

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Criminal Appeal no.1315 of 2010

JUDGMENT: (per Hon'ble Sri Justice M. Seetharama Murti)

This appeal under Section 374(2) of the Criminal Procedure Code, 1973 (herein after, 'the CrPC', for short) by the accused 1 to 4 is directed against the judgment dated 07.10.2010 of the learned Metropolitan Sessions Judge, Hyderabad, in SC.No.530 of 2009.

1.1 By the said judgment, the learned Metropolitan Sessions Judge found the 1st accused guilty of the offences punishable under Sections 460 and 302 of the IPC and the accused 2 to 4 guilty of the offences punishable under Sections 460 and 302 read with Section 34 of the IPC. For the offence punishable under Section 302 of the IPC, the 1st accused was sentenced to undergo imprisonment for life and pay a fine of Rs.500/- and undergo simple imprisonment for two weeks in default thereof. For the said offence read with Section 34 of the IPC, the accused 2 to 4 were sentenced to undergo imprisonment for life and pay a fine of Rs.250/- each and undergo simple imprisonment for one week each in default thereof. As regards the offence punishable under Section 460 of the IPC, the accused 1 to 4 were sentenced to undergo imprisonment for a period of two years and pay a fine of Rs.100/- each and undergo simple imprisonment for one week each in default thereof. The Court below further directed that the substantive sentences imposed against each of the accused on the above two counts shall run concurrently.

2. The learned Metropolitan Sessions Judge, Hyderabad, framed the following charges.

FIRSTLY: That accused no.1 to 4 of you on the intervening night of 9/10.7.2008 in the midnight, trespassed into the house bearing no.13-3-543, Dhor Basthi, Imampura, Hyderabad, from backside of the said

house, by scaling over the wall and entered into the room of the deceased Ambadas to commit an offence punishable with imprisonment/death, and that you thereby committed an offence punishable under Section 460 IPC and within my cognizance.

SECONDLY: That accused no.1 to 4 of you on the same day, time and place mentioned in charge no.1 supra, after entering into the house of deceased, in furtherance of common intention, A2 to A4 of you caught hold of Ambadas Chowgle and pushed him to a wall in the house, while A1 of you beat him with the iron rod on his head severely and committed murder and that you thereby committed an offence punishable under Section 302/34 IPC and within my cognizance.

2.1 At trial, the prosecution examined PWs 1 to 13 and exhibited P1 to P17 and marked MOs 1 to 3. No evidence was adduced on the side of the defence.

3. We have heard the submissions of the learned counsel for the appellants/accused and the learned Public Prosecutor appearing for the respondent/State. We have perused the material on record.

4. The case of the prosecution as unfolded by the evidence brought on record to sustain the aforesaid charges against the accused, which needs scrutiny, is as follows:

PW1-Ratna Bai is the elder sister of PW2-Ramesh Chowgle. The deceased Ambadas is their younger brother. The 1st accused is the son of the 2nd accused, who is the brother-in-law of PW1. The 3rd accused is the mother-in-law and the 4th accused is the wife of the deceased. The house of the deceased is situated near the house of PW1. The house of PW2 is situated adjacent to the house of the deceased. The 4th accused who is wife of the deceased used to quarrel with the deceased. Much against the wish of the deceased, the 4th accused used to reside most of the time in her mother's house, that is, the house of the 3rd accused in Chincholi of Gulbargah of

Karnataka. The deceased was interested in getting his children educated at Hyderabad. While so, about two years prior to 30.07.2010, i.e., the date of the deposition of PW1, in the morning hours of one Friday, the deceased came to her house on foot i.e., while walking along with a bicycle. At that time, he was having a bleeding injury on his head. When he knocked on the door of the house, PW1 opened the door. By that time, her son-Arun Kumar Hutkar (PW3) and one Shanta Ram, who had come to her house to extend an invitation for a function, were in her house. She enquired with the deceased about the cause of injuries. The deceased stated that on the previous midnight, while he was sleeping in his house, he heard barking of dogs and that he then went on to the terrace of his house and that later, he got down from the terrace and went into the house and that at that time, A1 to A4 attacked him. When the deceased thus revealed about the said occurrence, PW3 and the said Shanta Ram were also present. At the behest of PW1, PW3 took the deceased to the police station. Police referred the injured (deceased) to the Osmania General Hospital. On receiving a phone call, PW1 and her sister went to Osmania General Hospital. PW2 was also informed about the incident. PW2, who came to know about the incident through the local people and one Muninder, went to the hospital and saw the deceased and came to know from him about the incident. The then Assistant Sub-Inspector of Police, recorded Exhibit P1 statement of PW1 at the hospital. On the basis of the said Exhibit P1 statement of PW1 recorded at 17.00 hours on 10.07.2008, PW11 registered a crime for the offences punishable under Section 324 read with Section 34 IPC and issued Exhibit P13, FIR, and took up investigation. He recorded the statements of PWs 1 to 5. In the presence of PW6 and another panch witness, he prepared Exhibit P6, the scene of offence observation report, and Exhibit P7, the rough sketch of scene of offence, and seized blood stained and controlled earths from the scene and then proceeded along with PW6 to the house of PW2. Under the cover of Exhibit P5 seizure panchanaama, he seized from the said house, a yellow colour shirt-MO1 and a hand kerchief-MO2, which were stained with blood. The deceased died at 12.30 hours on 13.07.2008, while undergoing treatment in the said hospital. Having received the said intimation from the

Hospital, he informed PW12, the CI of police. On the same day at 07.00 PM, PW12 took up further investigation and altered the Section of law from 324 read with Section 34 IPC to 302 IPC and issued Exhibit P14, altered FIR. He held inquest over the dead body of the deceased at the hospital in the presence of PW7 and got prepared the Inquest report-Exhibit P8 and also examined PWs2 and 3 at that time and sent the dead body for Post Mortem Examination. On 14.07.2008 at 17.00 hours, PW11 produced A1 to A4 before PW12. PW12 then recorded the confession made by the 1st accused in regard to the place of weapon of offence. Led by the 1st accused, PW12 and the witnesses, PWs 8 and 9, who were secured by PW12, went to his house. A1 brought an iron rod-MO3 and handed it over to PW12; and, the same was seized under the cover of a recovery/seizure panchanaama, Exhibit P16. On production of the accused before the Court, they were remanded to judicial custody. On 16.07.2008, PW12 sent MOs 1 and 2 and MO3, white colour flakes collected from the switch board at the scene of offence, to the Forensic Science Laboratory and received Exhibit P17-FSL Report. PW10, the Doctor, who conducted PM examination, had issued Exhibit P11, Report, and Exhibit P12, final report, opining that the cause of death of the deceased is 'head injury' and stated in the evidence that the said injury is possible by MO3, iron rod. PW12 handed over the investigation to his successor, PW13. He verified the investigations done thus far and laid the charge sheet.

5. Having thus culled out the crux of the prosecution case, as sought to be established, from the testimonies of the witnesses, we have examined the contentions of the defence and the prosecution in juxtaposition.

6. To begin with, the death of the deceased is a homicidal death and the deceased died of a head injury is sufficiently established. In fact, the defence is not disputing the said aspect of the prosecution case. The only defence of the accused is that they are not responsible for the injuries caused to the deceased which resulted in his death.

7. From the evidence brought on record, it emerges that there are no eye-

witnesses to the incident in which the deceased was said to have sustained a head injury which eventually was found to be the cause of his death. PW1 is the sister of the deceased. PW3 is the son of PW1. According to their versions, the deceased came to their house on the next day morning and narrated to them the incident in which he had sustained injuries on the previous night. The Court below treated the said statement of the deceased made to PWs 1 and 3 and one Shanta Ram, who was not examined, as his oral dying declaration and recorded convictions and inflicted sentences against the accused for the afore stated offences with which they were charged.

7.1 Since the narration to PWs1 and 3 made by the deceased in regard to the alleged circumstances of the transaction that resulted in his death is being relied upon by the prosecution as an oral dying declaration of the deceased, it is necessary to examine the oral evidence of PWs1 and 3 on this aspect. The ASI of Police by name Mohd. Khasim Ali of Kulsumpura Police Station recorded the statement of the sister of the deceased, PW1, on 10.07.2008 at 3:40 PM. The said Officer is not examined. However, PW11-M.Gangadhar, the SI of Police, received the said statement under Exhibit P1 and registered the crime on the basis of the said statement. PW1 stated in her said statement recorded in Telugu to the following effect: "On 10.07.2008 morning at about 7:00 AM, the deceased, who is my younger brother came from Imampur to my house and woke me up. I saw blood coming from his head. Then, I asked him as to what had happened and why blood is coming from his head. Then, he had stated that his mother-in-law, brother-in-law-Suresh, Anil, son of Suresh, and his wife-Sunitha @ Godavari came to his house on the previous night and hit him with a rod on his head and fled away and that on that he fell on the floor and that not knowing what to do, he came to me. Immediately, I sent him along with my son to Kulsumpura Police Station and from there, the police took him to Osmania General Hospital and got him admitted. After admission into the hospital, his condition deteriorated and he is unable to talk."

7.2 In her testimony she had, however, stated thus: "The incident happened

about 2 years ago on one day which was a Thursday during night hours. During the next day morning hours, deceased came to my house walking but along with his cycle. He was with a bleeding injury on his head. When he knocked my door, I woke up from sleep. My son and also one Shanta Ram who came to invite us for a function were there then. I enquired with the deceased to know who injured him. He stated to me that during the previous night, at midnight hours, A1 to A4 attacked him. He stated that when he heard the barking of the dogs, he went to the terrace of his house and later when he got down and went inside the house, A1 to A4 attacked him. At the time when the deceased revealed the said incident to me, my son and Shanta Ram were there. Then my eldest son Arun took the deceased to Police Station, from there deceased was referred to Osmania General Hospital. Thereafter on receiving a phone call myself and my sister went to Osmania General Hospital. Ramesh was also informed about the incident at that time. In Osmania Hospital, police recorded my statement.” [Reproduced verbatim for emphasis].

7.3 PW3 who was examined to corroborate the version of PW1 deposed that the deceased was a slaughterhouse labourer and that there were misunderstandings between the deceased and the 4th accused from the beginning of the marriage between them and that A4 used to reside in Chincholi of Karnataka State, the place of her mother, the 3rd accused, and that on 10.07.2008 at 07:00 AM, while they were sleeping, the deceased came to their house on a bicycle and that on the deceased knocking on the door, PW1 opened the door and that they were surprised on seeing the deceased with an injury on his head and his shirt stained with blood and that on their enquiry, the deceased told them that during the previous night when he was sleeping in his house, A1 to A4 came there and that when he opened the door A1 beat him with an iron rod while the other three accused held him and that they tortured him and beat him and that he could identify the assailants by their voices though the light there was coming from a low voltage bulb and that he took the deceased on a motor cycle to Kulsumpura Police Station from his house and that the police referred the deceased to

Osmania General Hospital and that a Police Constable accompanied them to the hospital and that the deceased was admitted into the hospital and that he was unconscious for three days and died on 13.07.2008. PW3 in his cross examination has stated that they even served Tea to the deceased while he was in their house.

7.4 It is significant to note that the deceased was alone in his house on the intervening night of 9/10.7.2008, when the incident in which he was said to have sustained the serious head injury had occurred. According to PW1, the deceased stated to her that he was alone in his house on the intervening night of 9/10.7.2008 and on hearing the barking of dogs during that midnight he went on to the terrace and came down and that by that time, A1 to A4, who were in his house, attacked him. Her evidence is silent as to how A1 to A4 entered the house of the deceased. However, as per the version of PW3, the narration of the occurrence as given by the deceased is that on the night of the incident he was sleeping in his house and that on that night A1 to A4 came there and that when he opened the door A1 beat him with an iron rod while the other three accused held him and that they tortured him and beat him and that he could identify the assailants by their voices though the light there was coming from a low voltage bulb. Evidence of PW3 is silent as to why and for what reason the deceased had opened the door on that midnight. It is important to note that PW4, who had turned hostile to the case of the prosecution, deposed that her house is near the house of the deceased and that PW2 resides in a house adjacent to the house of the deceased and that the deceased is having wife and children and that on one day during midnight, she woke up from sleep as the dogs were barking and had noticed four persons with masks on their faces and that on being afraid she had left that place. Similarly PW5, who is the immediate neighbour of PW4, had also stated that in the middle of one night she had seen four male persons wearing masks. She also did not support the case of the prosecution. Thus, there is serious discrepancy on the aspect as to how A1 to A4 allegedly entered the house of the deceased on that night. Even the charge as framed by the learned Metropolitan Sessions Judge would indicate that A1 to A4

entered the house of the deceased by scaling over the wall; therefore, a separate charge for the offence of lurking house-trespass was also framed. No witness had stated that the assailants scaled the wall of the house of the deceased before entering the house. PWs 1 and 3 did not state in their testimonies that the deceased disclosed to them any utterances, which the assailants made at the time of the incident. The evidence of PWs 4 and 5 coupled with the version of the deceased as was said to have been stated to PWs 1 and 3 that he had identified the assailants by their voices casts a serious doubt as to the identity of the assailants and also as to how the assailants entered the house of the deceased on the night of the incident. The evidence is also not clear as to the assailants who allegedly entered the house of the deceased are the accused. If the deceased had really come to the house of PWs 1 and 3 after sustaining serious injuries, whether they would have waited so long without taking the deceased to a hospital or the nearest police station creates a doubt about the veracity of the versions of PWs 1 and 3. Be that as it may.

7.5 The next salient aspect for consideration is the conduct of the deceased after the alleged incident. PW2 is the elder brother of the deceased. His house is admittedly situated adjacent to the house of the deceased. He had deposed in his cross examination that on the night of the incident he slept in his house and that he did not hear any sounds from the house of the deceased. As per the evidence brought on record, immediately after the alleged incident on the midnight, the deceased did not go to the adjacent house of PW2, his brother, though he was available in his house. It is not the case of the prosecution that the deceased is having any strained relationship with his said brother. Though the incident had occurred allegedly in the midnight of the previous day, as per the evidence of PW1, the deceased came from his house to her house, which is at a distance of 1 ½ KMs, that too while walking with a bicycle. Thus, the version of the prosecution that the deceased, who had sustained serious injuries on the previous midnight, came to the house of PW1 on the next day morning at 7.00 AM while walking along with a bicycle without immediately going to his

brother's house, which is adjacent to his house is highly improbable and not credible, more particularly, in the light of the inconsistent versions of PWs 1 and 3, who are admittedly closely related to him. Shanta Ram, who was said to be an independent witness and who was said to have been present at the house of PWs 1 and 3 when the deceased allegedly narrated the occurrence was not examined by the police.

7.6 Another vital factor, which is apparent from the evidence, is that PW3 took the deceased on his motor cycle on 10.07.2008 morning to the police station; but, the police did not obtain a report from either PW3 or the deceased and also did not record their statements. According to the version of PW3 in his cross-examination, he left the motorcycle at the police station and took the deceased in an auto to the Osmania General Hospital along with a Constable, who accompanied them. Nevertheless, even that police constable was not examined. Though the incident had occurred on the previous midnight i.e., on 09.07.2008 and was reported to the police on the next day morning at about 9 AM, no crime was registered. Though evidence of PW3 discloses that a police constable had accompanied the deceased and PW3 to the hospital, it is not the case of the prosecution that the police received any medico-legal case intimation immediately from the hospital. An ASI of Police recorded Exhibit P1 statement of PW1 at the hospital at 3:40 PM on 10.07.2008; but, the crime was registered belatedly at 05:00 PM on that day. But the endorsement of the concerned Court Officer shows that the FIR was received by the Court on 11.07.2008 at 04.25 PM. There is inordinate delay in not only registering the crime but also in sending the FIR to the Court concerned. Though the deceased was admitted in Osmania General Hospital on 10.07.2008 morning hours and survived till he succumbed to the head injury on 13.07.2008 at 7.00 PM, neither his statement nor a declaration was recorded. It is not the specific case of the prosecution and no reliable evidence was also brought on record to show that he was unconscious from the time he was admitted into the hospital and till he died. The doctor, who treated him, was neither examined by the police nor was he cited as a witness and examined before the Court. The case

sheet maintained by the hospital was not secured and exhibited to show the condition of the deceased from the time of his admission into the hospital and till he breathed his last. In the facts and circumstances of the case, the delays in the registration of the crime and the dispatch of the FIR to the Court, in the absence of any explanation, cast any amount of doubt on the veracity of the prosecution case and the complicity of the accused in the crime.

7.7 Another aspect of the matter which needs advertence to is this: According to PW1, she went to the hospital and changed the clothes of the deceased and kept the blood stained clothes of the deceased in a plastic cover and kept it in his house and that later, the police seized the same. In fact, when she failed to fully support the case of the prosecution, she was declared hostile and was cross-examined by the learned Public Prosecutor. Nevertheless, according to the version of the prosecution, the bloodstained clothes of the deceased were seized from the house of PW2, but not from the house of the deceased. There is no explanation as to how the blood stained clothes of the deceased found their way to the house of PW2. The inherent inconsistencies in the versions of PWs 1 and 3, to whom the deceased had allegedly narrated about the occurrence, the conduct of the deceased in staying the whole night in his house after sustaining injuries, his further conduct in not going to the adjacent house of his brother, PW2, and his auxiliary conduct in allegedly going on foot and with a cycle to the house of PW1, which is at a distance of more than a Kilometre, coupled with the delays in the registration of the crime and the despatch of the FIR to the Court concerned and the other serious discrepancies in the prosecution case create an ineradicable shadow of doubt on the case of the prosecution.

7.8 Further, none of the independent witnesses supported the case of the prosecution about seizure of MO3-iron rod, the alleged weapon of offence, at the instance of A1, pursuant to the arrest of A1 to A4. Even the FSL report, Exhibit P17, on a perusal makes it clear that no blood was detected on MO3.

7.9 No motive was attributed to A1 and A2 for conspiring with A3 and A4 for committing the murder of the deceased. It is apt to recall that A2 is the son

of A1 and that A1 is the brother-in-law of PW1. Even no deep-rooted enmity between the deceased and A4 was established by adducing any required standard of evidence.

7.10 Learned counsel appearing for the accused-appellants submitted that there is no evidence that the deceased was through out unconscious till his death and inspite of the fact that the deceased survived for a few days after the alleged incident no attempt was made to get a dying declaration recorded through a learned Magistrate. It appears that no declaration was got recorded through a learned Magistrate though there was ample time for doing so; in deed, no evidence was adduced to show that any such possibility was ruled out because of the condition of the deceased from the time of his admission into the hospital till his death. The non filing of the inpatient record of the deceased, which is the best evidence, casts a deep-seated doubt on the veracity of the prosecution case. The learned counsel for the accused would also submit that the so-called oral dying declaration cannot by any stretch of imagination be considered to be a dying declaration in the sense it is understood in law. The learned public prosecutor supported the case of the prosecution and contended that the injured (deceased) having sustained a head injury could recover from the shock only after considerable time and that having been attacked, he might not have ventured to move out of the house in the night and that therefore, he waited till the next morning and then went to the house of his sister and hence, there is no improbability in such a conduct of the deceased. In reply, the learned counsel for the accused would submit that by any standards the conduct of the deceased is dubious and unnatural and that no explanation is forthcoming for the deceased not going to the adjacent house of his own brother, PW2. It is well settled that a statement made by a person can be considered as a dying declaration provided the person making the statement was at the time of making the statement conscious and was under the belief or apprehension that death is imminent. The principle on which dying declaration is admitted in evidence is indicated in legal maxim "nemo moriturus praesumitur mentiri" - a man will not meet his maker with a lie in his mouth." Unless there is sufficient evidence that the

situation in which the deceased was placed is grave and that the deceased was under the belief or apprehension that his death is imminent, the declaration cannot be termed as a dying declaration. Unless the dying declaration is of such nature that inspires full confidence no weight can be attached. In the light of the above principles, the acceptability of the alleged oral dying declaration of the deceased has to be considered in the instant case. Though as per the prosecution case, the deceased allegedly narrated to PWs 1 and 3 about the alleged circumstances of the transaction that allegedly resulted in his death, yet the said two witnesses in their respective testimonies gave different versions of the said narration, as already noted. Further their evidence, which does not inspire confidence, and the circumstances apparent from the evidence on record, like the deceased, who had sustained a head and other injuries on the previous midnight, going on foot to the house of PW1 on the next day morning that too by taking a bi-cycle along with him; and, the taking of Tea by the deceased at that time in the house of PW1; and, PW3 taking him on a motor cycle to the police station; and, the non filing of his inpatient case record from the hospital to show his condition at the time of his admission into the hospital; and, the absence of reliable and best evidence like the oral evidence of the Doctor, who had treated him; and the suppression of best possible evidence, namely, the case sheet to throw light on the decisive aspect as to the condition of the deceased during the next three days and till his death lend positive support to the contention of the accused that the condition of the deceased was not serious and that there is no evidence to accept that the deceased was under the belief or apprehension that his death is imminent at the time of the alleged narration/statement by him to PWs 1 and 3 and another about the alleged circumstances of the transaction that resulted in his death. Having regard to the legal position and the circumstances afore stated, we are of the considered view that the oral statement allegedly made to PWs 1 and 3 and another by the deceased on the next day morning cannot be characterised as an oral dying declaration in the sense it is understood in law. Therefore, the said statement of the deceased, if any, made to PWs 1 and 3 is not relevant and is not admissible being not a dying declaration and cannot be permitted

to be relied upon by the prosecution as Dying Declaration.

7.11 Further, the variations in the evidence as to the identity of the assailants and as to the manner in which they had entered the house of the deceased before the alleged attack on the deceased at his house and the implausible version of the prosecution that the deceased, who had sustained injuries on the previous midnight, went on foot, on the next day morning at about 07.00 AM., to the house of PW1 which is at a distance of more than one kilometre without going to the house of his elder brother-PW2, which is immediately adjacent to his house, and all the other circumstances discussed supra cumulatively advocate that the prosecution case is shrouded in suspicion and that it is unsafe to act upon such evidence to sustain the conviction recorded by the Court below against the accused for the offences charged.

8. Thus, a careful evaluation of the evidence brought on record would lay bare that there is no evidence of reliable and required standard, establishing the guilt of the accused, much less, beyond reasonable doubt for the offences with which they are charged. In the well considered view of this Court, the Court below erroneously considered the statement of the deceased said to have been made to PWs 1 and 3 on the next day morning of the incident as a Dying Declaration without considering the acceptability of the same in the light of the relevant legal principles. Further, the Court below failed to consider the inherent improbabilities and vital inconsistencies in the evidence of the prosecution witnesses and the improbable and unbelievable conduct of the deceased.

9. Viewed thus, we find that there is no evidence much less of the required standard to sustain the conviction of the accused for the offences with which they are charged and for which the Court below found them guilty. Accordingly, we hold that the judgment of the Court below is liable to be set aside and that the accused are entitled to be acquitted.

10. In the result, the Criminal Appeal is allowed and the judgment under appeal convicting the accused 1 to 4 for the offences with which they are

respectively charged is hereby set aside and the accused 1 to 4 are acquitted of the respective charges for which they are found guilty and the sentences inflicted against the accused are set aside. The accused 1 to 4 shall be set at liberty forthwith, if their confinement is not required in any other case. The fine amounts, if any, paid by them shall be refunded to them after the time for preferring further appeal/revision is over.

Miscellaneous petitions pending, if any, in this appeal shall stand closed.

SANJAY KUMAR, J

M. SEETHARAMA MURTI, J

08th August, 2016
RAR