

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

AND

THE HON'BLE SRI JUSTICE G. SHYAM PRASAD

CRIMINAL APPEAL Nos.1187 AND 1604 OF 2010

DATED: 07-06-2016

CRIMINAL APPEAL No.1187 of 2010

Between:

Vankeswaram Kalamma. --- Appellant

And

The State,
Rep. by Public Prosecutor. ---
Respondent

COUNSEL FOR THE APPELLANT : Mr. K. Sita Ram

COUNSEL FOR THE RESPONDENT : Public Prosecutor (TS)

CRIMINAL APPEAL No.1604 of 2010

Between:

Vankeswaram Ushaiah
and another. --- Appellants

And

The State,
Rep. by its Public Prosecutor. --- Respondent

COUNSEL FOR THE APPELLANT : Mr. C. Nageswara Rao

COUNSEL FOR THE RESPONDENT : Public Prosecutor (TS)

THE COURT MADE THE FOLLOWING:

COMMON JUDGMENT: (*Per Hon'ble Sri Justice G. Shyam Prasad*)

1. Criminal Appeal No.1604 of 2010 is filed by accused Nos.1 and 2 and Criminal Appeal No.1187 of 2010 is filed by accused No.3 in Sessions Case No.492 of 2009, on the file of the Judge, Family Court-cum- Additional District and Sessions Judge, Nalgonda. By judgment dt.06.08.2010 in the said Sessions Case, all the three accused were convicted for the offence under Section 302 read with Section 34 of the Indian Penal Code (IPC) and sentenced to suffer imprisonment for life, and to pay a fine of Rs.3,000/- (Rupees three thousand only) each and, in default of payment of fine, to undergo simple imprisonment for a period of six months.

2. The case of the prosecution, in brief, is that on 18.07.2009 at 14.00 hours (2 p.m.), the *de-facto* complainant (P.W.1) came to Dindi Police Station and lodged a report stating that on the morning of the previous day, i.e., on 17.07.2009, the accused, who belong to his village, hired the bullock cart of the deceased (his father) for bringing toddy leaves from Charagonda Village, that the deceased has taken bullock cart to the said village and he did not return on that night, that on the following day, i.e., on 18.07.2009 morning, his paternal aunt, i.e., Sailamma (P.W.2) informed P.W.1 over telephone that she was informed by one Velmaiah - electricity lineman over telephone that the deceased was found lying with injuries in the Gram Panchayat building, Singarajapally, that on hearing the same, P.W.1 along with his younger brother - Nune Ayodya went to the said village and

brought the deceased to his house, that on being informed about the incident, P.Ws.5 and 6 came to P.W.1's house and, on their enquiry, his father told them that on the previous day while he was returning with toddy leaves loaded in his bullock cart, hired by the accused to Tavaklapur village, en route when they reached the place near Mysamma Temple on the outskirts of Singarajapally, at about 10.00 p.m., accused Nos.1 and 2 questioned him about his continuing illegal intimacy with accused No.3 and that being a person belonging to Mala community his maintaining illegal intimacy with a person belonging to Madiga caste cannot be permitted and so saying accused Nos.1 and 2 beat the deceased with sticks and stones with an intention to kill and they caused him bleeding injuries; that accused No.3 joined accused Nos.1 and 2 by kicking him with her legs on his testicles; that later they left him there and went away along with the bullock cart and that thereafter, the deceased reached Gram Panchayat building with great difficulty and slept there for the night. Basing on the said report, P.W.13 registered a case in CrI No.82/1009 under Section 307 r/w. Section 34 IPC. He has visited the scene of offence situated near Mysamma Temple on the outskirts of Singarajapally Village. Since the exact scene of offence could not be located and no incriminating material could be found, Pw-13 has not conducted the scene of offence panchanama. As the condition of the injured was precarious, the Duty Medical Officer, Government Community Health Centre, Devarakonda, advised shifting of the deceased to Osmania General Hospital, Hyderabad, for expert treatment. Following the said advice, while the deceased was being shifted to the Osmania General Hospital, Hyderabad, he succumbed to the injuries at about 18.30 hours on 18.07.2009. P.W.1 informed P.W.13 about the death of the deceased over phone. The body of the deceased was brought to the Government Community Health Centre, Devarakonda, and the same was kept in mortuary. On receiving the death intimation, P.W.13 has altered the section of law from Section 307 read with Section 34 IPC to

Section 302 read with Section 34 IPC and sent the express alteration memo to the Court of the Judicial Magistrate of First Class, Devarakonda. P.W.14 has later taken over the investigation of the case, conducted inquest and got photographs of the dead body of the deceased taken. On 20.07.2009, on information, PW-14 along with his staff rushed to the Tavaklapur village and arrested accused Nos.1 to 3 at their respective houses in Harizanawada. On interrogation, the accused confessed in the presence of PW.10 and LW.16 that they killed the deceased by beating with stones and kicking him on his chest and testicles on the grudge that he belonging to mala community developed illicit intimacy with accused No.3, who belongs to madiga community. Further, in pursuance of their confession, the accused led the police and panchas to the scene of offence situated at Amla garden in Singarajapalli village, and there, the police seized a stone, which was used in the commission of offence, marked as M.O.1., and later sent the accused to judicial custody. PW.12, Civil Assistant Surgeon, conducted autopsy over the dead body of the deceased and opined that the cause of death was due to cerebral hemorrhage because of head injury.

3. In order to prove its case, the prosecution has examined P.W.s 1 to 14 and marked Exs.P.1 to P.10 and also produced M.O.1. On behalf of the defence, no one was examined but Ex.D-1 was marked.

4. On appreciation of the oral and documentary evidence, the Court below has rendered the judgment convicting and sentencing the appellants as noted above.

5. The learned counsel for the appellants, during course of their arguments, submitted that the case is based on circumstantial evidence and there are no direct eye witnesses; that the motive for the commission of the offence has not been established; that the events such as the accused hiring bullock cart of the deceased and going in

the bullock cart to the place where they purchased toddy leaves, have not been proved; that the interested testimony of PWs.1 to 6, who are either relatives of the deceased or villagers, cannot be relied upon as, the deceased receiving injuries, going to Gram Panchayat office and staying there all the night of 17.07.2009, being found by one of the villagers on the morning of 18.07.2009, giving of intimation to PW.4 and the deceased being taken to the house of PW.1, where he disclosed the incident to all his relatives and villagers, appear to be highly improbable; that the evidence of PW.11, who is said to have seen the deceased and accused together, is unreliable and untrustworthy as the accused, who are from other village, are strangers to PW.11 and there was no Test Identification Parade (TIP) conducted to identify accused by PW.11; and that after a lapse of time, identification of the accused for the first time in the court hall is inadmissible and the same cannot be acted upon. The learned Counsel further submitted that that the deceased lived for a considerable period of time after the alleged incident and in spite of that the police have not taken any steps for getting his dying declaration recorded by a Magistrate or at least by the doctor who treated him, initially. It is further submitted that the trial Court erroneously placed reliance on the statement of the deceased recorded under Section 161 Cr.P.C., by treating the same as dying declaration under Section 32 of the Indian Evidence Act and arrived at the conclusion that in the facts and circumstances of the case the accused are only responsible for the death of the deceased. The learned Counsel lastly submitted that this is a fabricated case foisted against the accused due to enmity.

6. Learned Public Prosecutor, appearing for the respondent-State, while defending the impugned judgment of the Court below, submitted that insofar as the testimonies of the witnesses are concerned, the settled legal proposition of law is that, though the witnesses are related

to the deceased their testimony cannot be discredited merely on the said ground and that their testimony can be scrutinized and can be relied on for arriving at a just conclusion; and that the prosecution could prove all the circumstances pointing to the guilt of the accused.

7. Having regard to the respective submissions of the learned counsel for the parties, the sole point that arises for consideration in these Appeals is, whether the prosecution proved the guilt of the accused beyond reasonable doubt for the offence punishable under Section 302 read with Section 34 of I.P.C.?

8. **POINT:** According to the prosecution, this is a case of murder of the deceased, who was a resident of Tavaklapur village of Dindi Mandal committed by the accused due to sexual jealousy. The case is based on circumstantial evidence. The Court below, placing reliance on the evidence of PWs.1 to 6, 8 and 11 has convicted the accused for the offence punishable under Section 302 read with Section 34 of I.P.C. The circumstances relied upon by the prosecution before the Court below are three fold. The first circumstance is that the deceased and accused were seen together at one place by PW.11 at Charakonda village; the 2nd circumstance is that the deceased was found with injuries at the Gram Panchayat office, Singarajapally village by Pw-4; and the 3rd circumstance is that the deceased himself has narrated the incident to PW-1 to PW-6 as to who were responsible for the injuries sustained by him and he also named the accused. The Court below, considering the evidence of the above said witnesses, and the circumstances in the case, and having found that there was no discrepancy in the evidence of all these witnesses, pointed out by the defence counsel in their cross-examination, convicted the accused.

9. In a case based on circumstantial evidence, motive plays an important role in bringing home the guilt of the accused. It is the case of the prosecution that there was a rumour in Tavaklapur village that

the deceased who belonged to Mala community, was having illicit intimacy with A-3, belonging to Madiga community; that A-1 and A-2, the agnates of A-3, also developed illicit intimacy with A-3; that the deceased used to tease accused No.3 for her illicit contacts with A-1 and A-2 and that therefore A-1 and A-2 with the help of accused No.3 have tried to do away the life of the deceased and beat him. Except the sole testimony alleged to have been made by the deceased that A-1 and A-2 questioned him about his illicit intimacy with A-3 and beat him with sticks and stones, there is absolutely no other evidence coming forth to corroborate the testimony of the deceased. The investigating officer also did not enquire in the village whether the deceased had illicit intimacy with A-3. The suggestion put to A-3 during her examination under Section 313 Cr.P.C. that A-1 and A-2 beat the deceased because of the illicit intimacy the deceased had with her, was denied by her as "false". If really the alleged intimacy between the deceased and A-3 is the motive for the commission of the offence, there was no possibility or probability of accused No.3 hitting the deceased on his testicles and causing him the injuries along with A-1 and A-2. Therefore, the version of the prosecution with regard to motive appears to be highly improbable.

10.. The Apex Court in ***Vijay Shankar Vs. State of Haryana***^[1], held at para-11 as follows:

"11. In each and every case, it is not incumbent on the prosecution to prove the motive for the crime. Often, motive is indicated to heighten the probability of the offence that the accused was impelled by that motive to commit the offence. Proof of motive only adds to the weight and value of evidence adduced by the prosecution. If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence. But even if the prosecution has not been able to prove its case on motive that will not be a ground to throw the prosecution case nor does it corrode the credibility of prosecution case. Absence of proof of motive only demands careful scrutiny of evidence adduced by the prosecution. In the present case, absence of convincing evidence as to

motive makes the court to be circumspect in the matter of assessment of evidence and this aspect was not kept in view by the High Court and the trial Court.” (Emphasis added)

In the instant case, as discussed above, the prosecution has failed to prove the motive, which was sought to be projected as the sexual jealousy between accused Nos.1 and 2 on one side and the deceased on the other, beyond reasonable doubt.

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11. The trial Court, relying on the decision of the Apex Court in ***Gulam Hussain and another Vs. State of Delhi***^[2] arrived at a conclusion that the statement of the deceased recorded under Section 161 Cr.P.C. by the Police can be considered as the dying declaration of the deceased.

12. The post-mortem examination reveals that the deceased has received the following injuries:

- 1) Swollen Scrotum 3 x 5 c.m. probably caused by blunt weapon;
- 2) Bruise 5 x 3 c.m. over right maxilla bone caused by rough surface;
- 3) Contusion with scratch mark over right lateral neck to clavicle;
- 4) Bruise small 2 x 3 c.m. on the base of neck; and
- 5) Bruise small 3 x 5 c.m. over left cheek.

13. One of the injury is on the head and having received such an injury on head, whether the deceased would be in a mentally fit position to make a statement as to the incident at all is not clarified by the medical officer. The medical officer who has treated the deceased, initially, has not been examined in this case. In the light of the injuries received by the deceased, his being in consciousness and speaking about the incident to his son PW.1 and his relatives and villagers does

not appear to be probable. The police allegedly recorded the statement of the deceased under Section 161 Cr.P.C., and at that time also, whether the deceased was in a fit condition to give statement or not, was not certified by any Medical Officer and therefore, recording of the statement of the deceased by the police appears to be unbelievable and improbable. The trial Court did not consider as to whether any precautions were taken either by the Police or the medical officer before recording the statement of the deceased under Section 161 Cr.P.C in the hospital to find out the mental fitness of the deceased to make the statement.

14. In ***Gulam Hussain***³, relied on by the trial Court, the Apex Court held as follows:

“(1) Section 32 of the Evidence Act is an exception to the general rule of exclusion of hearsay evidence and the statement made by a person written or verbal of relevant facts after his death is admissible in evidence if it refers to the cause of his death or any circumstances of the transactions which resulted in his death. To attract the provisions of Section 32, the prosecution is required to prove that the statement was made by a person who is dead or who cannot be found or whose attendance cannot be procured without any amount of delay or expense or he is incapable of giving evidence and that such statement had been made under any of the circumstances specified in sub-sections (1) to (8) of Section 32 of the Evidence Act.

In this case the statement of the victim of the burn injuries was recorded by an ASI in hospital after getting an opinion from the doctor that the injured was fit for statement. Later, he died and in his deposition he had referred to the circumstances which ultimately proved to be the cause of his death. Nothing has been pointed out by the defence side which could create any doubt regarding the making or admissibility in evidence of the statement. The submission that as the statement was recorded by the investigating officer which was treated as FIR, the same could not be treated as dying declaration and was inadmissible in evidence has no substance because at the time of recording the statement the ASI did not possess the capacity of an investigating officer as

the investigation had not commenced by then. Such a statement can be treated as a dying declaration which is admissible in evidence under Section 32(1) of the Evidence Act. The statement was voluntarily made by the deceased which was reduced to writing and has rightly been treated as a dying declaration after the death of the maker.”

15. In view of the principle laid down by the Apex Court in ***Gulam Hussain***², the trial Court concluded as follows:

“In view of the evidence of PWs.5 and 6 who are the independent witnesses and who directly heard from the deceased that A-1 to A-3 have beaten him while he was returning from Charagonda village and left him alone after beating, is consistent with the statement of the deceased recorded by PW.13 under Section 161 Cr.P.C. and it is therefore admissible in evidence. Therefore, I am of the considered view, that, all the circumstances, from the beginning, that the deceased found along with the accused persons at Charagonda village to till he was succumbed to the injuries are consistently proved from the evidence of the prosecution witnesses. Non-recovery of bullock-cart from the possession of the accused persons is not fatal to the case of the prosecution, since accused persons brought the bullock-cart to the village and if it is allowed to go, normally the bulls of the cart will lead to their destination without its driver.”

16. The facts in the decision referred supra are quite different from the facts of the instant case. The deceased was admitted in the hospital and, when he was alive, the police originally registered the case under Section 307 I.P.C. and started investigation. At least on coming to know of the gravity of the injuries, the Police ought to have taken steps for recording of dying declaration of the injured by the Magistrate. In the instant case, the approximate time of death was 12 to 18 hours prior to examination of the deceased by PW.12. When the Police recorded the alleged statement of the deceased under Section 161 Cr.P.C., in the hospital, he was in a very serious condition. However, the Police officer who has allegedly recorded the statement of the deceased did not take the assistance of the Medical Officer to find out whether the deceased was in a fit mental condition to make the

statement. Further, having sufficient knowledge that the deceased was in a serious condition, neither the Hospital authorities nor the Police Officer did not take steps to get the dying declaration of the deceased recorded by the concerned Magistrate. If really, the deceased was conscious, the Police or the Hospital authorities would have taken steps for giving requisition to the Magistrate for recording his dying declaration. When the deceased was able to speak to all the relatives and villagers and narrate the incident, it is not known why the Police have not taken steps to record his statement, at least through the Medical officer, who attended on him in the hospital, and also why they did not take any certificate from the Medical Officer that the deceased was in a fit condition to give the statement. The circumstances in which the alleged statement of the deceased was recorded under Section 161 Cr.P.C. throws any amount of suspicion on its genuineness that the same was not recorded when the deceased was conscious; and that the same might have been got prepared, as rightly contended on behalf of the appellants, due to political rivalry. Therefore, the recording of the statement of the deceased by the police is highly improbable and unbelievable.

17. According to the prosecution, accused Nos.1 and 2 started quarrelling with the deceased for the latter developing illicit intimacy with accused No.3 and started beating him and they beat him with a boulder, and A-3 kicked him with her legs on his testicles. Surprisingly, the medical evidence is otherwise. The nature of injuries stated by the Medical Officer clearly reveals that they are fatal and one of the injuries was on head and it was a cut injury. The medical officer, P.W.12, who conducted autopsy over the dead body of the deceased, opined that the cause of death was due to cerebral hemorrhage because of the head injury. The trial Court had only considered the chief-examination of PW.12 ignoring the cross-examination. M.O.1 is the stone alleged to have been seized from the scene of offence. The

evidence of PW-12-Medical Officer clearly reveals that the cut injury on the head of the deceased cannot be caused by an object like M.O.1. PW.12, deposed that the death of deceased was due to cerebral hemorrhage because of the head injury but he did not state whether the said injury is sufficient in the ordinary course of nature to cause death. In his chief-examination, PW-12 has stated that the injury No.1 may be possible to be inflicted by kicking with legs on testicles; that the other injuries are possible by a stone like M.O.1 and that he has issued Ex.P-7 post-mortem examination report. In the cross-examination, PW-12 has stated that there is no corresponding external injury to the injuries noticed on dissection of the head. He further stated that the head injury is a cut injury; that the said injury is found on the scalp after taking over the hair and first layer of the scalp; that the said cut injury is not found on the external observation and that it could be found only after dissection. He has made it clear that injury No.3-contusion with scratch mark over right lateral neck to clavicle is not possible with an object like M.O.1. Similarly, he deposed that injury Nos.4 and 5 are also not possible with an object like M.O.1. The medical evidence creates any amount of doubt as the prosecution has failed to explain the cut injury on the head of the deceased, which could not be traced externally at the time of post-mortem examination and which could be traced only during the post-mortem examination. Further, PW-12 did not state whether the head injury is sufficient in the ordinary course of nature to cause death. Therefore, the testimony of PW-12-Medical officer clearly creates a doubt about the version of the prosecution that the deceased was beaten to death by the material object like M.O.1.

18. In the background of medical evidence, the question is whether the testimony of the witnesses PWs.1 to 6 can be believed that they were informed by the deceased about the alleged incident that accused caused injuries to him or not? This question can be answered

in negative because the circumstances in the chain are not complete to prove the alleged incident. The evidence of P.W.1 reveals that on receiving the information from P.W.2 - his maternal aunt, he took an auto of P.W.3 - L. Shareen Shavali, and went along with his brother Ayodya to Singarajapally and there they found the deceased with injuries on his head, testicles and that his testicles were swollen.

19. As rightly submitted by the learned counsel for the appellants, the circumstances, viz., after receiving the fatal injuries, the deceased going to Gram Panchayat office, and staying there throughout the night, appears to be highly improbable, as, in the Gram Panchayat office at least a watchman would be present at night, but the deceased did not even inform anything about his receiving injuries to anybody there. The condition of the deceased is not known when he was in the Gram Panchayat office and also later when he was shifted to the Hospital.

20. A careful scrutiny of the evidence on record, clearly reveals that the deceased was found with the injuries in the Grama Panchayat office, Singarajapally and, on information, PW.1, the son of the deceased went there and brought the deceased in an auto to his house. There is no instance of the deceased informing his son about the occurrence of the incident on the way to their house. The evidence on record shows that the deceased informed PW.1 and other relatives and villagers only after reaching home. In the light of the serious injuries received by the deceased, his being in consciousness and speaking about the incident to PW-1 to 6 does not appear to be probable. If really, the deceased was conscious at the Grama Panchayat office, he would have immediately informed about the incident to PW-1, his son, when he went there to bring him home.

21. There was also a possibility of implication of the accused on

knowing about the injuries received by the deceased. Except the alleged testimony of the deceased, the prosecution failed to prove the important links in the case, namely, the alleged illicit intimacy between the deceased and accused No.3; the deceased teasing accused No.3 for the latter's alleged illicit intimacy with A-1 and A-2; as to what had happened after the accused beat the deceased, and as to why the police have not seized the bullock cart. The prosecution relied mainly on the aspect that the deceased informed about the incident to his son, PW.1 and other relatives and villagers when he was brought home. The other circumstance relied upon by the prosecution is the testimony of PW.11, who had testified about the sale of toddy leaves to the accused, who went along with the deceased in his bullock cart. However, the investigation does not show as to what happened to the bullock cart with the load of toddy leaves after the incident and how the toddy leaves were disposed of by the accused subsequently. According to the statement of the deceased, the accused have taken away the bullock cart. If the bullock cart has been taken away by the accused, it should have been seized from their possession which may probably connect the accused with the crime. Therefore, non-seizure of the bullock cart is fatal to the case of prosecution. Except the statements of PW-1 to PW-6, who are either relatives or other villagers, about the deceased informing them about the incident and the nature of injuries received by him, there is no other corroborating evidence to connect the accused with the crime. Further, it is natural the conduct of any person to inform his family members whenever he is leaving the village, but in this case there is no evidence on record that the deceased has informed any of his family members that his bullock cart was hired by the accused to go to Charagonda village for bringing toddy leaves. These circumstances and the nature of evidence with regard to the injuries received by the deceased coupled with the medical evidence, which have already been discussed above create any amount of doubt on the prosecution case.

22. Considering the facts and circumstances of this case, we are of the view that there is no sufficient evidence to connect the accused with the crime as the chain of circumstances is not complete in this case. Therefore, we do not see any valid ground to uphold the conviction recorded by the trial Court and therefore the conviction recorded by the trial Court is liable to be set-aside.

23. In the result, the Criminal Appeals are allowed. The conviction and sentence recorded against the appellants/accused Nos.1 to 3 in the judgment, dated 06.08.2010, in Sessions Case No.492 of 2009, on the file of the Judge, Family Court-cum-Additional District and Sessions Judge, Nalgonda, for the offence punishable under Section 302 read with Section 34 I.P.C., are set aside. Consequently, the accused shall be set at liberty forthwith, if they are not required in any other case or crime and the fine amount, if any, paid by them shall be refunded to them.

REDDY, J

C.V. NAGARJUNA

Date: 07-06-2016
BNR/DSH

G. SHYAM PRASAD, J

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

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21072016

CRIMINAL APPEAL Nos.1187 AND 1604 OF 2010

(Common judgment of the Division Bench
delivered by Hn'ble Sri Justice G. Shyam Prasad)

Date.07.06.2016

BNR/DSH

[\[1\]](#) 2015 (12) SCC 644

[\[2\]](#) 2000 (7) SCC 254