

**THE HON'BLE SRI JUSTICE K.C.BHANU
AND
THE HON'BLE SMT. JUSTICE ANIS
CRIMINAL APPEAL No. 710 OF 2010**

JUDGMENT: (Per the Hon'ble Smt. Justice Anis)

1. This Criminal Appeal, under Section 374(2) of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), is directed against the judgment dated 20.04.2010 in Sessions Case No.141 of 2008 on the file of the learned IV Additional Sessions Judge, East Godavari at Kakinada, whereunder and whereby the appellants/A.1 to A.5 were found guilty of the offence punishable under Section 302 of the Indian Penal Code, 1860 (for short, 'IPC') and accordingly convicted and sentenced them to undergo rigorous imprisonment for life and to pay a fine of Rs.100/- each, in default to undergo simple imprisonment for 15 days each.

2. The case of the prosecution, in brief, is as follows:

One Yepuri Murali Mohan @ Bobby (hereinafter referred to as 'the deceased') was the owner-cum-driver of a lorry and resident of Kakinada. The deceased once worked as driver under late Vegulla Sivababu (A.8). Later, the deceased discontinued his employment under A.8 for the reason that A.8 was involved in a murder case of one Vobilineni Satyanarayana Chowdary @ Abbu. After quitting employment under A.8, the deceased purchased a lorry of his own and used to drive the said vehicle. Subsequently, A.8 sold away the building of Kakinada Lorry Owners Association for a consideration of Rs.76 lakhs to meet the expenses of the murder of said Abbu. The deceased and one Mosa Hari Prasad (PW6) were said to be questioning late Vegulla Sivababu (A.8)

about the accounts of the lorry owners association. The deceased left the lorry owners association headed by A.8 and was actively participating in another union called Laxmi Motor Workers Union established by the opponents of A.8. Prior to the incident, A.8 asked the deceased to come back and join in the association run by him, but the deceased did not agree for that. As such, A.8 with the help of his supporters, hatched a plan to do away with the life of the deceased or PW6.

On 26.04.2007 at about 11.30 p.m., while PW1 was at his shop, the deceased visited him and took his motorcycle to get diesel from the petrol bunk. At about 12.45 midnight, the deceased and PW3 went to Kalyani auto garage centre and there they saw PW2 passing by and called him. While they were all talking, A.1 and A.4 came there, picked up quarrel and pushed the deceased. A.1 picked up a cement stone and hit the deceased on his head, and A.4 also caused injuries to the deceased with the same stone. A.4 took away the key of the motor bike of PW2 and made a telephone call informing that they found the deceased. Later, A.2, A.3 and A.5 came on a motorcycle. Then, A.2 attacked the deceased with knife and caused two injuries in the abdomen. A.3 attacked the deceased with a knife on the groin region. A.5 beat the deceased with a stone on his head. Meanwhile, PW2 took away his keys from A.4 and left that place to go to III Town Police Station to report about the incident, but on the way he met PW9 police constable and informed that A.1 and another were attacking the deceased. On the said information, PW9 rushed towards Kalyani auto garage centre and found the deceased lying on the ground with bleeding injuries. Then, PW9 informed the same to another police constable PW8 who shifted the injured to the Government Hospital, Kakinada, wherein he declared dead.

On 27.04.2007 at about 2.20 a.m., on receiving death intimation, the Sub-Inspector of Police, III Town police station (PW24) rushed to the hospital and on receiving Ex.P.1 report from PW1, he registered the same as a case in Crime No.56 of 2007 and issued FIR. Then, the Inspector of Police PW25 took up the investigation, visited the hospital and recorded the statements of PWs 1 to 3. PW25 also visited the scene of offence, prepared scene observation report and rough sketch in the presence of PW20 under Exs.P.11 and P.41 respectively. PW25 further got the scene photographed through PW7 under Ex.P.2. During the course of observing the scene of offence, PW25 seized three pairs of footwear -

MOs 4 to 6, bloodstained stone MO1, blood stained earth MO7 and controlled earth MO8. PW25 also conducted inquest at the hospital over the dead body of the deceased in the presence of PW20 under Ex.P.12 and sent the dead body for post-mortem examination.

On 27.04.2007, the Professor of Forensic Medicine PW18 held autopsy over the dead body of the deceased and opined that the cause of death of the deceased was due to fracture of skull with penetrate stab injury on left chest with multiple stab injuries and issued Ex.P.8 post-mortem examination report.

On 07.05.2007, PW25 apprehended A.1 to A.5 in the presence of PW20. In pursuance of the statement made by A.1, at his instance, Motor cycle MO9, LG cell phone MO10 and pair of clothes were recovered under Ex.P.13 panchanama. At the instance of A.3, Hero Honda motorcycle MO13 and cell phone MO14 under the cover of Ex.P.15, and blood stained clothes MO17 and a knife MO3 under the cover of Ex.P.17 were recovered. At the instance of A.4, one reliance cell phone MO15

was seized under Ex.P.16 panchanama. Later, PW25 filed a memo for altering the Section of law from 302 r/w 34 IPC to 148, 302 r/w 109 and 120B r/w 149 IPC.

On 15.05.2007, PW25 filed requisition for conducting test identification parade for A.2, A.3 and A.5 and accordingly, on 19.05.2007, PW19 held test identification parade wherein PW1 identified A.2, A.3 and A.5 under Ex.P.10.

After receipt of reports from RFSL and after completion of investigation, PW25 filed the Charge sheet into the Court against A.1 to A.7 as A.8 was no more.

3. The trial Court framed the following Charges against the accused:

“Firstly, that you A.1 to A.7 along with Vegulla Sivababu (A.8) (who is no more) prior to 26.4.2007 at Kakinada agreed among you to do away with the life of Yepuri Murali Mohan @ Bobby and in pursuance of the criminal conspiracy you commit murder of Yepuri Murali Mohan @ Bobby attacking him with cement stones and knives and thereby committed an offence punishable under Sec.120 (B) of the Indian Penal Code, and within my cognizance.

Secondly, that you A.1 to A.5, on the intervening night of 26/27.4.2007 at about 00-30 hours at Tilak Street near Anjaneyaswamy temple, Kakinada – members of an unlawful assembly and in prosecution of common object to attack Yepuri Murali Mohan @ Bobby (the deceased), committed an offence of rioting with deadly weapons like knives and stones, and thereby committed an offence punishable under Sec.148 of the Indian Penal Code and within my cognizance.

Thirdly, that you A.1 to A.5, on or about the same date, time place during the course of same transaction mentioned in Charge No.2 supra, did commit murder by intentionally or knowingly caused the instantaneous death of Yepuri Murali Mohan @ Bobby (the deceased) – to wit – A1 beat the

deceased on the face with cement stone, A2 stabbed the deceased with a knife on the chest, A3 stabbed the deceased with the knife on the testicles and on the face, A4 and A5 beat the deceased with cement stones, and thereby committed an offence punishable under Sec.302 of the Indian Penal Code and within my cognizance.

Fourthly, that on or about the same date, time and place and during the course of same transaction mentioned in Charge No.2 supra, A6 and A7 of you abetted the commission of offence of murder of Yepuri Murali Mohan @ Bobby by A.1 to A.5, which was committed in consequences of your abetment and thereby you committed an offence punishable under Sec.302 r/w 109 of the Indian Penal Code, and within my cognizance.”

When the said charges were read over and explained to the accused, they pleaded not guilty and claimed to be tried.

4. To substantiate its case, prosecution examined PWs. 1 to 25 and got marked Exs.P.1 to P.43, besides case properties MOs 1 to 24.

5. After closure of prosecution side evidence, the accused were examined under Section 313 Cr.P.C. to explain the incriminating circumstances found against them in the evidence of prosecution witnesses. The accused denied the same and stated that they had no defence evidence.

6. Upon considering the evidence on record, the trial Court found A.1 to A.5 guilty of the offence punishable under Section 302 IPC and accordingly convicted and sentenced them as stated supra, while acquitting A.1 to A.7 for the offence punishable under Section 120B IPC; A.1 to A.5 for the offence punishable under Section 148 IPC and A.6 and A.7 for the offence punishable under Section 302 r/w 109 IPC. Aggrieved thereby, the present Criminal

Appeal is preferred by A.1 to A.5.

7. Now, the points that arise for determination are –
1. Whether the cause of death of the deceased is homicidal in nature?
 2. Whether the prosecution is able to prove the guilt of the appellants/A.1 to A.5 for the offence punishable under Section 302 IPC beyond all reasonable doubt?
 3. Whether the judgment of the trial Court is correct, legal and proper or not?

8. The learned counsel for the appellants/A.1 to A.5 argued that the very presence of so-called eyewitnesses PWs 1 to 3 relied on by the prosecution, cannot be believed; that the witnessing of incident by PWs 1 to 3 is highly doubtful as PWs 2 and 3 in their evidence did not state about the presence of PW1; that PW1 did not make any attempt to rescue the deceased from the attack made by A.1 and A.4; that all the alleged three eyewitnesses did not try to interfere when A.1 and A.4 were quarreling and attacking the deceased, and therefore, all the said circumstances create doubt about the presence of PWs 1 to 3 eyewitnesses relied on by the prosecution.

The learned counsel further argued that the conduct of PW1 has to be scrutinized very carefully because according to the prosecution he was present when the attack was made by A.1 and A.2, but he did not report the matter to the police after the incident though one can reach I Town Police Station within two or three minutes by walk and III Town Police Station within ten minutes; that PW1 did not inform to the family members of the deceased whose house is situated at a distance of five minutes walk from

the scene of offence, but strangely he went to the house of PW6 and informed him; that PW6 in his evidence did not depose about PW1 informing him that A.1 and A.4 are the assailants and according to him PW1 informed that some unknown persons attacked the deceased and caused injuries with stone and knife.

It is also argued that when PW1 came along with PW6 to the scene of offence, two police constables were present and PW1 informed about the attack made by A.1 and A.4 on the deceased to the police, but no report was given by him at that point of time to police and gave complaint Ex.P.1 at the Government hospital at about 3.30 a.m., and the trial Court has not considered the said aspects.

It is further argued that PW1 in his evidence admitted that he does not know A.2, A.3 and A.5, but he gave the names of A.3, A.6 and A.7 and one Matta Bujji, and claims that PW3 gave those names to him, but PW3 in his evidence stated that he does not know A.3, A.6 and A.7. It is also argued that the prosecution conducted the test identification parade on 19.05.2007, but failed to explain when PW1 gave the names of A.3, A.6 and A.7 and one Matta Bajji and why they were not put up for identification parade, whereas A.2 and A.5 were put up for identification.

It is also argued that as the evidence of PW1 is contrary to the evidence of other witnesses, it is to be drawn that PW1 was not present at the time of incident and he has not seen any accused while attacking the deceased.

The learned counsel further argued that according to prosecution, PW2 has seen the attack made by A.1 and A.4, but in his evidence he stated that he did not give the name of A.4 to the

police and he mentioned only A.4 as a lean person without disclosing his name, and he further deposed that prior to the incident he does not know A.3 and A.4 and PW1 informed him the name of A.1, and thus, the accused are strangers to PW2 and no test identification parade was held to identify those accused and identification made in the Court at first time after lapse of 1 ½ years which is not reliable. It is also argued that PW1 deposed that while he was going to the police station to give complaint, on the way he met police constable PW9 and informed about the incident, whereas PW9 stated that at about 12.50 a.m. PW2 came to him in a hurry manner and informed that A.1 and another person were attacking the deceased, but he did not give the name of A.4 and on the information given by PW2, PW9 informed the same to PW8 and rushed to the scene of offence, and thereafter the Sub-Inspector of police also reached there.

It is also argued by the learned counsel that non-registration of crime on receiving the information about cognizable offence is fatal to the case of prosecution and further the prosecution failed to explain the delay.

The learned counsel also argued that PW2 admitted that when he narrated about the incident to the Sub-Inspector of Police, he took the signature, but the said statement was suppressed by the prosecution and fabricated Ex.P.1 with due deliberations, and the prosecution also not explained why the Investigating Officer not registered the case on the statement given by PW2.

It is also argued that PW3 is a solitary witness, he witnessed the entire incident and admits in his evidence that A.2, A.3 and A.5 are strangers to him and he has seen them for the first time at the time of incident and again in the Court, but the

Investigating Officer has not conducted the test identification parade for identifying A.2, A.3 and A.5 by PW3.

The learned counsel also argued that though A.1 and A.2 were convicted under Section 302 IPC, they were acquitted under Section 120B and 148 IPC, and therefore, each accused is liable for their individual overt acts only. It is further argued that PWs 1 to 3, who are the alleged eyewitnesses to the prosecution, stated in their evidence that A.1 and A.4 were not armed with any weapon, but they took up a stone near Anjaneyaswamy temple and hit the deceased, and therefore, that itself shows that they have no pre-meditation nor intention to kill the deceased. It is further argued that a perusal of the evidence of PWs 2 and 3 shows that the quarrel between the deceased and the accused took up for five minutes, A.1 picked up a quarrel with the deceased, pushed him down and beat him with a stone, and therefore, A.1 does not have any intention to kill the deceased and during the course of quarrel he picked up the stone from the place of incident and hit the deceased.

The learned counsel argued that the evidence of PWs 1 and 2 shows that A.1 beat the deceased with the cement stone on the head, A.4 also beat him with the same stone on the head of the deceased, whereas PW3 stated that A.1 hit the deceased with the cement stone on his head, A.4 with the same stone caused two injuries on the head of the deceased, A.2 attacked with a knife causing two injuries in the abdomen, A.3 attacked with a knife on groin region, A.5 beat with the stone on head and again A.2 beat with the same stone on head.

It is also argued that as per the evidence of doctor, who conducted post-mortem examination, the cause of death of the

deceased was due to injury to brain due to fracture of skull with penetrating stab injury on chest with multiple injuries and the injuries 1 and 2 are incised wounds which could have been possible by knife, and thereby, the prosecution failed to explain how the stab injury was caused on the head of the deceased. It is further argued that PW3 in his evidence stated that A.2 and A.3 stabbed the deceased in abdomen, PWs 1 to 3 stated that A.1 and A.4 hit the deceased on head with a stone, but the prosecution failed to explain which of the injury caused by A.1 and A.4 is fatal.

The learned counsel also argued that in Ex.P.1 complaint and as per Section 161 Cr.P.C. statements of PWs 1 to 3, one Matta Bujji indiscriminately hit the deceased with stone on head, but strangely his name was deleted from the charge sheet and no explanation was given by the prosecution, and therefore, the prosecution failed to explain who caused the fatal injury.

The learned counsel further argued that the overt act attributed to A.2 and A.3 i.e. stabbing in the abdomen is an improvement and the medical evidence does not show any injury on abdomen, and thus, there is no evidence against A.2, A.3 and A.5. It is also argued that the names of A.2, A.3 and A.5 were not in the first information report and none of the mediators who are present at the time of inquest also not stated their names, and therefore, the prosecution failed to establish the identity of A.2, A.3 and A.5 and their involvement in the alleged offence.

It is further argued that the prosecution failed to prove that A.1 and A.4 caused the fatal injury, and therefore, prayed the Court to allow the appeal. It is also argued that in the event if this Court comes to a conclusion that A.1 and A.4 committed the

offence, a lenient view may be taken as the prosecution failed to establish who caused the fatal injury and on the other hand one Matta Bujji indiscriminately beat the deceased with a stone on his head, and therefore, prayed the Court to convert the sentence from Section 302 IPC to 304 Part II IPC.

The learned counsel further relied on a case-law reported in *Dorai Alias Mariappan Vs. State of T.N.*^[1], wherein the Hon'ble Supreme Court held as follows:

“PW 1 stated that immediately after the occurrence his mother arrived at the place of occurrence at 2.30 a.m. and at the same time the police also arrived to whom this witness gave his statement but the same was not taken note of. It is not known whether the appellant was named or not in the said statement which could have been the first version of the occurrence and no explanation has been furnished by the prosecution as to why the police did not take statement of this witness at the place of occurrence itself on the fateful night at 2.30 a.m. As the police was there, statement given by this witness should have been taken by the police and forwarded to the police station for recording the first information report and there could have been no reason for PW 1 to go to the police station for lodging the first information report.”

The learned counsel further relied on a decision reported in *Bollavaram Pedda Narsi Reddy and others Vs. State of A.P.*^[2], wherein the Hon'ble Supreme Court held at Para 8 as follows:

“The evidence given by the witnesses before the Court is the substantive evidence. In a case where the witness is a stranger to the accused and he identifies the accused person before the Court for the first time, the Court will not ordinarily accept that identification as conclusive. It is to lend assurance to the testimony of the witnesses that evidence in the form of an earlier identification is tendered. If the accused persons are got identified by the witness

soon after their arrest and such identification does not suffer from any infirmity that circumstance lends corroboration to the evidence given by the witness before the Court. But in a case where the evidence before the Court is itself shaky, the identification before the magistrate would be of no assistance to the prosecution.”

The learned counsel further relied on a decision reported in *Radhey Shyam Vs. State of U.P.*^[3], wherein the Hon’ble Supreme Court held as follows:

“It held that the three convicted accused had exceeded the right of private defence but we do not find any evidence to show that the appellant had given the fatal blow or any blow which was likely to cause the death of Ram Saran. In the absence of such evidence, the appellant could have been convicted only under Section 325 and not under Section 304 Part I IPC.”

The learned counsel also relied on a decision reported in *Ashok Kumar Vs. State of Punjab*^[4], wherein the Hon’ble Supreme Court held as follows:

“Moreover, it appears from the dimensions of injuries Nos.3 and 4 – both are 1/3” x 1/4” – that these two injuries must have been caused by the same weapon and the same person must be the author of both these injuries. Now the only assailant, who according to the prosecution evidence, inflicted two injuries was the unidentified assailant and hence injury No.3 would more properly be attributable to him and not to the appellant. It is, therefore, not possible to say that the prosecution has established beyond reasonable doubt that injury No.3, which was the fatal injury, was caused by the appellant. The possibility cannot be ruled out that it was injury No.2 which was caused by him and hence the conviction of the appellant for the offence under Section 302 cannot be sustained and for the individual injury caused by him, he can be convicted only under Section 324.”

9. On the other hand, the learned Public Prosecutor argued that PWs 1 to 3 are the eyewitnesses who gave evidence about committing the offence by all the accused; that initially A.1 and A.4 attacked the deceased with a cement stone and thereafter A.2, A.3 and A.5 also joined them and attacked the deceased with knives, resulting which the deceased died on the spot; that the delay of four hours in lodging the complaint is not fatal in the cases of this nature; that the findings of the trial Court need no interference, and finally, prayed the Court to dismiss the appeal.

10. **Points:**

A perusal of the evidence produced by the prosecution shows that PW1 is the *de facto* complainant who lodged the complaint to the police under Ex.P.1 wherein he stated about witnessing the incident.

11. In this case, the Investigating Officer received the complaint, registered the same as a case in Crime No.56 of 2007 and issued FIR. The Investigating Officer also pressed the service of PW7 photographer who took the photographs of the scene of offence as well as the dead body of the deceased under Exs.P2 and P.3. Further, the Investigating Officer conducted inquest over the dead body of the deceased in the presence of PW20 under Ex.P.12 and sent the dead body for conducting post-mortem examination.

12. PW18, who is the Professor of Forensic Medicine, conducted autopsy over the dead body of the deceased on 27.04.2007 and found the following:

Antemortem External injuries:

1. An obliquely placed wedge shaped incised cut injury of 2.5 x 1 x 0.5 cms present over left back of the head

(occipital region). It is 27 cms above the inner aspect of left eye brow and it is 27 cms above the inner aspect of left eyebrow and it is 18 cms to the left of pinna of the left ear and is stained with dried blood and is reddish in colour.

2. An obliquely placed spindle shaped stab wound of 1 x 0.25 cms x 3 cms size is present over right frontal region of the head. It is 6 cms above the right ear. It is 8 cms above the outer aspect of right eyebrow. Dried blood is coming out to the exterior from the wound and is reddish in colour.
3. A reddish abraded contusion of 7 x 5 cms size with an deformity of the underlying head is present over the right temple and extending upto the frontal region of right side of the head and is reddish in colour.
4. An obliquely placed incised cut injury of 1.5 cms x 0.25 cms x 0.25 cms size present over upper aspect of pinna of the right ear stained with dried blood.
5. A reddish abrasion of 10 x 5 cms size with deformity of underlying structures present over left forehead region extending upto the left frontal region of the head.
6. A reddish abrasion 1 x 0.5 cms size present over upper aspect of right ala of the nose.
7. A reddish abrasion of 4 x 3 cms size present over right chin region.
8. An obliquely placed spindle shaped penetrating stab wound of 3 x 1 x 7 cms size present over left front lower chest region. It is 0.5 cms to the left of midline of lower chest region and it is 26 cms above the inner aspect of left groin through which dried blood is coming out to the exterior and is reddish in colour.
9. A skin deep, obliquely placed incised wound of 6 x 0.5 cms x 0.25 cms size present over back of right mid chest region and is stained with dried blood.
10. An obliquely placed scratch abrasion of 10 x 0.25

cms size present over back of outer aspect of right forearm, reddish in colour.

11. An obliquely placed skin deep incised wound of 6 x 0.5 x 0.25 cm size present over back of outer aspect of left hand and wrist and is reddish in colour. It is a defence wound.
12. An obliquely placed muscle deep spindle shaped stab wound of 4 x 1 x 3 cms, present over upper and inner aspect of right thigh through which dried blood is coming out to the exterior. It is 3 cms below the inner aspect of right groin.
13. An obliquely placed spindle shaped stab wound of 3 x 0.5 x 14 cms size, present over right mid front scrotal region through which dried blood is coming out to the exterior.

Antemortem Internal injuries:

1. On dissection of external injuries 3 and 5, there were corresponding contused area of 20 x 10 cms present on underlying frontal region of scalp. Below of it there were multiple fragmentary fractures present over an area of 18 x 9 x 1 cms, on frontal vault of the skull. Below the fracture the coverings of the brain is lacerated and the underlying mid frontal lobe of the brain at an area of 7 x 3 x 9 cms size, lacerated.
2. On dissection of external Injury No.2, there were corresponding stab wounds present all over the tissue layers of right frontal region of scalp from there the weapon entered into the substance of brain through the fracture of skull produced by the external injuries 3 and 5 and internal injury No.1 and there is penetrating stab wound of 1 x 0.5 x 0.25 cms size present at the right frontal lobe of the brain, with blood and blood clots of 500 gms in size in the substance of frontal lobe of the brain is present.
3. On dissection of external injury No.8 i.e., stab wound of left front lower chest region. There were corresponding stab wounds present in all the underlying tissue layers of the left

lower chest from there obliquely the weapon enters through 8th costal cartilage and there is an incised cut fracture of 1 x 0.5 cms x 0.25 cms size present over lower aspect of left 9th rib from his, in enter the peritoneal cavity through the omentum and there were a stab wound of 1 x 0.5 x 0.25 cms size at the mid aspect of large intestine and there is presence of blood and blood clots of 1000 grams in the peritoneal cavity.

4. On dissection of external injury No.13, there were corresponding stab wounds in the underlying tissues of right side scrotum and the weapon enters through the adjoining structures and with presence of penetrating stab wound of 0.5 x 0.25 x 0.25 cms size present in between the structures and the right scrotal sac containing 100 ml of blood and blood clots.”

PW18 stated that there are thirteen external injuries and four internal injuries, the external injuries 3, 5, 6, 7 and 10 and internal injury No.1 can be possible with MO1 cement stone, and external injuries 1, 2, 4, 8, 9, 11, 12 and 13 and internal injuries 2, 3 and 4 may be possible with MO2 knife. PW18 in his opinion stated that the deceased would appear to have died of an injury to the brain due to fracture of skull with penetrating stab injury on left chest with multiple stab injuries. Ex.P.8 is the post-mortem examination certificate.

13. A perusal of the evidence of above witnesses coupled with the post-mortem examination certificate clearly established that the death of the deceased is a homicidal one.

14. A perusal of the evidence shows that the incident of attack on the deceased took place some time after the midnight of 26/27.04.2007, the deceased was shifted to hospital by 2.15 a.m., PW24 received the death intimation and Ex.P.1 report from PW1 by 3.30 a.m. and thereafter a case was registered in Crime No.56

of 2007 of III Town (L&O) Police Station, Kakinada.

15. PWs 1 to 3 are claiming themselves as eyewitnesses to the incident. PW1 stated that he knows the deceased since several years; that he is doing electrical works of the motor vehicles; that on 26.04.2007 at 11.30 p.m., the deceased came to his shop and took his motorcycle to get diesel for his vehicle from a petrol bunk; that PW1 closed his shop and went to his house; that as the deceased did not return even after one hour, PW1 started from his house and reached near Kalyani Auto Garage centre where he found the deceased and PWs 2 and 3; that at that time, A.1 and A.4 came on a motorcycle and attacked the deceased with a cement stone on his head; that A.4 made a phone call to somebody and after that three persons came to the scene of offence; that he do not know the names of the said three persons and when they tried to attack the deceased with knife, he got frightened, ran away from the scene of offence and went to the house of PW6; that after some time, himself and PW6 came to the scene of offence and found the deceased was lying on the ground with injuries; that the police people were also present at the scene of offence; that the deceased was shifted to government hospital and he gave complaint under Ex.P.1 at the hospital.

16. PW2 is another eyewitness to the alleged incident. He stated that he is a businessman; that he knows A.1, A.3 and A.4 by their names; that on 27.04.2007 at 30 hours, while he was going on his motorcycle to his house and when he reached near Kalyani auto garage, the deceased and PW3 called him; that at that time, A.1 and A.4 came on a motorcycle, picked up a quarrel with the deceased; that A.1 picked up a cement stone at Anjaneyaswamy temple near the scene of offence and beat the deceased on his

head; that A.4 made a phone call to somebody; that thereafter he left the place to go to police station to inform about the incident and on the way he met PW9 police constable to whom he informed about the incident; that he came along with PW9 to the scene of offence and by that time the deceased found dead on the ground with injuries.

17. PW3 is another eyewitness to the incident. He stated that he knows A.1 and A.4 even prior to the incident; that he knows A.2, A.3 and A.5 only after the incident; that he does not know A.6 and A.7; that on 26.04.2007 at 12.45 in the night he was with the deceased at Kalyani auto garage centre; that they called PW2 while he was going on the way; that when they were talking with each other, A.1 and A.4 came on a motorcycle and pushed the deceased; that A.1 hit the deceased with a cement stone on his head; that A.4 also caused injuries with the same stone on the head of the deceased; that A.4 made a phone call to A.2, A.3 and A.5 who came on a motorcycle and attacked the deceased with a knife and caused injuries in the abdomen; that A.2 attacked the deceased with a knife in the abdomen; that A.3 attacked on the groin region and A.5 beat the deceased with a stone on his head.

18. Coming to other witnesses, PW4 is the brother of the deceased who spoke about the differences between A.8 and the deceased. Further, the evidence produced by the prosecution shows about the collecting phone particulars, addressing letter to Airtel, Idea Cellular and Reliance, arresting of the accused, recording the confessional statement and recovering the weapons, cell phones and bloodstained clothes by the Investigating Officer. Further, the Investigating Officer, after receiving the post-mortem certificate and RFSL report and after completing the investigation,

filed the charge sheet into the Court.

19. The main contention of the learned counsel for the appellants is that the very presence of PWs 1 to 3 at the time of incident is highly doubtful. It is also argued that the trial Court rightly acquitted A.6 and A.7. As per Ex.P.1, PW1 has not seen the attack made by A.3, A.6 and A.7 and also A.2 and A.5. Further, PW3 informed PW1 that one Matta Bujji beat the deceased forcibly with a stone on the head of the deceased. Even in Ex.P.1 complaint, it is specifically mentioned that the said Matta Bujji beat the deceased with a stone on his head forcibly. But, the Investigating Officer has not explained why the name of the said Matta Bujji was deleted from the charge sheet. It is also argued that the names of A.2 and A.5 were not mentioned in Ex.P.1 to show that they attacked the deceased. Therefore, the very presence of eyewitnesses cannot be believed and it is highly doubtful. Therefore, the prosecution failed to prove the guilt of the accused.

20. Admittedly, the trial Court acquitted A.6 and A.7 from the charges and no appeal has been preferred by the State against the said acquittal order.

21. PWs 1 to 3 are the alleged eyewitnesses to the incident which was happened sometime after the midnight on 26/27.04.2007. PW1 gave a report to police under Ex.P.1 wherein he did not state about A.2, A.3 and A.5, but only stated that three persons came to the scene of offence. According to PW1 in Ex.P.1, A.1 took the stone and beat the deceased on his face, but in the evidence he stated that A.1 and A.4 caused injuries to the deceased with a cement stone by hitting on his head. PW1 further stated that after the alleged attack made by A.1 and A.4, he left

the scene of offence, went to the house of PW6 and informed about the incident, and thereafter he returned to the scene of offence along with PW6 where the police were present, lifted the body of the deceased and shifted him to the Government hospital at 12.45 hours.

22. As per Ex.P.1, PW3 informed the names of A.3, A.6 and A.7 to PW1 and also informed that one Matta Bujji beat the deceased with a stone on the head of the deceased forcibly. As per the evidence of PW1, he did not witness the attack made by A.2, A.3 and A.5 with knives on the deceased. PW3 only informed the overt acts against A.2, A.3 and A.5.

23. A perusal of the evidence of PW1 also shows that when the first incident was taken place i.e. attack made by A.1 and A.4 on the deceased with a stone, he went to the house of PW6. But, PW1 did not inform the incident to the family of the deceased. Further, after PW1 returned back to the scene of offence along with PW6, no report was given by him to the police. Moreover, PW1 did not go to the police station to inform about the incident and instead he went to the house of PW6. Therefore, the evidence of PW1 shows that he did not witness the alleged attack made by A.2, A.3 and A.5 on the deceased with knives.

24. PW2 is another eyewitness who stated about the attack made by A.1 and A.4. However, due to fear, PW2 left the scene of offence and he did not witness the incident of attack made by A.2, A.3 and A.5 on the deceased with knives. PW2 stated that he does not know A.4 and his name, but he informed the police about one lean person. In the cross-examination, PW2 admitted that he does not know any one of the accused prior to the incident and PW1 gave the name of A.1. As per the evidence of PW2, while

leaving from the scene of offence due to fear, he met police constable PW9 on the way and informed about the incident. PW2 also stated that he gave a statement to the police and he signed on the said statement. Strangely, the Investigating Officer suppressed the said statement which was given at an earlier point of time to the police. Further, PW2 did not attend the test identification parade and he does not know A.3 and A.5. When police asked PW2, he did not give the name of A.4 but described A.4 as a lean person. Therefore, it is clear that PW2 has not witnessed the alleged attack of A.2, A.3 and A.5 on the deceased with knives. However, PW2 witnessed only while A.1 and one lean person were causing injuries to the deceased with stone. Further, the evidence of PW2 also cannot be believed with regard to attack of A.4 on the deceased as he does not know A.4 and his name.

25. Coming to the evidence of PW3, he stated about the overt acts against all the accused. According to the prosecution, PW3 witnessed the entire incident that A.1 and A.4 came on a motorcycle, picked up a quarrel with the deceased and attacked the deceased with a stone, and later A.2, A.3 and A.5 were arrived and caused injuries with knives.

26. A perusal of the evidence of PWs 1 to 3 shows that they have no prior acquaintance with A.2, A.3 and A.5 and there is a discrepancy in the report given to the police. Further, their presence at the scene of offence is doubtful because PW1 and PW2 have not witnessed the incident when A.2, A.3 and A.5 attacked the deceased.

27. The learned counsel for the accused argued that except the evidence of PW3, there is no other evidence to identify the

presence of A.2, A.3 and A.5 while committing the offence, and though PW3 is a solitary witness, he admits that A.2, A.3 and A.5 were strangers to him and no test identification parade was held, and therefore, committing of the offence by A.2, A.3 and A.5 is doubtful and they are entitled for acquittal.

28. In the absence of holding the test identification parade and identifying A.2, A.3 and A.5 for the first time in the court, are no doubt fatal to the case of prosecution. Further, when the prosecution is relying on the solitary testimony of PW3, his evidence should be wholly reliable. On this aspect, it is pertinent to refer to a decision reported in *Vadivelu Thevar Vs. The State of Madras*^[5], wherein it was held thus:

“Generally speaking oral testimony in this context may be classified into these categories, namely:

- (i) Wholly reliable
- (ii) Wholly unreliable
- (iii) Neither wholly reliable nor wholly unreliable

In the first category of proof, the Court should have no difficulty in coming to its conclusion either way it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach on suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.”

29. As per Ex.P.1, one Matta Bujji beat the deceased indiscriminately with a stone on his head and the prosecution failed to explain why his name was deleted from the charge sheet. Further, the doctor PW18, gave opinion that the death of the deceased had occurred due to injury to brain due to fracture of

skull with penetrating stab injury on left chest with multiple stab injuries. PW3 also has not stated that A.2 and A.3 stabbed the deceased on the head, instead he stated that A.2 stabbed the deceased with a knife in the abdomen, A.3 stabbed the deceased with knife on the groin region and A.5 beat the deceased with a stone on his head. But, the said aspects are silent in Ex.P.1. Moreover, there is no evidence on record to show that the accused attacked the deceased with a knife on the head and the prosecution failed to explain the stab injury on the head. Further, there is no injury in the abdomen of the deceased as claimed by the prosecution. Therefore, on that ground also, the evidence of prosecution has to be disbelieved.

30. The trial Court, after considering the evidence, also comes to a conclusion that some sort of discrepancies are cropped up in the very preparation of the report while giving the names of the accused and mentioning the names of all the eyewitnesses and their presence at the time of incident. The evidence of PWs 1 to 3 is not consistent regarding identification of A.2, A.3 and A.5 who alleged to have attacked the deceased. Further, the evidence of PW3 is not reliable because he did not inform PW1 that A.2 and A.5 stabbed the deceased with knives, but according to the prosecution he is the solitary witness who saw when all the accused attacked the deceased. As seen from the evidence of PW2 and PW3, it is a fact that the presence of PW1 was not deposed by them in order to show him as an eyewitness. The evidence of PWs 1 to 3 was consistent to the extent of the incident of attack made by A.1 and A.4 on the deceased. Therefore, the prosecution failed to prove the charge against A.2, A.3 and A.5 for the offence punishable under Section 302 IPC. Accordingly, the

conviction and sentence recorded by the trial Court against appellants/A.2, A.3 and A.5 are liable to set aside.

31. The learned counsel for the accused argued that due to fit of anger, A.1 and A.4 must have beat the deceased with a stone available at Anjaneyaswamy temple and they were not armed with any weapon while they were quarreling with the deceased. PW2 in his cross-examination stated that a quarrel between the deceased and the accused took place for five minutes. Whereas, PW1 and PW3 stated that after seeing the deceased, A.1 and A.4 got down from the motorcycle and attacked the deceased with the stone available near the scene of offence.

32. The learned counsel for the appellants argued that for the last five years the accused were in jail, they are innocents and they have not committed any offence, and prayed the Court to extend the benefit of Exception 4 to Section 300 IPC and convert the conviction and sentence from 302 to 304

Part II IPC.

33. In a case law reported in *Veeramaneni Srinivas Rao Vs. State* ^[6], the Division Bench of this Court held as follows;

“The first part of Section 304 IPC is intended only on those cases in which the act of the accused person would be culpable homicide amounting to murder, but for the fact that it was committed in circumstances which render one or other of the exceptions in Section 300 IPC applicable. The second part of Section 304 IPC applies to those rather rare cases of deliberate assault where the act of assault can be separated from the injury caused with the result, that knowledge of likelihood to cause death can be proved without intention to cause vital injury being established. It is slightly lesser class of offences where there is knowledge that the act is likely to cause death, but

where the intention to cause death is not present. Exception 4 of Section 300 IPC is applicable because four conditions are satisfied (i) absence of premeditation (ii) there must be a sudden fight (iii) the killing must be in the heat of passion upon a sudden quarrel and (iv) the offender should not have taken undue advantage or acted in a cruel or unusual manner. There is no prior intention of accused to kill the deceased. Accused was not armed with any weapon. Accused picked up a weapon available at the scene and dealt a blow on the head.

In these circumstances, it can be said that accused actuated by heat of passion, all of a sudden, being provoked, used a handy weapon and smote on the head. Therefore, the act of the accused squarely falls under exception 4 of Section 300 IPC. The accused must be having knowledge that his act would likely to cause death. Hence accused is found guilty under Section 304 Part II IPC.”

34. Under Section 300 IPC, except in the cases excepted therein, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death; or secondly if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Where culpable homicide falls under any one of the four clauses of Section 300 IPC and none of the exceptions applies, the culpable homicide is

murder and is punishable under Section 302 IPC. Exception 4 of Section 300 IPC can apply if all the four conditions laid down are satisfied viz. (1) absence of pre-meditation; (2) there must be a sudden fight; (3) the killing must be in the heat of passion upon a sudden quarrel; and (4) the offender should not have taken undue advantage or acted in a cruel or unusual manner.

35. A perusal of the evidence of PW18 doctor shows that the death of the deceased was due to injury to brain due to fracture of skull. As per Ex.P.1, PW3 informed PW1 that one Matta Bujji attacked the deceased with a stone forcibly on the head. A perusal of Ex.P.1 shows that PW1 witnessed while A.1 was attacking the deceased with a stone on his face, but he did not state anything against A.4. Likewise, the prosecution failed to explain who caused the stab injury on the head of the deceased. Further, the number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Though A.1 and A.4 had no pre-meditation to cause death of both the deceased, at the same time, they must have knowledge that the injuries are likely to cause death of both the deceased. Therefore, in view of the case-law cited supra, the appellants/A.1 and A.4 are liable to be convicted for the offence punishable under Section 304 Part II IPC instead of 302 IPC.

36. In the result, the conviction and sentence recorded by the IV Additional Sessions Judge, East Godavari at Kakinada, vide judgment, dated 20.04.2010, in Sessions Case No.141 of 2008 against the appellants/A.2, A.3 and A.5 of the offence punishable under Section 302 IPC, are set aside. The appellants/A.2, A.3 and

A.5 are found not guilty of the above offence and accordingly, they are acquitted of the same. The appellants/A.2, A.3 and A.5 shall be released forthwith, if they are not required to be detained in any other case. Fine amount, if any, paid by the appellants/A.2, A.3 and A.5 shall be refunded to them.

37. With regard to appellants/A.1 and A.4, the conviction and sentence recorded by the IV Additional Sessions Judge, East Godavari at Kakinada, vide judgment, dated 20.04.2010, in Sessions Case No.141 of 2008 against them of the offence punishable under Section 302 IPC, are set aside. However, the appellants/A.1 and A.4 are found guilty of the offence punishable under Section 304 Part II IPC, and accordingly, they are convicted and sentenced to undergo rigorous imprisonment for a period of five (5) years and to pay a fine of Rs.1000/- (Rupees One thousand only) each, in default to undergo simple imprisonment for one month each. The period of detention underwent by the appellants/A.1 and A.4 during the course of investigation, trial of the case and after conviction shall be given set off under Section 428 Cr.P.C.

38. The Criminal Appeal is partly allowed to the extent indicated above. Miscellaneous Petitions, if any, pending in this Criminal Appeal shall stand closed.

(K.C. BHANU, J)

(ANIS, J)

13.07.2015
Anr

THE HON’BLE SRI JUSTICE K.C.BHANU
AND
THE HON’BLE SMT. JUSTICE ANIS

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CRIMINAL APPEAL No. 710 OF 2010
(per the Hon’ble Smt. Justice Anis)

13.07.2015

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[\[1\]](#) (2004) 11 S.C.C. 742
[\[2\]](#) AIR 1991 S.C. 1468

[\[3\]](#) (1999) 1 S.C.C. 168

[\[4\]](#) AIR 1977 S.C. 109(1)

[\[5\]](#) AIR 1957 SC 614

[\[6\]](#) 2011 (1) ALD (CrI.) 777 (AP)