused. He pleaded not guilty and claimed to be tried. The prosecution, in order to prove its case against the accused, examined PWs 1 to 10 and got marked Exs. P1 to P8 and MOs 1 to 4. The Trial Court found the accused guilty of the offence under

Section 302 of IPC, convicted him thereunder and sentenced to undergo imprisonment for life. Hence, the appeal.

4. Before going to the arguments made by the learned Counsels for the parties, it would be necessary to advert to the evidence.

5. PW 1 is the sister-in-law of the deceased. She deposed in her evidence that the deceased Savithri was given in marriage of the accused about seven years prior to her death. About two years prior to the death of the deceased, the accused borrowed loan of Rs. 6,000/- from Sarangapoor State Bank of Hyderabad had opened a pan shop at Navipet and that the accused did not conduct his business properly and was addicted to bad vices and sustained loss in his business. Subsequently, the accused sent the deceased to her brother's house demanding Rs. 5,000/- from them. However, they could not fulfil the demand of the accused and that they sent the deceased back. As a result, the accused started harassing the deceased. She further deposed that on the fateful day of 25.1.1996 at about 7 a.m. on hearing the cries from the house of the accused, she rushed to the house of the accused and saw the deceased lying with burn injuries. On inquiry, the deceased disclosed that she was set fire by her husband. Thereupon, she and her younger co-sister shifted the deceased to the police station in a rickshaw and she drafted a written complaint. Subsequently, the police shifted the deceased to Government Hospital, Nizamabad and after undergoing treatment for about 15 days, the deceased succumbed to the injuries in the hospital.

6. PW 2, who is supposed to be the eye-witness to the incident, deposed that on the day of the incident he came out of his house around 6 or 7 a.m., for passing urine and found the accused and the deceased standing in the Verandah of their house and quarrelling with each other. He also found the accused lighting a match-stick and threw it on the Pallu of the saree of the deceased causing burning of her saree and when there were flames the accused ran away from the house into the Bazar. He further deposed that the deceased was crying by stating 'bachavo-bachavo' and came running towards his wife Anju, who was cleaning the courtyard of their house and that he caught hold of the deceased and made her to fall on the ground and extinguished the flames. He further deposed that one

Rathod Naidu also came to the place and brought a blanket to extinguish the flames in order to save the deceased. In the meanwhile, PW 1 Rathod Laxmi and her husband-Mangthya, Jamuna - co-sister of PW 1 and others came there and the deceased was shifted in a rickshaw by PW 1 and others to the police station. He further deposed that he was examined by the police after the death of the deceased, who succumbed to burn injuries while undergoing treatment in the Government Hospital.

7. PW 3 Dr. Rama Devi, who conducted post-mortem on the dead body of the deceased, deposed that she and one Dr. Shashikanth Bhusari, conducted post-mortem on the dead body of the deceased on 10.2.1996 and found 70% superficial and deep burns and issued Ex. P2 post-mortem report. They opined that the cause of death is due to septicemia and shock due to 70% burns.

8. PW 4, the then Principal District Munsif, Nizamabad, deposed that on receipt of requisition on 25.1.1996 along with certificate of Government Head Quarters Hospital, Nizamabad, from the Head Constable of Outpost Police Station, Government Hospital, Nizamabad, he went to the Government Head Quarters Hospital, Nizamabad, to record the dying declaration of Smt. Savithri. The patient was shown to him by Dr. Swamy Goud and doctor examined the patient before him and satisfied that the patient is in fit condition to give statement. He also deposed that he came to know through the deceased that her mother tongue is Hindi and, therefore, he has taken the assistance of Dr. Swamy Goud, who translated his questions in Hindi to the declarant and then the said Dr. Swamy Goud also translated the Hindi version of the declarant in Telugu and then the learned Magistrate recorded Ex. P4 dying declaration of the deceased. He further deposed that he was satisfied about the mental condition of the patient and has also obtained the certificate of the doctor. The doctor also gave an endorsement to the effect that the patient was conscious and coherent.

9. PW 5 is the Panch witness for the seizure of MOs 1 to 4 under Ex. P5 Panchanama. PW 6 is also a Panch witness for the inquest held over the dead body of the deceased and Ex. P6 is the inquest Panchanama.

10. PW 7 is the then Mandal Revenue Officer, Nandipet, who conducted inquest over the dead body of the deceased. Ex. P6 is the Inquest Panchanama.

11. PW 8, the then Inspector of Police, Nizamabad, deposed that he visited the scene of offence on 10.2.1996 and seized Mos 1 to 4 from the scene of offence. On the same day, he recorded the statements of PWs 1 and 2 and others in the Government Hospital. PW 9 is the Inspector of Police, who took up investigation of the case from PW 8 and filed charge-sheet in the case.

12. PW 10, the Sub-Inspector of Police, Navipet Police Station, deposed that on 25.1.1996 when he was in the police station, PW 1 came to the police station at about 9 a.m. and presented Ex. P1 complaint and he registered the same as Crime No. 18 of 1996 under Sections 498-A and 307, IPC and issued Ex. P7 FIR. Subsequently, PW 8 took up the investigation.

13. The learned Senior Counsel appearing on behalf of the respondent-accused, Sri C. Padmanabha Reddy, contended that the incident occurred on 25.1.1996 and the deceased survived of the burns for 15 days till 9.2.1996, but the prosecution did not examine the witnesses under Section 161, Cr.P.C. for all those 15 days, their statements including the statement of PW 2 who was an alleged eye-witness were recorded after 15 days of the incident and there was abnormal delay in examining the witnesses which is fatal to the prosecution case. The learned Senior Counsel further contended that Ex. P4 dying declaration recorded by PW 4 the Judicial Magistrate of First Class could not be taken as true version of the deceased as admittedly the Magistrate who recorded the dying declaration had taken the services of one Dr. Swamy Gowd for the purpose of translation of the statement given by the deceased who spoke in Hindi as the Magistrate was not acquainted with Hindi language. Further the evidence of the prosecution do not disclose that the doctor has initially certified about the fitness and the mental condition of the deceased for giving declaration since it was case of 70% burns and it would not be possible for the patient to be conscious and coherent and capable of giving declaration. He further contended that PW 4 Magistrate has deposed in his evidence that he has also obtained the certificate of the doctor who was present throughout and the doctor gave endorsement to the effect that the

patient was conscious and coherent in giving statement, but there was no such certificate of the doctor and the doctor was also not examined.

14. On the other hand, learned Public Prosecutor contended that the evidence on record would clinchingly establish the case against the appellant-accused and the Court below was justified in convicting and sentencing the appellant for the charge framed against him. He further contends that even assuming that there was no certificate of the doctor as to the fitness of the declarant's state of mind, it would not ipso facto render the dying declaration unacceptable and the evidentiary value of such a declaration would depend on the facts and circumstances of the particular case. In support of the said contention, he relied on a decision of the Supreme Court in *Laxman v. State of Maharashtra*, III (2002) CCR 247 (SC)=V (2002) SLT 49=2002 SC (CrI.) 1491.

15. Coming to the evidence, the learned Senior Counsel, Mr. C. Padmanabha Reddy, appearing on behalf of the appellant-accused has argued that there is contradiction in the evidence of PWs 1 and 2. Firstly, he pointed out the discrepancy in the evidence of PWs 1 and 2, contending that according to PW 2, the accused and the deceased were found in the Verandah of their house quarrelling with each other and he also found the accused lighting a match-stick and throwing it on the Pallu of the saree of the deceased and that the deceased having caught fire came running towards his wife Anju. However, PW 1's evidence goes to show that on hearing the cries from out of the house of the accused, she entered into the house of the accused and found the deceased lying there with burn injuries and many people gathered there. Learned Counsel has further pointed out that the omission in the statement of PW 2 recorded under Section 161, Cr.P.C. regarding his witnessing the incident is a vital omission which amounts to contradiction and it goes in favour of the accused. It is also further argued by him that PW 2 who happened to be the eye-witness deposed that when the deceased has caught fire and started running towards his wife Anju, he made her to fall on the ground and extinguished the flames and that one Rathod Naidu also came to the place, brought a blanket to extinguish the fire to save the deceased and in such a case when PW 2 has tried to extinguish flames, in general, he also might have got some burn injuries but there is no whisper of burn

injuries suffered by PW 2 and in view of that version, the entire evidence of PW 2 has to be discarded. Learned Counsel further contended that one Rathod Naidu, who tried to extinguish the flames on the deceased, was not examined by the prosecution for the reasons best known to them.

16. The evidence of PW 2 is as under:

'At about 3 1/2 years back to this day, on one day in the morning at about 6 or 7 a.m., when I was out of my house to pass urine outside the house, I found the accused-Bhasker and Savithri were standing in the Verandah of their house. I found them engaged quarrelling. I also found that accused-Bhasker lighting a match-stick and thrown on the Pallu of the saree of Savithri, on account of which, there was burning of the saree, there were flames, and after setting Savithri ablaze by lighting the match-stick, the accused ran away from the house into the Bazar. Savithri was crying by stating 'Bachavo Bachavo'. Savithri having caught with fire came running towards my wife Anju, who was cleaning the courtyard of our house. I caught hold of Savithri and made her to fall on the ground and extinguished the flames. Rathod Naidu also came to the place brought another blanket to extinguish the fire to save Savithri who was burnt. In the meanwhile, Laxmi PW 1, and her husband-Mangthya, Jamuna the co-sister of PW 1 and others came. Savithri was shifted in a rickshaw by Laxmi PW 1 and others to the police station.'

17. So the evidence of PW 2 goes to show that the deceased having caught fire started running towards his wife Anju, who was cleaning the courtyard of their house and that he caught hold of the deceased and made her to fall on the ground and extinguished the flames, whereas the evidence of PW 1 goes to show that on hearing cries, she entered into the house of the accused and found the deceased burnt and lying with burn injuries. A clear reading of the evidence of both PWs 1 and 2 goes to show that there is an utter contradiction in their depositions and as such their evidence has to be discarded. It is also to be further noted that the evidence of PW 8 Inspector of Police goes to show that PW 2, who happened to be the eye-witness to the incident, has omitted to state before him about his witnessing the accused setting fire to the person of the deceased and the said omission, as rightly argued by the learned Senior Counsel, is a crucial omission

which amounts to contradiction.

18. The relevant portion in Ex. P4 dying declaration reads as follows:

'The patient is examined by Dr. Swamy Goud and he opined that patient is fit to give statement. I am also satisfied with the condition of the patient and recorded her statement in Telugu. The patient speaks in Hindi. The Dr. Swamy Goud translated in Telugu. I recorded the statement and explained the same in Hindi to patient, which she admitted to be correct. I also understand Hindi to a little extent.'

19. Further, the evidence of PW 4 Magistrate, who recorded Ex. P4 dying declaration, reads as under :

'I ascertained the patient as to her mother tongue and she informed me that her mother tongue is Hindi. Therefore, I have taken assistance of Dr. Swamy Goud and he translated my questions in Hindi to the declarant and then he also translated the Hindi version of declarant in Telugu language to me, and I have commenced recording D.D. at 1 p.m., and concluded.

I was satisfied that the patient was conscious and coherent to give answers. I have obtained right thumb impression of declarant, the patient-Smt. Savithri.

I have also obtained the certificate of the doctor that was present throughout. The doctor gave endorsement to the effect that the patient was conscious and coherent. The dying declaration is Ex. P4.'

20. Even though the evidence of PW 4 Magistrate goes to show that he has obtained a certificate of the doctor to the effect that the patient was conscious and coherent but no such certificate was made available either to the Court below or before this Court. The learned Public Prosecutor has relied upon the judgment of the Supreme Court in *Laxman v. State of Maharashtra* (supra), wherein it is held as under:

'A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he had recorded the dying declaration.'

21. The learned Public Prosecutor argued that the signature of the doctor itself amounts to the certification and hence there is no need for separate certificate, and the evidence of the Magistrate has to be looked into with reference to the signature as that of the certification, and the evidence of the Magistrate and the dying declaration has to be given its credence. But for the reasons best known to the prosecution the said doctor was not examined. The Apex Court in a latest judgment in P.V. Radha Krishna v. State of Karnataka, IV (2003) SLT 603=III (2003) CCR 47 (SC)=2003 SCC (Cri.) 1679, has held that the dying declaration has also to be proved like the other evidence. But, in the case on hand it is to be noted that the doctor who has appended his signature to the dying declaration - Ex. P4 and who has translated the dying declaration into Telugu has not been examined and the learned Magistrate purely depended on the version of the doctor to note down Ex. P4. Hence the non-examination of the doctor is fatal to the prosecution. There is another circumstance to disbelieve the dying declaration. The Magistrate who has recorded the dying declaration deposed that he has obtained the certificate of the doctor and also the endorsement, but there is no certificate of the doctor. Therefore, we are of the opinion that Ex. P4 need not be given any evidentiary value. It is pertinent to note that a reading of Ex. P4 goes to show that the deceased deposed that her husband, mother-in-law, Thannu, two small children were present and her mother-in-law asked her husband to pour kerosene on her and set fire and her body was got burnt by her mother-in-law through her husband. Thus, the dying declaration of the deceased goes contrary to the evidence of PW 2 who deposed that he has seen the accused setting fire to the saree of the deceased in the Verandah and as such, in view of the above contradictions, the evidence of PW 2 also has no credence and evidentiary value and has to be discarded. However, in the background of the evidence, the Trial Court came to the conclusion that it was the accused that poured kerosene on his

wife and set her on fire. But, in view of the discrepancy in the evidence of PWs 1 and 2 with regard to the place of occurrence, we hold that the prosecution has failed to prove the place of occurrence of the incident and, therefore, the evidence of PWs 1 and 2 has to be discarded. There is discrepancy in the evidence of the learned Magistrate with regard to the obtaining of certificate by the doctor and the said certificate is not filed and hence, his evidence has no credibility and that we have no hesitation to observe that the recording of the dying declaration itself is against the rules framed under Criminal Rules of Practice. Rules 33 of Criminal Rules of Practice and Circular Orders, 1990, reads as follows :

(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 of 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 question 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.'

22. In this case, the learned Magistrate has not followed the procedure contemplated under Rule 33 of Criminal Rules of Practice while recording the dying declaration and hence, we are bound to observe that there is utter violation of Rule 33 of Criminal Rules of Practice and Circular Orders, 1990.

23. Further, it has to be observed that the Trial Court has not taken into consideration the omission in the 161, Cr.P.C., statement of PW 2 and also the admission of the same by the Inspector of Police, Nizamabad Rural Circle, in his evidence as PW 8. Thus, the prosecution failed to bring home the guilt of the accused beyond all reasonable doubt.

24. In the result, the criminal appeal is allowed and the conviction and sentence passed by the learned Sessions Judge, Nizamabad against the appellant-accused for the offence punishable under Section 302 of IPC in Sessions Case No. 345 of 1997 on his file are hereby set aside and the appellant-accused is acquitted of the said charge and he shall be set at liberty forthwith if he is not required in any other case.

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