

HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

CRIMINAL APPEAL No.1640 of 2010

JUDGMENT: *(Per Hon'ble Sri Justice U.Durga Prasad Rao)*

This appeal is filed by appellants/A.1 and A.2 aggrieved by the judgment dated 25.08.2010 in S.C.No.307 of 2009 passed by the Principal Sessions Judge, East Godavari, Rajahmundry whereby the learned Judge convicted A.1 and A.2 for the offences punishable under Sections 302 r/w 149 IPC and 324 r/w 149 IPC and sentenced them to suffer RI for life and to pay fine of Rs.5,000/- in default to suffer SI for two months each for the first count and also to suffer RI for one year and to pay fine of Rs.1,000/- in default to suffer SI for one month each for the second count and directed both the sentences to run concurrently while acquitting A3 to A8.

2) The prosecution case is thus:

a) The deceased—Shaik Subhani was a resident of Rajahmundry; A.1 is the resident of Ganapathinagar, Rajahmundry; A.2 is the resident of Krishnapuram Village, A3, A4 and A6 to A8 are the residents of Mallisala Village, Jaggampeta Mandal; PWs.1 to 5 are close friends of deceased.

b) On the morning of 30.11.2008, the deceased, PWs.1 to 5 and some others went to Singaramma Temple of Gokavaram Mandal for garden party. Whiles, A7 and his son—A8 also went to the temple to fulfil their

owe to the Goddess on the eve of A8 securing job and they invited all their relatives and friends for lunch; A.1 and A.2 being the close relatives of A7 also attended the said function. A.1 got acquaintance with PWs.1 to 5. At about 2.00 PM, A.1 and A.2 approached PW1 and the deceased and others in a drunken state and asked them to give some chicken curry for which the deceased and PW1 refused but invited them to have lunch and go. A.1 and A.2 felt insulted and thereby an altercation took place between them; then, A.1 and A.2 left the place and informed about the incident to the villagers of Mallisala including the other accused; thereupon, about 25 to 30 persons including A.1 to A8 formed into an unlawful assembly with an intention to attack the deceased and their associates and cause them injuries and went to the place where deceased and others were conducting garden party and attacked the deceased and PW1 with sticks and hit the deceased indiscriminately causing him grievous injuries and also beat PWs.1 and 2 when they tried to intervene and caused simple injuries to PWs.1 and 2 and fled away from the scene; immediately the deceased and PW1 were shifted to GSL Hospital, Rajanagaram for treatment where the deceased succumbed to injuries while undergoing treatment. PWs.1 and 2 were sent to Government Hospital, Rajahmundry for treatment.

c) On receipt of hospital intimation, PW16—Head Constable of Rajanagaram PS visited the hospital and recorded the statement of PW1; at 11.30 PM, he received death intimation from the hospital authorities; then he sent the death intimation along with the statement of PW1 to the

police Gokavaram PS on the point of jurisdiction; basing on the same, PW18—SI of Police, Rajanagaram, who is the in charge of Gokavaram PS registered a case in Cr.No.87 of 2008 under Sections 147, 148, 302, 324, 506 (2) r/w 149 IPC and handed over the file to PW19—C.I of Police, Korukonda Circle, for investigation.

d) During the course of investigation PW19 visited the scene of offence and got it photographed; drafted the scene of offence observation report under Ex.P10, prepared Ex.P19—rough sketch; seized the deadly weapons—M.Os.1 to 6 from the scene; examined 12 witnesses and recorded their statements; held inquest over the dead body and sent it for post-mortem examination. PW20—the Successor I.O arrested A.1 to A6 and sent them to judicial custody. After completion of investigation he laid charge sheet. PW.21—another C.I also conducted part of investigation.

e) On appearance of the accused, the trial Court framed charges under Sections 148, 506-II, 302, 324, 302 r/w 149 and 324 r/w 149 IPC against the accused and conducted trial.

f) During trial, PWs.1 to 21 were examined, Exs.P1 to P20 were marked and MOs.1 to 6 were exhibited on behalf of prosecution. Exs.D1 to D6 were marked on behalf of defence.

g) After completion of trial, the accused were examined under Section 313 Cr.P.C. and incriminating circumstances revealed in the prosecution evidence were put to them to which the accused denied.

h) A perusal of the judgment would show, the trial Court basing on the evidence of medical and other witnesses, held that the deceased met with homicidal death and PWs.1 and 2 received simple injuries in the incident. So far as the complicity of A.1 to A.8 is concerned, the trial Court on analysis of the evidence, observed that A.1 was admittedly a known person of prosecution witnesses and A.2, who is a relative of A.1 was witnessed during the relevant time of galata by prosecution witnesses for a considerable period and therefore, their identity and their overtacts as deposed by the prosecution witnesses could be accepted. The Court further observed, the prosecution witnesses have had no previous enmity with them and therefore, their evidence can be believed. So far as A.3 to A.8, who are admittedly strangers to prosecution witnesses are concerned, the trial Court did not believe the evidence of eye witnesses, though the I.O got conducted Test Identification Parade (T.I Parade) through PW.11, for the reason that as per the evidence of PW.12, the accused were detained in the Police Station and therefore, the possibility of the I.O showing them to the prosecution witnesses even before the T.I Parade cannot be ruled out. Thus the trial Court convicted A.1 and A.2 and acquitted the rest.

Hence the appeal by A.1 and A.2.

3) Heard arguments of Sri T.Pradyumna Kumar Reddy, learned counsel for appellants/A.1 and A.2 and learned Public Prosecutor for the State (Andhra Pradesh).

4 a) Severely fulminating the judgment of the trial Court, learned counsel for appellants would firstly argue that the trial Court wholly misappreciated the evidence so far as A.1 and A.2 are concerned and convicted them. In expatiation, he argued, in this case PWs.1 to 10 were projected as eye witnesses, of which, PWs.1 to 5 are close friends of deceased and hence interested witnesses. PWs.6 to 10, who are independent witnesses, did not support the prosecution case. Therefore, the prosecution case hinged on only the interested evidence of PWs.1 to 5. The trial Court ought to have rejected the evidence of PWs.1 to 5 due to a number of discrepancies in their evidence with reference to their respective 161 Cr.P.C statements. He argued, the omissions and discrepancies raise a grave doubt about the veracity of prosecution case. However, the trial Court placed implicit reliance on their evidence and convicted the accused. Hence the same is not sustainable under law.

b) *Secondly*, regarding the identification of the accused, learned counsel would argue that admittedly except A.1 all other accused are strangers to the prosecution witnesses. Though the I.O got conducted T.I Parade through PW.11 and the witnesses identified the accused, still the trial Court rightly rejected the accuracy of T.I Parade since the accused were illegally detained and shown to witnesses in advance. When the identifying capacity of PWs.1 to 5 was disbelieved in respect of A.3 to A.8, the trial Court ought not to have believed the same evidence as against A.2, who is also an utter stranger to prosecution witnesses.

Further, A.2's name was not mentioned in FIR. Therefore, he deserves acquittal. However, the trial Court convicted the A.2 on surmises.

c) *Thirdly and alternatively*, he argued that there was no previous enmity between the victims and A.1 and A.2 and there was no motive or premeditation to kill the deceased and to cause injuries to PWs.1 and 2 and the entire incident took place on a trivial altercation and the accused had no intention to kill the deceased. Further, as per the prosecution, it was only A.6 who dealt with severe blows on the deceased but not A.1 and A.2 as they only caused minor injuries. In all those circumstances, the trial Court ought not to have convicted the appellants/A.1 and A.2 under Section 302 IPC. He would submit that if at all they are found guilty, their offence may at best come under Section 304 IPC. He thus, at the first instance, prayed to allow the appeal and acquit the appellants/A.1 and A.2 and alternatively, prayed to modify conviction.

5) Per contra, while supporting the judgment learned Public Prosecutor would argue that the trial Court rightly convicted A.1 and A.2 and acquitted A.3 to A.8 on a different context which had no impact on their conviction. He would submit that since A.3 to A.8 were strangers to prosecution witnesses and as the veracity of T.I Parade was not accepted, the trial Court opined that it was not safe to convict A.3 to A.8. However, that is not the case with A.1 and A.2. The prosecution witnesses had acquaintance with A.1 and they observed A.2 for a considerable period during the incident and therefore, their identifying A.1 and A.2 was rightly believed by the trial Court. He would further

submit that PWs.1 and 2 are injured and they have no enmity with the accused and therefore, their evidence was rightly accepted. He further argued that there are no discrepancies in the evidence of PWs.1 to 5 so far as the complicity of A.1 and A.2 in the offence. The discrepancy if any was with reference to the involvement of the other accused alone.

a) Nextly, opposing the alternative argument of the appellants Counsel, learned Public Prosecutor would submit that at the instance of A.1 and A.2, about 25 to 30 persons came with sticks and indiscriminately beat the deceased and also injured PWs.1 and 2. Their utterings before and during the incident and their overtacts would amply suggest that they had an intention to kill the deceased. Since A.1 and A.2 also beat the deceased, they were rightly convicted for the charge under Section 302 r/w 149 IPC. He thus prayed to dismiss the appeal.

6) The points for determination in this appeal are:

(i) *Whether deceased met with homicidal death and PWs.1 and 2 received injuries in the incident occurred on 30.11.2008 near Singaramma temple?*

(ii) *If point No.1 is held in affirmative, whether A.1 and A.2 as members of the unlawful assembly, are responsible for the homicidal death of the deceased and injuries of PWs.1 and 2 and whether prosecution could establish their guilt beyond reasonable doubt?*

7) **POINT No.1:** The oral evidence of PWs.1 to PW.5, PW.15 and PW.17 coupled with Exs.P.13 and P.14—wound certificates and P.17—post-mortem report would all cumulatively establish the homicidal death

of deceased Shaik Subhani and injuries of PWs.1 and 2. As per the evidence of PWs.1 to 5, the incident occurred on 30.11.2008 outside the Singaramma Temple premises where the deceased received blows on his head with sticks and fell unconscious and PWs.1 and 2 also received injuries in the galata. PW.17 who conducted post-mortem on the dead body of Shaik Subhani, deposed that he found the following external and internal injuries:

“External injuries:

- (1) A diffused depression contusion on left frontal parietal region.
- (2) A contusion on the left collar bone of size 2” x 2”.
- (3) A contusion on the right frontal area of size 5” x 1½”.
- (4) A contusion on the right occipital area.
- (5) Swelling and contusion below both the eyes.
- (6) Small contusion on the left temporal region of size 1” x 1”.

Internal injuries:

On opening the skull, scalp, blood clots present within the scalp layers. Depressed fracture present on the left frontal parietal area and frontal ethamoidal sinus. All fractures communicated with each others. On removing the meninges, blood clots present within the brain matter and in all the cranial fossa. Fracture on the base of the skull.”

He opined that the deceased died due to the ante mortem head injuries. He further stated that the injuries could be caused by means of sticks like MOs.1 to 6.

a) Then PW.15, the Civil Assistant Surgeon, District Hospital, Rajahmundry, who examined PWs.1 and 2 deposed that on 01.12.2008, he examined Majji Kishore Kumar (PW.1) and found the following injury:

*“An abrasion on the middle of frontal region of his head ½” x ½”
brownish in colour.”*

Accordingly, he issued Ex.P.13—wound certificate. He also examined Chalapureddi Raju (PW.2) and found the following injuries:

*“(1) Two abrasions on his left arm in the middle of it’s posterior
aspect ¼” x ¼” and 1” x ¼” brownish in colour respectively.*

*“(2) Two abrasions on his left arm below his deltoid region, vertical
in position of size 1” x 1/6” and ¾” x 1/6” brownish in colour
respectively.”*

He issued Ex.P.14—wound certificate. The doctor opined that the injuries of PWs.1 and 2 could be caused with a blunt object. It was no doubt elicited in the cross-examination that the injury of PW.1 could also be caused with a Cricket ball while he was catching it and injuries to PW.2 could be caused while coming into contact with rough surface. The doctor however emphatically stated that the injured made a statement before him that they were beaten by one known and nine (9) unknown persons with sticks.

b) So the above oral and documentary evidence establishes that the deceased met with homicidal death and PWs.1 and 2 received injuries in the galata occurred near Singaramma temple on 30.11.2008.

8) Apart from the above oral and documentary evidence, the suggestions given to PWs.1 to 5 in the cross-examination themselves establish that the deceased and PWs.1 and 2 received injuries in the galata that occurred near Singaramma temple on 30.11.2008. It was suggested to PWs.1 and 2 that they received injuries when a cricket ball

hit them while they were playing cricket and as they misbehaved with some ladies in a drunken condition, several persons in the mob attacked and caused injuries to the deceased and thereby the prosecution party ran away and did not witness who beat them actually. More or less similar type of suggestion was given to PWs.3 to 5 also. From this, it can be inferred that the defence is not seriously disputing the fact that the deceased sustained injuries in a galata that occurred near Singaramma temple on 30.11.2008. So the point No.1 is concerned, the prosecution could establish the homicidal death of deceased and the injuries of PWs.1 and 2. It has now to be seen, how far A.1 and A.2 are responsible for such acts, in the point infra.

9) **POINT No.2:** the prosecution examined PWs.1 to 10 to establish the guilt of accused. Out of which, PWs.6 to 10 did not support its case and they turned hostile. Hence the evidence of PWs.1 to 5 has to be scrutinised. It must be noted that the trial Court upon consideration of the evidence on record held A.3 to A.8 not guilty of the offence. The prosecution has not preferred any appeal against the said acquittal. Therefore, in this appeal the evidence on record is scrutinised and analysed to the extent it is relevant to A.1 and A.2.

10) As per prosecution, the incident occurred on 30.11.2008 in the open place outside Singaramma temple where accused party consisting of around 30 persons attacked the prosecution party and caused injuries to deceased and PWs.1 and 2 with sticks and skulked away. PWs.1 to 5 are

said to be the eye witnesses and hence their evidence needs close scrutiny.

a) PW.1 deposed that on 30.11.2008, himself, the deceased and PWs.2 to 5 and some other friends went to Singaramma temple and after Darshan of the goddess, they selected a place in the premises of the temple for preparing food; at about 1:30pm, when they were making arrangements for taking food, A.1, who was known to PW.1 came along with A.2 and when asked, A.1 replied, he came there to attend a function of his relative and when PW.1 asked about A.2, he replied A.2 was his relative. PW.1 requested A.1 to take lunch but A.1 refused on the ground that he had to take lunch with his relatives and so saying, he asked to provide some chicken curry, for which, PW.1 refused on the ground that there was no sufficient chicken curry but again A.1 forcibly asked him to provide; at that time, A.1 and A.2 were in a drunken condition; when PW.1 refused, A.1 abused them and both the accused kicked the chicken curry container and made other items of the food pell-mell. At that time PW.2 intervened and questioned the highhanded act of A.1 and A.2 and they pushed A.1 and A.2. Then the accused went away giving a warning that they would see their end; thereafter, they came along with 20 to 25 persons. Out of them A.6 ascertained from A.1 and A.2 that PW.1 and deceased pushed A.1 and A.2; then A.6 beat on the head of the deceased with a stick and A.1 and A.2 also beat the deceased with the sticks in their hands and thereafter the remaining accused also beat the deceased indiscriminately; when PW.1 intervened A.1 beat him with stick on his

head; when PW.2 intervened, A.6 beat him and when PW.2 raised his hands to ward-off the blows, he received injuries on his right fore-arm right shoulder and below the left eye; then A.6 and other accused again beat the deceased and warned them and went away.

b) PW.1 further deposed that himself and PW.2 took the deceased to Government Hospital, Jaggampeta and as there were no doctors, they shifted him to GSL Hospital, Rajanagaram by 108 ambulance; PW.3 and Perla Raju went to PS at Jaggampeta; himself and others proceeded to GSL Hospital, Rajahmundry; at about 6:30pm on knowing through one Rokkam Prasad that A.1 came near the Hospital, PW.1 and Katta Manikanta Swamy went outside the Hospital and caught-hold of the collar of A.1 and enquired him about the names of other persons who beat them and A.1 disclosed the names of Sitaramayya, Balla Rambabu, Kanavareddi Nagulu, Kanavareddi Rambabu and some others and in the meanwhile on hearing some sound from inside the Hospital, he went inside and later came out but A.1 was not found; at about 10:00pm, one constable came and recorded his statement under Ex.P.1; Shaik Subhani died in the hospital at about 11:15pm; 20 days later, himself and other witnesses identified A.1 to A.6 in the Central jail, Rajahmundry during the T.I parade conducted by Magistrate. He identified MOs.1 to 6 in the Court.

c) In the cross-examination he admitted that except A.1, he was not aware of the remaining accused and their place of abode; unless A.1

disclosed the names of other accused at the Hospital, he had no opportunity to know their names. He admitted that the name of PW.2 was not found in Ex.P.1 and it was also not mentioned to the effect that A.6 beat PW.2. However, PW.1 volunteered that in fact he disclosed all those particulars to the constable but it seems he did not record those particulars in Ex.P.1. He further admitted that Ex.P.1 does not contain about A.1 and A.2 making galata for chicken curry. In that context also PW.1 volunteered that he stated all the details relating to galata to the constable but it appeared he did not record. He again stated that because of the ghastly accident, he was in a confused state, he informed some details and failed to inform some other details of the offence and he did not go through the contents of Ex.P.1. When it was brought to the notice of PW.1 about the endorsement above his signature to the effect that the contents of the statement were read over to him, he volunteered that he just signed without noticing about such endorsement. He denied the suggestion that he received injury with the cricket ball while playing cricket and he also denied the suggestion that as they misbehaved with some ladies in a drunken condition, several persons in a mob attacked and caused injuries to the deceased and they ran away and as they do not know who beat them actually, they summoned Tirru Rambabu, co-brother of Majji Poornachandra Rao and taking advantage of the situation, the said Tirru Rambabu mentioned some names and thereby the accused were implicated in the case because of the enmity with Tirru Rambabu.

d) It may be noted, the other eye witnesses i.e, PWs.2 to 5 also deposed more or less in similar manner as that of PW.1 and the similar type of defence suggestion was given to them which they denied. Hence their depositions are not reproduced.

11) When we intensely scrutinised the depositions of PWs.1 to 5, they are identical and consistently depict that when prosecution members were engaged in the lunch arrangements, A.1 and A.2 approached them in a drunken condition and A.1 was known to PWs.1 to 5 and they raised galata for chicken curry and because PWs.1 and others refused to provide them the curry, they felt insulted and within no time brought some 25 or 30 persons from Mallisala village and attacked the deceased and PWs.1 and 2. The evidence of PWs.1 to 5 is intrinsic and unshattered with regard to the origin of the galata, the complicity of A.1 and A.2 in causing injuries to deceased and PWs.1 and 2. It is true, there are some omissions and discrepancies in their evidence with reference to Ex.P.1 and their 161 Cr.P.C statements. However, most of the omissions and discrepancies are either insignificant or touching the identity of the other accused. For instance, in Ex.P.1—statement, PW.1 did not mention about the name of A.2 and he also did not give the full details about the origin of the galata but he only stated that A.1 and another person came in a drunken state and picked up quarrel with PW.1 and others. Similarly, he did not specially mention in Ex.P.1 that A.6, A.1 and A.2 beat on the head of the deceased. He only stated that one person in the mob beat on the head of the deceased and when he fell down, three more persons beat

him with sticks on his head and then all of them kicked him with legs. Similarly, he did not mention in Ex.P.1 that A.1 and A.2 beat PW.1 and PW.2.

a) Similarly, PW.2 in his cross-examination admitted that he did not state to the police (161 Cr.P.C statement) that A.7 instigated other accused to beat them and on that all the accused beat the deceased. He further admitted that he did not state to the police that A.1 came along with A.2 and when they asked him about A.2, he replied that A.2 was their relative and that he would not take lunch with them. PW.4 admitted that till now he does not know the names of A.2 to A.8.

b) It must be noted that there requires a very strong convincing cause to discard the evidence of injured witnesses, for, their injuries themselves speak of their presence at the scene at the relevant time of offence and also their intention to speak against only their assailants but not others. It is only when the defence unmistakably establish that the injured thoroughly mistook the identity of the accused or intentionally implicated the accused, such evidence shall be discarded. Viewing in that angle, merely because all the details are not mentioned in the statement of PW.1, that cannot be a ground to reject his evidence. It must be noted that FIR is not an encyclopaedia to meticulously detail all the facts. PW.1 candidly expressed that because of the ghastly incident, he was in a confused state and thereby he informed some details and failed to inform the other details to the constable. Despite the lacking of some details in FIR, the basic fabric relating to the offence was clearly mentioned. It is

not in dispute that all the witnesses know A.1. His presence and participation in the offence was clearly stated in Ex.P.1. Since A.2 accompanied A.1 and he was observed by the witnesses for a considerable period during the relevant time of offence, identification of A.1 and A.2 by the prosecution witnesses and participation of A.1 and A.2 in the offence need not be doubted. The minor discrepancies in the evidence of PWs.1 to 5 will not adversely affect the veracity of their evidence. It is true that PW.1 stated as if A.1 came near the hospital and when enquired, he revealed the names of some of the accused to him. This part of the evidence being quite unnatural, the trial Court rejected the same. However, it must be again mentioned here that this part of the evidence which is discarded relates to the identity of the other accused but not A.1 and A.2. As already stated, A.1 is a known person and A.2 was observed by PWs.1 to 5 for a considerable time and therefore, their identity and participation in the offence as spoken by PWs.1 to 5 need not be doubted. The unanimous evidence of PWs.1 to 5 depict that A.1 and A.2 beat the deceased with stick on his head and A.1 beat PW.1 with stick. We therefore hold that the trial Court rightly held A.1 and A.2 guilty. Therefore, we are unable to accept the argument of the learned counsel for appellants that since the evidence of PWs.1 to 5 in respect of the guilt of A.3 to A.8 was disbelieved, it should be rejected with reference to A.1 and A.2 also. As already pointed out, A.1 and A.2 stand on a different footing as A.1 was known to the witnesses and A.2 was seen for a considerable time before and during the offence.

12) Then regarding the charge under Sec.302 IPC, we find force in the submission of learned counsel for appellants. The admitted facts culled out from the evidence would reveal that A.1 and prosecution witnesses were known to each other and A.2 was a stranger to them by the date of offence. There were no previous disputes between them. The origin of the offence was on a trivial issue. When PW1 and others refused to provide chicken curry to A.1 and A.2, they felt insulted and went away and came in a group and beat the deceased, PWs.1 and 2. No doubt A.1 and A.2 and others beat the deceased indiscriminately on his head but caused only simple injuries to PWs.1 and 2. The whole facts would only depict that the accused might have had the knowledge that their act was likely to cause the death of the deceased but they have no intention to cause such death. Therefore, in our considered view, A.1 and A.2 are guilty of the charge under Sec.304-II IPC r/w 149 IPC but not under Section 302 r/w 149 IPC. We are fortified by the decision of Apex Court in *Mer Dhana Sida vs. State of Gujarat*¹. In similar circumstances, when A.3 fired gun at the deceased Karsan Malde and A.2, A.4 and A.5 inflicted stick blows, which resulted in death of Karsan Malde mainly on account of fracture of tenth and eleventh ribs and rupture of the spleen, the Apex Court observed that all persons participated in such an act could atleast be imputed with the knowledge that they were likely to cause injuries which were likely to cause death and therefore, they were guilty of committing an offence under Section 304-II IPC r/w 34 IPC. In the instant case also by causing head injuries on the deceased, A.1 and A.2

¹ (1985) 1 Supreme Court Cases 200

and other unidentified assailants can be attributed with the knowledge that they were likely to cause injuries which were likely to cause death. However, we cannot attribute the intention on the part of A.1 and A.2 to kill the deceased. Hence they are guilty of the charge under Section 304-II IPC r/w 149 IPC. The A.1 and A.2 are also guilty of the other charge under Sec.324 r/w 149 IPC. This point is answered accordingly.

13) In the result, this Criminal Appeal is partly allowed. While upholding the conviction and sentence passed by the trial Court against the appellants/A.1 and A.2 for the offence under Section 324 r/w 149 IPC, the conviction and sentence passed under Section 302 r/w 149 IPC is set aside and it is held that the appellants/A.1 and A.2 are guilty for the charge under Section 304-II IPC r/w 149 IPC and they are accordingly sentenced to undergo R.I for a period of Seven(7) years and to pay a fine of Rs.5,000/- (Rupees five thousand only) and in default to suffer S.I for two months. Both the substantive sentences shall run concurrently. The remand period if any, undergone by the appellants/A.1 and A.2 shall be given set-off.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

SURESH KUMAR KAIT, J

U. DURGA PRASAD RAO, J

Date: 30.08.2017

Murthy/scs