

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

AND

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CRIMINAL APPEAL No.469 of 2012

JUDGMENT:

(Per Sri TSC,J)

1 This Criminal Appeal is filed under Section 374 (2) Cr.P.C. challenging the judgment dated 24.02.2012 passed in S.C.No.425 of 2011 on the file of the Court of the III Additional District & Sessions Judge (FTC) at Medak, wherein and whereby the appellants herein were found guilty of the offence punishable under Section 302 r/w 34 of IPC, convicted and sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs.500/- each, in default, to suffer imprisonment for a period of six months.

2 The case of the prosecution, in nutshell, is that on 28.11.2009 P.W.1 lodged a complaint (Ex.P.1) before the Station House Officer, Shivampet Police Station, basing on which, P.W.11 – the S.I. of Police, Shivampet Police Station, registered a case in Cr.No.107 of 2009 under Section 302 IPC.

3. The gist of the complaint is that one Cheemudi Ramaiah originally belonged to Muppireddypalli village. His two elder daughters died and the third daughter was given in marriage to Allipuram Karunakar (A.1), who belongs to Tuniki Khasala village of Wargal Mandal, Medak District. Three years prior to 2009, Ramaiah migrated to his in-laws village Kothuru, as his land was acquired by the Government. Thereafter, Ramaiah came to the village and received an amount of Rs.15.00 lakhs towards compensation for his acquired land from the Government. On 21.11.2009, A.1 requested Ramaiah to come to his village.

On 22.11.2009 Ramaiah went to Runika Khasala village as his wife was also in that village for the last ten days to look after the wife of A.1, who was not doing well. On 22.11.2009, A.1 and Marigalla Yadagiri (A.2) took Ramaiah to Waddepally village for collection of ayurvedic medicine. In the midway, they purchased two beer bottles and one quarter whisky bottle and took Ramaiah to forest area located near Chakarimetla temple of Shivampet at about 1.00 PM. After consuming beer and whisky, A.1 requested Ramaiah to give him an amount of Rs.6.00 lakhs which was kept in bank. However, Ramaiah refused to give the money to A.1. Then A.1 and A.2, who is cousin of A.2, hatched up a plan to kill Ramaiah, in consequence whereof, A.2 caught hold the legs of Ramaiah and A.1 beat him indiscriminately and strangled him with a towel. Ramaiah fell unconscious. Thereafter A.1 and A.2 left the place under the impression that Ramaiah died. On 23.11.2009 at about 5.00 PM, Ramaiah went to Muppireddypalli and narrated the incident to P.Ws.1 to 4 and one Cheemudi Narsaiah (L.W.2). On the next day i.e. 24.11.2009 P.W.1 and others admitted Ramaiah in Gandhi Hospital, Secunderabad where Ramaiah died on 27.11.2009 at about 7.00 AM, while undergoing treatment. P.W.11 conducted inquest over the dead body of the deceased in the presence of P.W.8 and L.W.12 (C.Pentaiah) and prepared inquest panchanama Ex.P.3. P.W.11 examined and recorded the statements of P.Ws.1 to 4, L.Ws.2 and 3. On 28.11.2009 Dr. P.Vijaya Sagar (P.W.13) conducted autopsy over the dead body of Ramaiah (hereinafter referred to as 'the deceased') and issued Ex.P.8 Postmortem Examination report. P.W.12- the Inspector of Police took up further investigation in this case and apprehended A.1 on 12.12.2009 in the presence of P.W.9 and L.W.4 and recorded his confession statement

Ex.P.4. The Inspector also recovered M.Os.1 to 3 under the cover of panchanama Ex.P.5. On 21.12.2012 the Inspector apprehended A.2 in the presence of P.W.10 and L.W.5, and recorded his confession statement Ex.P.6 and seized motorcycle – M.O.4. After completion of investigation, the Inspector of Police laid charge sheet before the Judicial Magistrate of First Class, Narsapur against the accused for the offences stated supra.

4. The learned Judicial Magistrate of First Class, Narsapur numbered the charge sheet as PRC No.20 of 2010 and committed the case to the District & Sessions Division, Medak after completion of necessary formalities.

5. The learned Principal District & Sessions Judge, Medak took cognizance of the offence under Section 302 r/w 34 of IPC and numbered it as S.C.No.425 of 2011 and made it over the same to the III Additional District & Sessions Judge (Fast Track Court), Medak. The learned III Additional District & Sessions Judge framed charge against the accused for the offence punishable under Section 302 r/w 34 of IPC. The accused denied the charge and claimed to be tried.

6. In order to bring home the guilt of the appellants / accused, before the trial Court, on behalf of the prosecution, P.Ws.1 to 13 were examined and Exs.P.1 to P.8 and M.Os.1 to 4 were marked. On behalf of the defence no oral or documentary evidence was adduced.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the

appellants were guilty of the offence charged and convicted and sentenced them as stated supra. Hence the present appeal.

8. The learned counsel for the appellants attacked the judgment of the trial Court on the following grounds:

- a. The prosecution miserably failed to assign reasons much less cogent and valid reasons for the delay in lodging the complaint.
- b. The prosecution failed to establish the motive on the part of the appellants for committing the alleged offence.
- c. Non-examination of the family members of the deceased is fatal to the prosecution case and the same was not considered by the trial Court.
- d. The trial Court failed to consider the discrepancies in the testimony of P.Ws.1 to 4, which go to the very root of the case of the prosecution.
- e. The trial Court convicted the appellants on assumptions and presumptions, which is not permissible under law.

9. *Per contra*, the learned Public Prosecutor submitted that there is no inconsistency or discrepancy in the testimony of P.Ws.1 to 4 to disbelieve their version. He further submitted that the testimony of P.Ws.1 to 4 clinchingly establishes that the deceased made oral dying declaration to them with regard to the manner in which the incident occurred. He further submitted that mere delay in lodging the complaint by itself is not a valid ground to brush away the case of the prosecution without taking into consideration the other attendant circumstances. He lastly contended that there are no grounds much less valid grounds to interfere with the impugned judgment and the appeal is, therefore, liable to be dismissed.

10. We have considered the submissions of the Counsel and the material on record.

11. The oral testimony of P.Ws.1 and 11 coupled with Exs.P.1 and P.7 clearly reveal that P.W.1 set the criminal law into motion. Whether or not the delay in lodging the complaint is fatal to the case of the prosecution will be considered at the appropriate stage.

12. As per the testimony of P.W.11, he conducted inquest over the dead body of the deceased on 28.11.2009 in the presence of P.W.8 and one Pentaiah (L.W.12) and prepared inquest panchanama Ex.P.3. The testimony of P.W.8 also reveals that he was present at the time of conducting of inquest over the dead body of the deceased. The oral testimony of P.Ws.8 and 11 coupled with Ex.P.3 clearly reveals that inquest was conducted over the dead body of the deceased on 28.11.2009. The panchayatdars opined that the deceased died due to injuries. The testimony of P.W.13 reveals that he conducted autopsy over the dead body of the deceased on 28.11.2009 and issued P.M. certificate Ex.P.8. His testimony further reveals that the deceased died of multiple injuries. The oral testimony of P.Ws.7, 11 and 13 coupled with Exs.P.3 and P.8 clearly reveals that the deceased died due to multiple injuries. The death of the deceased is thus homicide.

13. The point that falls for consideration is '*whether the prosecution has established the guilt of the appellants for the offence punishable under Section 302 r/w 34 of IPC beyond all reasonable doubt or not?*

14. Even as per the prosecution version, none of the prosecution witnesses witnessed the incident. The prosecution case is solely based

on the oral dying declaration alleged to have been made by the deceased to P.Ws.1 to 4. In such circumstances, motive would play a vital role. If the prosecution case is based on the direct evidence, the role of motive is minimal.

15. As per the prosecution version, A.1 and A.2 killed the deceased as he refused to give to A.1, an amount of Rs.6.00 lakhs, which was kept in the deceased's bank account. A.1 is none other than the son-in-law of the deceased. Accused No.2 is cousin of accused No.1.

16. As per the testimony of P.W.5, he borrowed an amount of Rs.3,70,000/- from the deceased. As per the testimony of P.W.7, he borrowed Rs.30,000/- from the deceased and repaid Rs.20,000/-. These two witnesses were examined to prove that the deceased was having sufficient money in his bank account. As per the testimony of P.Ws.1 and 4 also the deceased received nearly Rs.15.00 lakhs from the Government towards compensation in the land acquisition proceedings.

17. Let us consider whether the prosecution has collected any evidence on this aspect.

18. In the cross-examination, P.W.12-the investigating officer, deposed, in unequivocal terms, that he did not collect any documents or bank account pass book of the deceased. As seen from the testimony of P.Ws.11 and 12 they did not examine and record the statements of the family members of the deceased. As per the prosecution version, the deceased deposited money in his bank account. If that is so, what prevented the investigating officer to verify the bank account of the deceased, is not explained. There is no evidence much less cogent and

convincing evidence to show that as on the date of the alleged incident i.e. 22.11.2009, the deceased was having sufficient money in his bank account.

19. In the absence of positive and cogent evidence, it may not be possible for the Court to arrive at a conclusion that the accused killed the deceased on the ground that he refused to give Rs.6.00 lakhs to A.1.

20. Having regard to the facts and circumstances of the case, we are of the considered view that the prosecution failed to prove the motive for the alleged offence.

21. It is the case of the prosecution that on 22.11.2009, while going to forest, the accused purchased two beer bottles and one quarter whisky bottle. To prove this aspect, the prosecution examined P.W.6 who is the owner of Sri Lakshmi Narasimha Wines, Nacharam.

22. In the chief examination, P.W.6 deposed that A.1 and A.2 along with another person came to his shop about two years back and purchased two beer bottles and one quarter whisky bottle. In the cross examination he deposed that he cannot identify each and every customer who visit his shop. He further stated that the daily turnover of his shop is Rs.50,000/-.

23. When P.W.6 is not in a position to identify each and every customer, how he identified the accused, who allegedly bought alcohol in his shop 2 years back, in the open court, is not explained. It is not the case of the prosecution that P.W.6 had any acquaintance with accused persons. In such circumstances, identifying the accused in the open

court for the first time after two years is highly improbable and unbelievable.

24. In our opinion, the trial Court erred in simply believing the version of P.W.6 placing reliance on his chief examination. The very purpose of cross examination of a witness is to elicit the truth thereby to eliminate the false version. A careful scanning of cross examination of P.W.6 falsifies his chief examination. Hence, we are of the considered view that no credibility can be attached to this witness.

25. The crucial and material witnesses in this case are P.Ws.1 to 4. P.W.1 is sister-in-law and P.W.3 is the sister of the deceased. P.Ws.2 and 4 are the village elders.

26. As per the testimony of P.W.1, the deceased came to the village at about 5.00 PM. As per her testimony, the deceased informed her that the accused had taken him to the forest area and demanded him to give Rs.6.00 lakhs, which he kept in the bank account, to accused No.1, for which he refused. Thereupon, A.2 caught hold of his legs and A.1 beat him indiscriminately and strangled him with a towel.

27. P.Ws.2, 3 and 4 deposed in the same lines with that of P.W.1, so far as the manner of the alleged incident is concerned.

28. The trial Court treated the statement alleged to have been made by the deceased to P.Ws.1 to 4 as oral dying declaration and that apart from the same, it held that it would fall within the purview of Section 6 of the Indian Evidence Act, 1872.

29. There is no quarrel with the proposition of law that the Court can place reliance on the oral dying declaration, provided, the same inspires the confidence of the Court. The facts which form part of the same transaction are admissible in view of Section 6 of the Evidence Act.

30. The next point that falls for consideration is at which place the deceased made the alleged oral dying declaration to P.Ws.1 to 4.

31. If the chief examination of P.W.1 is taken into consideration, the deceased came to Muppireddypalli village at about 5.00 PM. Her chief examination is silent as to whose house the deceased came on that day. In the cross examination, P.W.1 stated that the deceased was in her house for one day, which does not find place either in her 161 Cr.P.C. statement or in the F.I.R.

32. As per the testimony of P.W.2, himself, P.W.4 and one Narsaiah went to the deceased. When they enquired, the deceased narrated the incident. There is no whisper in the testimony of this witness at whose house he enquired the deceased. His testimony is totally silent on this aspect.

33. As per the testimony of P.W.3 the deceased came to her house and narrated the incident. Thereafter P.W.2 and P.W.4 came to her house and on enquiry the deceased narrated the incident to them.

34. As per the testimony of P.W.4, himself and P.W.2 went to the house of P.W.1 where the deceased narrated the incident to them.

35. If the testimony of P.W.1 is taken into consideration, she simply stated that the deceased came to the village. If the testimony of P.W.2 is

taken into consideration, he enquired the deceased at the house of P.W.1. If the testimony of P.W.3 is taken into consideration, the deceased came to her house.

36. If the testimony of P.W.4 is taken into consideration, he enquired the deceased at the house of P.W.1. If the testimony of P.W.3 is taken into consideration, P.Ws.2 and 4 enquired the deceased at her house.

37. A careful scrutiny of the testimony of these witnesses reveals that they have given different version with regard to the place where the deceased made the alleged oral dying declaration.

38. If the testimony of P.W.1 is taken into consideration, the Court has to exclude the testimony of P.W.3. If the testimony of P.W.2 is taken into consideration, the testimony of P.W.4 has to be excluded.

39. It is settled principle of law that the Court can place reliance on the testimony of a witness if the same is cogent, coherent, consistent and convincing. P.Ws.1 to 4 are the material witnesses in this case. The testimony of these witnesses is inconsistent with each other with regard to the exact place where the deceased made the alleged dying declaration. On the other hand, there are number of material contradictions in the testimony of these witnesses. The Court cannot lose sight of these vital aspects while considering the truthfulness or otherwise of the version put forth by the prosecution.

40. Even as per the case of the prosecution, the deceased never visited Muppireddypalli village in the last three years. In such circumstances, what prompted the deceased to go to the village and make oral dying declaration to P.Ws.1 to 4. The testimony of these

witnesses does not inspire the confidence of the Court. The trial Court has lost sight of this aspect and simply believed the version of the prosecution witnesses. At this juncture, we are placing reliance on the ratio laid down in *Nagender vs. State (NCT of Delhi)*¹ where the Hon'ble apex Court held at para Nos.12 and 13 as follows:

12. We have carefully gone through the testimonies of PW-5 and PW-12. In our opinion, the testimony of PW-5 is doubtful because if the deceased intends to disclose the name of the culprit who had set her and her daughter on fire, it was expected that she should have told the same to her husband on way to hospital and, moreover, there is not even a whisper about the desire of the deceased to make a statement to the police to record her statement. Otherwise also, had the deceased disclosed the name of the accused as the person responsible for her burn injuries to Dharmender (PW-5), under the normal circumstances, he was expected to tell his brother Nagender (PW-1) as well as other persons present in the Maruti van about the dying declaration so made. Therefore, we do not find it safe to rely upon the testimony of PW-5 and the, High Court, has rightly discarded his testimony.

13. With regard to the testimony of Inspector Nirmal Kaur (PW-12), there is no authentic evidence on record to justify her presence to record the statement of the deceased. If the version of PW 12 is true, then she, under the natural course of circumstances, was expected to convey this information to the concerned P.S. whereas as per her version she only prepared a performa and deposited it in the office. There is no explanation as to why the dying declaration, if it was made, was not reduced into writing. Therefore, in our opinion, the testimony of PW-12 is highly doubtful and the prosecution has failed to establish that the deceased actually made any dying declaration in her presence.

41. Having regard to the principle enunciated in the case cited supra, we are of the considered view that this is not a fit case to place reliance on the testimony of P.Ws.1 to 4, so far as the alleged oral dying declaration of the deceased is concerned.

42. Mere delay in lodging the complaint by itself is not a valid ground to discard the prosecution version in toto without taking into consideration the other attending circumstances. At the same time, the Court shall not glibly swallow the prosecution version. It is needless to

¹ (2016) 15 SCC 743

say that the prosecution has to assign reasons much less cogent and valid reasons for the delay in lodging the complaint. Let us consider the facts of the case in the light of the above legal principle.

43. The incident has taken place near Chakarimetla temple of Shivampet on 22.11.2009. The deceased came to Muppireddypalli village on 23.11.2009 and he was in the village for one day. Thereafter he was shifted to Gandhi hospital, Secunderabad on 25.11.2009. The deceased died on 27.11.2009 at about 7.00 AM.

44. The above referred dates are most relevant in order to consider whether the delay in lodging the complaint is fatal to the prosecution case or not. How the deceased came to Muppireddypalli village with such multiple injuries is not properly explained by the prosecution. The reason for not lodging complaint by the deceased himself also creates a reasonable suspicion. For one reason or the other, neither P.W.1 nor P.W.4 chose to lodge complaint at least on 23.11.2009. P.W.1 did not choose to lodge the complaint immediately after the death of the deceased i.e. on 27.11.2009 at about 7.00 AM. The testimony of P.W.11 clearly reveals that P.W.1 came to the police station on 28.11.2009 at about 1.00 PM and lodged the complaint. There is an abnormal and unexplained delay of 30 hours in lodging the complaint. Such an abnormal delay in lodging the complaint also creates a doubt in the mind of the court.

45. At this juncture, we are placing reliance on the principle laid down in *Muttaicose Alias Subramani vs. State of Tamil Nadu*² wherein the Hon'ble apex Court held at Para No.9 as follows:

9. In *Ashok Kumar Chaudhary and Ors. v. State of Bihar* (2008) 12 SCC 173, this Court has observed as under:

16. It is trite that mere delay in lodging the first information report is not by itself fatal to the case of the prosecution. Nevertheless, it is a relevant factor of which the court is obliged to take notice and examine whether any explanation for the delay has been offered and if offered, whether it is satisfactory or not. If no satisfactory explanation is forthcoming, an adverse inference may be drawn against the prosecution. However, in the event, the delay is properly and satisfactorily explained; the prosecution case cannot be thrown out merely on the ground of delay in lodging the FIR. Obviously, the explanation has to be considered in the light of the totality of the facts and circumstances of the case.

46. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, we are of the considered view that the delay in lodging the complaint is also fatal to the prosecution case.

47. A perusal of Ex.P.3 – inquest panchanama reveals that inquest commenced at 02-15 PM at the mortuary of Gandhi hospital, Secunderabad and ended at 04-00 PM. The complaint was lodged at 1.30 PM on 28.11.2009 in Shivampet police station of Medak district, whereas the inquest was commenced at mortuary of Gandhi hospital, Secunderabad on the same day at 02-15 PM and completed by 4.00 PM. A perusal of the inquest panchanama Ex.P.3 reveals that the deceased was admitted in Gandhi hospital, Secunderabad on 24.11.2009 vide MLC No.58818. P.W.2, in his cross examination, deposed that they did not inform to the doctor how the deceased sustained injuries. If really the deceased sustained injuries as narrated by them, what prevented P.Ws.1

² (2017) 8 SCC 598

and 2 to inform the doctor in whose hands the deceased received injuries? The prosecution intentionally and wilfully did not produce the MLC No.58818. As seen from the testimony of P.W.13, he commenced autopsy over the dead body of the deceased on 28.11.2009 at 4.00 PM and completed by 5.00 PM. At what time P.W.13 received the requisition is also not mentioned. For one reason or the other the prosecution did not produce the requisition given to P.W.13 for conducting autopsy over the dead body of the deceased. Non-production of MLC report coupled with the requisition also creates some sort of doubt in the mind of the Court with regard to the version put forth by the prosecution.

48. The other circumstance on which the prosecution relied is recovery of M.Os.1 to 4 from the possession of appellants. As per the testimony of P.W.9, P.W.12 apprehended A.1 in his presence on 12.12.2009. A.1 confessed before him that he beat the deceased indiscriminately and the same was reduced into writing, which is Ex.P.4. As per the testimony of P.W.10, two years back P.W.12 apprehended accused No.2, who in turn disclosed that he caught hold of the legs of the deceased when A.1 beat him indiscriminately and the same was reduced into writing, which is Ex.P.6.

49. Exs.P.4 and P.6 are the alleged confessional statements of the accused Nos.1 and 2 respectively. Any confession made before the police officer is inadmissible. Hence, these two documents are no way helpful to the case of the prosecution.

50. As per the testimony of P.W.9, M.Os.1 to 3 were recovered in pursuance of the information given by A.1, under the cover of panchanama Ex.P.5. As per the testimony of P.Ws.11 and 12, in

pursuance of the information given by A.2, M.O.4 was recovered under the cover of Ex.P.6. The trial Court marked the entire confessional statement of A.2 (Ex.P.6) which includes the seizure of M.O.4, instead of marking the relevant portion. Mere recovery of two empty beer bottles, one empty whisky bottle, a towel and a motorcycle by itself is not sufficient to connect the accused with the offence.

51. Having regard to the facts and circumstances of the case, we are of the considered view that the prosecution failed to prove the guilt of the appellants beyond all reasonable doubt. Viewed from any angle, the conviction and sentence imposed against the appellants by the trial Court in S.C.No.425 of 2011 is not valid either on facts or in law and is liable to be set aside.

52. In the result, the appeal is allowed. The conviction and sentence dated 24.02.2012 imposed against the appellants in S.C.No.425 of 2011 on the file of the Court of the III Additional District & Sessions Judge (FTC) at Medak is hereby set aside. The appellants shall be set at liberty forthwith, if their presence is not required in any other crime. The fine amount, if any, paid by the appellants shall be returned to them. M.O.4 shall be returned to the second appellant and M.Os.1 to 3 shall be destroyed after the appeal time is over.

SRI M.S. RAMACHANDRA RAO, J.

SRI T. SUNIL CHOWDARY, J.

Date: 30.10.2017.
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