

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
HON'BLE SRI JUSTICE M.S.K.JAISWAL

Criminal Appeal No.1551 of 2010

Date:05.12.2016

Between:

Shaik Madina,
S/o Nanaji and another.

..... Appellants/
Accused Nos.1 and 2

And:

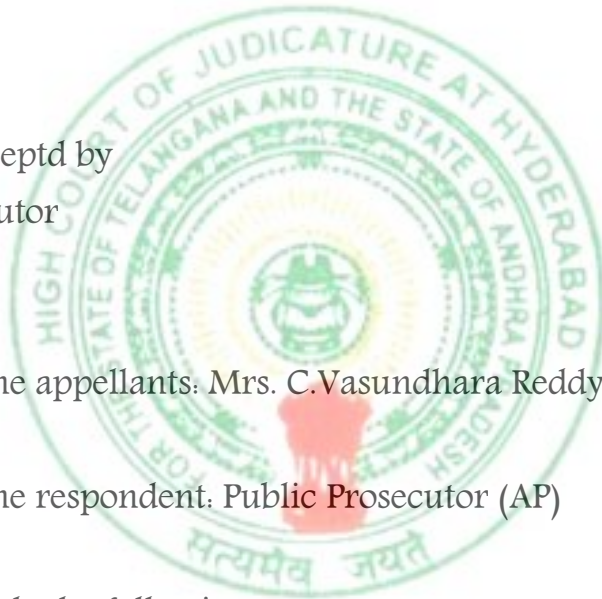
State of A.P., repled by
Public Prosecutor

.....Respondent

Counsel for the appellants: Mrs. C.Vasundhara Reddy

Counsel for the respondent: Public Prosecutor (AP)

The Court made the following:



JUDGMENT: *(per Hon'ble Sri Justice C.V.Nagarjuna Reddy)*

The accused in Sessions Case No.256 of 2010 on the file of the VII Additional Sessions Judge, (Fast Track Court), East Godavari at Rajahmundry are the appellants in this Criminal Appeal. They were charged for the offences under Sections-302, 392, 404 and 201 read with 34 of the Indian Penal Code and found guilty for all these offences. They were sentenced to suffer Rigorous imprisonment for life and to pay a fine of Rs.3,000/- each, in default, to suffer Rigorous imprisonment for one year for the offence under Section-302 I.P.C; to suffer Rigorous imprisonment for ten years and to pay a fine of Rs.2,000/- each, in default, to suffer Rigorous imprisonment for six months for the offence under Section-392 I.P.C; to suffer Rigorous imprisonment for three years and to pay a fine of Rs.500/- each, in default, to suffer Rigorous imprisonment for three months for the offence under Section-404 I.P.C.; and to suffer Rigorous imprisonment for seven years and to pay a fine of Rs.500/- each, in default, to suffer Rigorous imprisonment for three months for the offence under Section-201 I.P.C. All the sentences were directed to run concurrently.

The case of the prosecution, in brief, is as under:

P.W-4 is the wife and P.W-10 is the brother of the deceased.; that the deceased owns a Tata Indica car bearing

No.AP5 U 6259; that the deceased, P.Ws.2, 3, 5 and 6 are all taxi drivers and members of Kannamamba Taxi Union; that P.W-1 was the Secretary of that Union; and that the drivers used to pick up passengers at Rajahmundry Railway Station.

That on 02.02.2010, the deceased left the house and telephoned to P.W-4 at 9.15 pm saying that he paid the college fee of their children; that P.W-20 is a rickshaw puller; and that two persons (identified as the appellants) boarded his rickshaw and initially, they went to Kotipalli bus-stand and from there, he dropped them at the taxi stand situated at Railway station.

That at about 9.30 pm on 02.02.2010, while the deceased, P.Ws.2, 3, 5 and 6 were all at the taxi stand, the appellants after bargaining, hired the taxi of the deceased for Rs.2,000/- to go to Visakhapatnam; that the deceased and the appellants left the taxi stand at 9.30 pm and went towards Visakhapatnam; that P.Ws.8 and 9, who were in-charge of Krishnavaram and Vempadu Toll gates, respectively, spoke to the fact that on the intervening night of 7/8.02.2010, a car bearing No.6259 crossed the Toll gate; and that Exs.P-6 and P-7 are the copies of the Up and Down charges and the Computer Maintenance report, respectively. issued by the Toll Plaza.

That on the next day morning, the members of Kannamamba Union went to P.W-1 and informed him that the

deceased did not return back to Rajahmundry; that on 04.02.2010, at around 5.30 pm., P.W-1 lodged a report at II Town, L & O Police Station, Rajahmundry, which is marked as Ex.P-1 and basing on which, P.W-24 registered a case in Crime No.23 of 2010 under "Man Missing", issued copies of FIR to all the officers concerned, proceeded to the scene of offence, i.e., near Railway Station, prepared its rough sketch-Ex.P-31, addressed a letter to the Superintendent of Police, East Godavari District requesting him to obtain details and tower location of the cell phone No.9030199004 of the missing person; that during the course of investigation, he examined and recorded the statements of P.Ws.1 to 7 and 20; that on 11.02.2010, he proceeded to Krishnavaram Toll Plaza, examined P.W-8 and seized Ex.P-6; and that he further proceeded to Vempadu Toll Plaza, examined P.W-9 and seized Ex.P-7 to verify as to whether the vehicle bearing registration No.AP5 U 6259 crossed the Toll gate.

Meanwhile, on 13.02.2010, P.W-18 received an information about the presence of a dead body on the road at 2/32 Mile Stone leading from Paderu to Vizag. Then, he lodged a report which is marked as Ex.P-16, basing on which, P.W-22 registered a case in Crime No.7 of 2010 under Section-174 Cr.P.C., issued copies of FIR to all the officers concerned, rushed

to the scene, found the dead body lying in a decomposed state and on receiving information from P.W-22, P.W-25 sent P.W-24 and the blood relatives of the deceased to the scene, where P.W-10-the brother of the deceased identified the dead body and then, P.W-24 held inquest over the dead body in the presence of P.W-18.

That on 13.02.2010, on receiving requisition from the Station House Officer, Paderu, P.W-23 held autopsy at the place where the dead body was lying, found it in a totally decomposed state and opined that the cause of death was due to cardio respiratory arrest and also due to throttling leading to asphyxia. That on the same day evening, P.W-25 received the call particulars of Tata Docomo Cell Phone No.9030199004-Ex.P-33 and found that the SIM of appellant No.1 bearing No.9440787928 was used in the cell phone of the deceased and that basing on the SIM card number, P.W-24 detected the address of the owner of the SIM card through the Third Eye of Andhra Pradesh Police Messaging System and found that it belonged to P.W-13-the brother of appellant No.1.

On 14.02.2010, P.Ws.19, 24 and 25 rushed to Paderu, secured the presence of P.W-13, recorded his statement, who stated that his cell phone was taken by appellant No.1 prior to 02.02.2010 and he was using the same. Then P.W-13 led the

Police to the parents-in-law's house of appellant No.1 at Dwarakanagar, Chodavaram, where P.W-25 secured the presence of P.W-18 and arrested the appellants and seized the cell phone-MO-8 under Ex.P-18-Panchanama. Basing on Ex.P-18, as per the directions given by P.W-25, P.W-24 altered the Section of law from "Man Missing" to Sections-302, 307, 404 and 201 read with 34 IPC and issued copies of altered FIR-Ex.P-32 to all the concerned.

The appellants further led the Police to the place where they secreted MO-1-Tata Indica Car adjacent to the house of P.W-14. P.W-25 found a fake number 'AP31 K 7181' affixed on MO-1 instead of 'AP5 U 6259' and then, he verified the Engine and Chassis numbers of MO-1, which were found tallied with the numbers in 'C' book, prepared rough sketch of scene, where MO-1 was seized and recorded the statement of P.W-14, which was marked as Ex.P-11. Thereafter, the appellants led the Police to the place where the dead body of the deceased was thrown. Ex.P-36 is the rough sketch of the scene. From there, the appellants further led the Police to the shop of P.W-15, where they got prepared the sticker and affixed it to MO-1. The statement of P.W-15 was recorded, which was marked as Ex.P-12. Thereafter, on 15.02.2010, he sent the appellants to judicial custody and on the same day, he examined and recorded the

statement of P.W-16, which was marked as Ex.P-13 and further got the Section 164 Cr.P.C. statements of P.Ws.2, 3, 5, 6, 13 and 20 recorded by P.W-21.

On receiving the proceedings-Ex.P-22 from the Chief Judicial Magistrate, Rajahmundry, to conduct the Test Identification Parade, P.W-21-the then Additional Judicial First Class Magistrate, on 20.02.2010, recorded the Section 164 Cr.P.C statements of P.Ws.3, 5, 6 and 20 and held Test Identification Parade, where P.Ws.3, 5, 6 and 20 identified the appellants. After receiving all the relevant documents and on completion of the investigation, P.W-25 filed the charge sheet.

On appreciation of the oral and documentary evidence, the lower Court has disposed of the case in the manner as noted above.

Mrs. C.Vasundhara Reddy, learned counsel for the appellants, submitted that the prosecution failed to prove the guilt of the appellants beyond reasonable doubt; that the dead body of the deceased having been found on 13.02.2010, i.e., 11 days after the deceased went missing, the lower Court ought not to have relied upon the last scene theory; that the prosecution failed to prove that the mobile bearing No.9030199004, which was recovered from appellant No.1, belongs to the deceased and that the mobile bearing

No.9440787928 belongs to P.W-13, who has allegedly handed over his cell phone to appellant No.1; and that in the absence of the prosecution establishing these facts, it has failed to connect the appellants to the death of the deceased.

Alternatively, the learned counsel submitted that the evidence on record clearly establishes that it is a case of robbery and that the lower Court has committed a serious error in convicting the appellants for murder under Section 302 IPC.

Learned Public Prosecutor appearing for the State of Andhra Pradesh opposed the above submissions and sought to sustain the conviction and sentence of the appellants.

We have carefully considered the submissions of the learned counsel for both parties and perused the record.

The case of the prosecution is based on circumstantial evidence. P.Ws.2 and 3, who are the co-taxi owners-cum-drivers of the deceased, categorically deposed that on 02.02.2010 at 9.30 pm., two persons came to the taxi stand and approached the deceased for hiring his Tata Indica car for going to Visakhapatnam; that the said persons settled the fare for Rs.2,000/- in their presence as well as that of P.Ws.5 and 6; and that accordingly, they left the place thereafter.

P.W-21 conducted the Test Identification Parade, in pursuance of the requisition made by the Police, during which, the prosecution witnesses correctly identified the appellants.

Nothing of significance could be elicited from the cross-examination of these witnesses to falsify their testimony that the deceased and the appellants were last seen together at around 9.30 pm on 02.02.2010.

The evidence of P.W-25-Investigation Officer would show that on 13.02.2010, he has received a phone call from the Inspector of Police, Paderu in response to the radio message issued by P.W-24 on 04.02.2010 stating that one dead body was found lying near K.M.Stone No.2/32 at Vallangi Kanthamma 'U' point in Sivamala dress; that he has sent P.W-24 and the staff along with the kith and kin of the deceased to Paderu; that on the mid night of 13.02.2010, P.W-24 returned to Rajahmundry and informed him that the dead body belonged to the missing person; and that he has collected the call particulars and the International Mobile Station Equipment Identity (for short 'IMEI') particulars of Tata Docomo cell phone No.9030199004.

P.W-24 stated that in pursuance of Ex.P-1-written report submitted by P.W-1 at 5.30 pm on 04.02.2010, he registered a case in Crime No.23 of 2010 under the head "Man Missing" and sent copies of the FIR to all the officers concerned; that on the

same day, he has examined P.W-1 and recorded his detailed statement; that thereafter, he has examined P.Ws.2 to 6 and other witnesses on different dates; that on 13.02.2010, he received information from P.W-22 about a dead body lying in between Minumuru and Paderu Ghat road near Vommangi Kanthamma "U" point in Sivamala dress; and that after informing the same to the relatives of the deceased, he has gone to the place where the dead body was lying and held inquest under Ex.P-17-Inquest report. He further stated that he has examined P.W-10, L.W.15-P.Ramarao and L.W-16-Adapa Appalaraju and recorded their statements; that on 14.02.2010, himself and the Circle Inspector of Police along with his staff went to Paderu, arrested the appellants at Dwarakanagar, Chodavaram Village, drafted the confessional statements of the appellants, altered the provision of law from "Man Missing" to Sections-302, 397, 404 and 201 read with 34 IPC, issued copies of the altered FIR to all the concerned and on 15.02.2010, he sent MOs.1 to 8 to the Court and handed over the further investigation to the Circle Inspector of Police.

P.W-23-the doctor, who conducted autopsy over the body of the deceased, deposed that on 13.02.2010, he has received intimation from P.W-24 requesting him to conduct post-mortem examination over the body of the deceased and that

accordingly, he has conducted the post-mortem and issued Ex.P-29-Post-mortem Certificate. He has further deposed that he found the total body in a decomposed state with fractures of ramus and right wing of hyoid bone, contusion of 10 x 5 cm, black and brown in colour on the left cheek; and that all those injuries are ante-mortem. He has further deposed that the age of the wounds was 10 to 12 days. In his opinion, the cause of death was due to Cardio respiratory arrest and secondary, due to throttling leading to asphyxia.

Nothing adverse to the case of the prosecution could be elicited from this witness either regarding the injuries or the time thereof. This evidence conclusively proves that the death of the deceased must have taken place within a few hours after he and the appellants have left together in the Tata Indica car owned by the former.

P.W-25 deposed that on 13.02.2010, he has collected the call particulars and IMEI particulars of the Tata Docomo cell phone No.9030199004, vide Ex.P-33; that he found that the cell phone number of appellant No.1 bearing No.9440787928 was used in M.O-8-Cell phone belonging to the deceased, whose IMEI number is 359323020146570; that appellant No.1 has used the SIM card of his brother (P.W-13) in the cell phone of the deceased; that based on the same, the Police have detected

the address of the owner of the SIM card through the Third eye of Andhra Pradesh Police Messaging System and thereupon, they found that the SIM card belongs to P.W-13; that on 14.02.2010, P.W-25 along with P.Ws.19 and 24 and his staff and L.W-27-Gandham Subbarao proceeded to Paderu, secured the presence of P.W-13 and recorded his statement; that in his statement, P.W-13 stated that appellant No.1 has taken his cell phone prior to 02.02.2010 and used the same and further he stated that appellant No.1 was at his parents-in-law's house at Dwarakanagar, Chodavaram Village; that after securing P.W-18 and L.W-24, P.W-25 left for Chodavaram Village along with P.W-13, where both the appellants were found and they were arrested; that on being questioned separately, both the appellants have voluntarily confessed their guilt; and that appellant No.1 has handed over MO-8 under the cover of Ex.P-18. P.W-25 has further deposed that for confirmation, he has verified the IMEI number in the presence of the mediators and the same tallied with MO-8; that the confessional statement of appellant No.1 was reduced into writing by P.W-19 duly attested by P.W-25; that thereafter, Ex.P-34-rough sketch was prepared in the house of appellant No.1; that at 4.30 pm, on the information furnished by the appellants, P.W-25, the mediators and P.W-13 were led to the place where MO-1-Tata Indica Car

was secreted at a place situated by the side of vacant site of one Karri Thammayya Naidu, which is by the side of the house of P.W-14; that he has found a fake registration number- AP.31.K.7181 on MO-1 in place of 'AP.5U.6259'; that he verified the Engine and Chassis numbers of MO-1 and found them tallying with the numbers in C-book; that he has also verified with the Third Eye of Andhra Pradesh Police Messaging System; that he has prepared a rough sketch and seized MO-1 under Ex.P-19-panchanama in the presence of P.Ws.13, 18, 19 and L.W.24-P.Lakku and L.W-27-Gandham Subbarao; that on being questioned, the appellants stated that they have prepared a sticker with fake number and affixed the same on MO-1; that he has recorded Ex.P.12 statement of P.W-14 near whose house MO-1 was seized; and that thereafter, the appellants led the Police to the place where the dead body was thrown and accordingly, Ex.P-20-Observation report and Ex.P-36-rough sketch of the scene of offence were prepared.

The afore-mentioned evidence of P.W-25 reveals that the involvement of the appellants was detected by following the IMEI method.

Section 161 Cr.P.C. statement of P.W-13-brother of appellant No.1 (Ex.P-10) was recorded by the Police and his statement under Section-164 Cr.P.C. was also recorded by P.W-

21-Magistrate under Ex.P-11. In both these statements, P.W-13 has categorically stated that on the morning of 02.02.2010, his elder brother (appellant No.1) came to Paderu and took his cell phone bearing No.9440789928. Though he has turned hostile, he has admitted that he has stated before the Police as in Ex.P-10. He has also admitted that he has told the Police that after taking his cell phone on 02.02.2010, appellant No.1 came to Paderu on 03.02.2010, but did not return the same to him; that the appellants and some other were moving in a Tata Indica car; and that he thought that the said car belongs to somebody. He has further deposed that he told the Police that he gave his cell phone to his brother-appellant No.1. Thus, Exs.P-10 and P-11-statements of P.W-13 and his evidence before the Court would amply prove that appellant No.1 has taken the cell phone of P.W-13 on 02.02.2010 and failed to return the same to him and that appellant No.1 was also using a Tata Indica Car on 03-02-2010.

In order to show that the cell phone of the deceased was in possession of the appellants and that they have used the same by changing the sim card, two separate call lists marked as Ex.P-33 were filed. The first call list under Ex.P-33 pertains to the calls either made from or received by cell phone No.9030199004, having IMEI No.359323020146570. It is the case of the

prosecution that the cell phone having the aforesaid sim number and the IMEI number belongs to the deceased. The second call list under Ex.P.33 pertains to the calls made from or received by cell phone No.9440787928. A perusal of this call list would show that the call data commenced from 19.59 hours on 01.02.2010 upto 07.27 a.m. on 03.02.2010 on cell phone No.9440787928, having IMEI No.359819016211482, and that from 07.29 a.m. on 03.02.2010 the calls from the said cell number were made through mobile bearing IMEI No.359323020146570, which belongs to the deceased. This evidence clearly establishes that the sim card bearing No.9440787928 was inserted in the mobile of the deceased, which was seized from the possession of appellant No.1.

The learned counsel for the appellants vehemently argued that as per Exs.P-10 and P.11, statements of P.W.13 under Sections 161 and 164 Cr.P.C., respectively and his evidence before the Court, his mobile number was 9440789928 and that therefore the prosecution failed to connect appellant No.1 with sim card bearing No.9440787928. This submission though appears to be attractive at the first blush, pales into insignificance on a deeper scrutiny.

P.W.25 in his chief examination clearly deposed that he has found the cell phone number of the accused as

9440787928 which was used in M.O.8 – cell phone belonging to the deceased with IMEI No.359323020146570. He has also referred to Ex.P.33 call lists. In his cross-examination it was elicited from him that it is true that in page No.5 of Ex.P.18 mediators' report, cell phone number was mentioned as 944078928. He has however stated that one digit bearing No.'7' was missing in the said number. He has reaffirmed the stand that IMEI number mentioned in Ex.P.18 belongs to the deceased and he did not file any document to that effect.

From a close reading of the cross-examination to which P.W.25 was subjected, it is abundantly clear that no suggestion was put to him that cell phone No.9440787928 did not belong to P.W.13 or that his correct cell number was 9440789928. Had it been the case of the defence that the cell phone belonging to the deceased was used by any person other than the accused, such suggestion should have been put forth to P.W.25. Absence of such suggestion would clearly reveal that the categorical assertion made by P.W.25 in his chief examination that the appellants used the cell phone bearing No.9440787928 remained unchallenged. Merely because P.W.13 has given the cell phone number with variation in one digit, i.e., instead of '7928' in the last four digits, it was mentioned as '9928', the same does not throw any doubt on the case of the prosecution

that the appellants started using the mobile belonging to the deceased from the morning of 03.02.2010 by using the sim card bearing No.9440787928, which evidently belonged to P.W.13, brother of appellant No.1. This fact, in conjunction with the further fact that the cell phone bearing IMEI No.359323020146570 belonged to the deceased was seized from the possession of appellant No.1 would clearly establish that after doing away with the life of the deceased, the appellants started using the mobile of the deceased from the morning of 03.02.2010 by replacing the sim card belonging to P.W.13.

Though the learned counsel for the appellants submitted that no proof was filed to show that mobile No.9030199004 with IMEI No.359323020146570 belonged to the deceased, we do not find any merit therein. A scrutiny of the entire evidence does not reveal that there is any serious doubt coming forth from the defence that the aforementioned cell number with IMEI number did not belong to the deceased. When a fact is not in dispute, it is unnecessary for a proponent to such fact to produce any evidence in support thereof. Ex.P.18 mediators' report clearly shows that appellant No.1 has confessed to the fact that he has kept the cell phone of the deceased with him. He has accordingly handed over the cell phone – M.O.8 stolen

from the deceased. The description of the cell phone was also shown as 'Nokia 2760 Plus' Model with IMEI No.359323020146570 with sim No.944078(7)928. P.W.25 has clarified in his evidence that the digit '7' is missing from the aforementioned number. The admissibility or authenticity of Ex.P.18 is not disrupted by the defence. Therefore, to the extent the confession leading to the recovery of M.O.8 has not been impeached and that it is proved from the admissible portion of the confessional statement vide Ex.P.18 that the mobile seized from the possession of appellant No.1 belonged to the deceased.

Thus, the prosecution is able to establish not only the last seen theory but also the possession by the accused of the cell phone belonging to the deceased, in addition to recovery of M.O.1 at the instance of appellant No.1 on the vacant land at the house of P.W.14. Though there was a gap of about ten to eleven days between the time when the deceased was seen in the company of the appellants and tracing of the dead body of the deceased, the evidence of the doctor clearly reveals that the deceased must have been done to death within a short span of time after he left along with the appellants. In the light of these facts, we have no reason to discard the last seen theory. The recovery of M.O.8 from the possession of appellant No.1 and that of M.O.1 at his instance amply supply a vital link in the

entire case of the prosecution connecting the appellants to the death of the deceased.

In this context, illustration (a) of Section 114 of the Indian Evidence Act, 1872 is attracted to the facts of this case. Under this illustration, the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The appellants failed to explain how they came into possession of M.Os.1 and 8. The totality of the circumstances, namely, the deceased being seen in the company of the accused, death of the deceased shortly thereafter and the unexplained possession of M.Os.1 and 8 by the accused, warrant a presumption that it is only the accused who are responsible for the death of the deceased which was admittedly homicidal. Further more, the appellants failed to discharge the burden cast on them of proving the facts especially within their knowledge, as envisaged under Section 106 of the Indian Evidence Act.

For the aforementioned reasons, we have no hesitation to hold that the circumstantial evidence brought out by the prosecution as discussed above would clearly prove that it is only the appellants who are responsible for the death of the deceased.

The next aspect to be considered is whether the presumption drawn under illustration (a) of Section 114 of the Indian Evidence Act could be further stretched to find the appellants guilty of graver offence than mere theft/robbery. Section 390 of IPC defines 'robbery' as under:

"390. Robbery.- In all robbery there is either theft or extortion.

When theft is robbery.- Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.- Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.- The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint."

Section 392 of IPC deals with 'punishment for robbery' and the same reads as under:

"392. Punishment for robbery.- Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to

fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

Section 394 of IPC deals with ‘voluntarily causing hurt in committing robbery, which reads as follows:

“394. Voluntarily causing hurt in committing robbery.- If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

From a close examination of the definitions extracted above, it appears to us that in order to attract the offence ‘robbery’, intention of the accused must be primarily related to theft or extortion and not commission of murder. If, in the process of committing such theft, either the offender voluntarily causes or attempts to cause any person death or hurt or wrongful restraint, the theft will amount to robbery, and if a person commits the extortion by putting that person in fear of instant death of, instant hurt, or of instant wrongful restraint to that person or to some other person, and by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted, it becomes robbery. Thus, in both the cases the primary intention of the offender must be to commit either

theft amounting to robbery or extortion amounting to robbery. If while committing theft or extortion, the offender causes injuries or death to a person, still the act may not amount to offence under Section 302 IPC. The dividing line being thin, the question as to whether a particular act becomes robbery simplicitor or robbery coupled with murder, needs to be adjudicated based on facts of each case.

The learned counsel for the appellants has relied upon the following portion in Ex.P.18:

“...we committed theft of a bajaj pulsar motor cycle that was parked near a house. We committed theft of a pulsar black colour motor cycle and sold it to Aryot. After the said offence we committed theft of a black colour motor cycle which was parked in front of a house, and sold it to a person by name Suribabu for Rs.15,000/- and we have shared the said proceeds equally. I used to go to Mosque on Thursday, when I got acquaintance with one person, named, Khader, resident of Paderu. He used to do Fan machine winding. During the conversation, we presumed that the money earning is not sufficient for our luxuries and decided to earn more by committing some crimes.....We started at 9.00 p.m. from Railway Station. We got filled petrol in a petrol bunk at the end of Rajahmundry. When asked for money we paid the hire charges of Rs.2,000/-, he got filled petrol worth Rs.1,000/-. At Nakkapalli in a road-side Dhaba, we consumed arrack and ate palav, near Kasimkota on the way where there are nobody, we decided to commit theft of the car and to avoid the driver, we paid tollgate tax at Krishnavaram and Nakkapalli. We after crossing Nakkapalli asked the driver to stop the car as we have to answer calls of nature and we were talking and stopped, later

driver asked to come earlier otherwise he would go away. After going to some distance disputed with him and he told that he would not stop the car. We forcibly avoided him, immediately Khader who was sitting behind, dragged the driver with the towel which was round his neck and I fisted him, he tried to oppose. I held his neck and pressed, held the nose and he died..."

The learned counsel submitted that from the aforementioned confessional statement, it is clear that the main intention of the appellants was only to commit theft of four-wheelers, as the income earned by them by committing theft of two wheelers was not sufficient, and that the motive of the appellants was only to commit theft of the car and in that process they may have caused the death of the deceased. She has further fortified her submission of lack of intention or preparation on the part of the appellants to kill the deceased by relying upon the circumstance that they did not carry any weapon and that as they could not take away the car without causing physical harm to the deceased, they might have perforce felt the need of causing injuries to the deceased leading to his death. She has accordingly submitted that the offence if at all, squarely falls within the definition of theft constituting robbery under Section 390 of IPC and the lower Court has rightly convicted the appellants for the said offence, but, however, it has committed an error in simultaneously

convicting the appellants for the offence under Section 302 of IPC as well.

P.W.19, one of the panch witness to Ex.P.18, deposed that the appellants have confessed that after thinking as to how to cause the theft of the car, they have asked the deceased to stop the car on the pretext of answering calls of nature, that they have also called the deceased to join them in answering the calls of nature, that when the deceased declined, they had proceeded further and that in the process an altercation has taken place during the further journey. It is thereafter that the appellants appeared to have grown desperate and attacked the deceased with accused No.1 throttling the deceased with his towel and accused No.2 fisting the deceased, as a result of which he died due to asphyxia. The manner in which the entire incident has taken place would reveal that the appellants have caused the death of the deceased in the process of committing robbery without there being any premeditated intention of causing death before committing theft of the vehicle.

In the aforementioned facts and circumstances of the case, we feel that the lower Court has committed an error in finding the appellants guilty of murder.

Accordingly, the judgment of the lower Court to the extent of convicting and sentencing the appellants for the offence

under Section 302 IPC is set aside and the judgment to the extent of convicting and sentencing them with regard to all other offences is sustained.

The criminal appeal is accordingly partly allowed.

C.V. NAGARJUNA REDDY, J

M.S.K. JAISWAL, J

05-12-2016

dr/bnr

