

**THE HON'BLE SRI JUSTICE C.PRAVEEN KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD**

CRIMINAL APPEAL NO.1059 OF 2011

JUDGMENT: (per Hon'ble Sri Justice C.Praveen Kumar)

The appellant is the sole accused in Sessions Case No.113 of 2009 on the file of the Court of II Additional District and Sessions Judge (Fast Track Court), Srikakulam (for short, trial Court). He was tried for an offence punishable under Section 302 IPC for causing the death of one Ponnada Ramu (deceased) on 04-01-2009 at 8.30 PM. After appreciating the oral and documentary evidence on record, the trial Court convicted the accused of the said charge, under Section 235(2) of the Cr.P.C., and sentenced him to suffer 'imprisonment for life' and to pay a fine of Rs.100/-, in default, simple imprisonment for one month.

2. The case of the prosecution as culled out from the evidence is as under:-

(i) The deceased is the son of P.Ws.1 and 2 and P.W.1 is wife of P.W.2. The house of the accused, who is a toddy tapper, is situated towards east side of house of P.W.1. About 2 ½ years prior to the incident, the deceased came to the house of P.W.1 by leaving his wife at her parents' house and stayed there for one month. There was a common path way in between the houses of the prosecution party and the accused and that there were disputes between them, due to the act of the accused in placing thorny bushes across the said path way. A report came to be lodged before the village Sarpanch – P.W.5 about placing thorny bushes across the path

way. The elders advised the accused not to place thorny bushes across the path way. The evidence on record shows that on one Sunday as usual, P.Ws.1 and 2 went to wash their clothes and while they were returning home, noticed thorny bushes kept across the pathway. P.W.2 removed them and questioned the accused as to why he is placing the thorny bushes across the way frequently. P.W.3 also came there and questioned the accused as to why he placed thorny bushes across the pathway. At about 7.00 P.M., the deceased along with P.W.4 went to the house of brother-in-law of L.W.1 to fetch a blanket. While they were coming back to the house, the accused is said to have called the deceased to his house and accordingly, the deceased went to the house of the accused. On hearing the accused calling the deceased, P.W.1 is said to have gone there and noticed the accused hacking the deceased with tapper's knife on the left side of the neck and thereafter leaving the place. According to the evidence of P.W.1, at that time, P.W.4 also witnessed the incident. On hearing their cries, P.Ws.2 and 3 came to the spot.

(ii) However, the evidence of P.W.4 is different. According to him, on the date of incident, he went to the house of P.Ws.1 and 2 to see a T.V.Programme, and after seeing the film titled Deshamuduru in the T.V., upto 8.30 PM., himself and deceased went to the shop of one I.Ramanamma (P.W.10) and purchased khaini. While they were returning from the said shop, they noticed the accused beating his wife in front of his house. Then the deceased questioned the accused about it, to which, the accused replied that

he has got every right to beat his wife and that the deceased has no business to question him. Thereafter, both of them went to the house of P.Ws.1 and 2 and had supper. After having supper, the deceased asked P.W.4 to sleep in his house, to which, P.W.4 told him that they will go to the house of P.W.4 to get a blanket. Accordingly, they went to the house of P.W.4 and asked his mother for a blanket. She told him that there was no spare blanket and asked them to take some blanket from the house of P.Ws.1 and 2. While returning to the house of P.Ws.1 and 2, and when they were passing in front of the house of the accused, the accused is said to have called the deceased. The deceased asked P.W.4 to wait and then went into the house of the accused. P.W.4 stated to have stood at a coconut tree which was situated at a distance of 20 to 30 feet from the house of the accused. After waiting for two minutes, he went to the house of the accused and noticed the accused hacking the deceased with tapper's knife on the left side of the neck and then pushed him out side the house. Thereafter, the accused is said to have left the place. On raising cries, P.Ws.1, 2 and 3 and others came to the scene of offence, and with the help of a torch light, which was in the hands of P.W.4, they noticed the incident. It was admitted by P.W.4 that there was no other light in that house and the entire area was dark. After the incident, P.Ws.1 and 2 went to the house of P.W.5 and informed about the incident. He advised them to report the incident to the police. Hence, P.W.2 lodged a report before the Sub-Inspector of Police, Gara Police Station, who registered a case in Crime No.2 of 2009 under Section

302 IPC and issued F.I.R. - Ex.P.23. Thereafter, P.W.13 - Inspector of Police, Srikakulam, took up further investigation from P.W.11 and accordingly, proceeded to the house of the accused at Ramachandrapuram. He inspected the scene of offence, and as it was late in the night, he could not conduct any panchanam, but he got photographed the scene of offence with the help of a photographer and posted the guard at the scene of offence. Next day, at about 6.00 AM., he inspected the scene of offence and conducted panchanama of the scene, which was placed on record as Exs.P.19. He seized M.Os.1 to 13 under the observation report, which was marked as Ex.P.18. Thereafter, he conducted inquest over the dead body of the deceased in the presence of mediators. Ex.P.1 is the inquest report. During the inquest, he examined and recorded the statements of P.Ws.1 to 3, 5 and 6 and thereafter forwarded the dead body of the deceased to the concerned Medical Officer for Post Mortem Examination. P.W.12 - the Assistant Professor, Orthopedic Department in RIMS Hospital, Srikakulam, conducted autopsy over the dead body of the deceased and issued Ex.P.24 post mortem report. According to him, the cause of death of the deceased was due to hemorrhagic shock, secondary to the injury to the major blood vessels caused by a sharp object. He also noticed two injuries on the body, one is a deep lacerated injury over left side of the neck extending from occipital of skull passing across the neck upto the chin and the second is a lacerated injury over the right shoulder. P.W.13 further stated that on 27-01-2009, he arrested the accused near his house and seized a pocket telephone

diary. After examining P.Ws.9 to 11 and others, and after collecting all the material, he filed the charge sheet, which was taken on file as PRC.No.16 of 2009.

3. On committal, the trial Court framed charge under Section 302 IPC to which the accused pleaded not guilty and claimed to be tried. In support of its case, the trial Court examined P.Ws.1 to 13 and got marked Exs.P.1 to P.29 and M.Os.1 to 13. After the closure of the prosecution evidence, the accused was examined under Section 313 Cr.P.C., wherein he denied the incriminating material appearing against him in the evidence of prosecution witnesses. The plea of the accused in his 313 Cr.P.C., examination appears that on the date of incident, the prosecution party i.e., P.Ws.1 to 4 and the deceased collectively came to his house with an intention to kill him. As P.W.3 tried to kill him, he escaped from the house and thereafter, the deceased died.

4. After considering the oral and documentary evidence available on record, the trial Court, while rejecting the plea of the accused, believed the oral evidence of P.Ws.1 to 4 and convicted the accused. Assailing the same, the present appeal is filed.

5. The learned counsel for the appellant would submit that there is no incriminating material to prove the alleged incident. According to him, the plea of the accused that it was the prosecution party who came to the house of the accused to attack him and in the said process, the blow which was intended to be given against the accused landed on the deceased. He further

submits that none of the witnesses have actually seen the manner in which the incident took place. He took us through the inconsistencies in the evidence of P.Ws.1 and 4 and argued that neither of them witnessed the incident to prove that the incident happened in the manner suggested by the prosecution.

6. On the other hand, the learned Public Prosecutor would contend that if really the prosecution party came to attack the accused, the natural conduct of the accused would be to inform about the incident to the Sarpanch, who was available in the village on that night. Therefore, he submits that the plea of the accused that the prosecution party tried to attack him is incorrect.

7. It is an admitted fact that there were disputes between the family of P.Ws.1, 2 and deceased with the accused for placing thorny bushes on the pathway between the house of the accused and P.W.2. It is also an admitted fact that on the date of incident, there was no electricity in the house of the accused or in the street and that P.W.4 claims to have seen the incident with the help of a torch light, which he was carrying with him. Therefore, from the circumstances referred to above, it is clear that the incident took place in darkness and in the house of the accused, where there were no lights.

8. The first question that arises for consideration is whether the plea of the accused that it was the prosecution party who came to attack him can be accepted or not?

9. As seen from the evidence on record, during the course of cross examination, it was suggested to P.W.1 that after the incident, the deceased, P.W.3, his wife Kanakamma and their son went to the house of the accused to kill him with a knife and that in the darkness in an attempt to kill the accused, the knife in the hands of P.W.2 touched the neck of the deceased, which lead to his death. The suggestion given to her remained a suggestion. In 313 Cr.P.C examination, the accused states that P.W.3, his wife, deceased and P.W.4 came to his house to kill him, but however, he escaped and ran away and later the deceased died. There is discrepancy with regard to the plea suggested by him to P.W.1 and the defence taken by him in his 313 Cr.P.C examination. The suggestion given to P.W.1 would indicate as if she has seen the blow landing on the deceased i.e., the blow given by P.W.3 touching the neck of the deceased, which lead to his death, but during 313 Cr.P.C examination, it is stated that he escaped and ran away and later came to know about the death of the deceased. Things would have been different, had the accused informed the Sarpanch about the incident or at least lodged a report with the police on the next day. Therefore, we feel that it is difficult to accept the plea of the accused and hold that the prosecution party came to the house of the accused to attack him.

10. Coming to the oral evidence of P.Ws.1 to 4, it is to be noticed that all the witnesses in one voice speak about the disputes between both the families with regard to laying of thorny bushes. The evidence on record shows that a complaint came to be made to

the Sarpanch of the village with regard to placing of thorny bushes by the accused. The evidence of P.W.1 also discloses that on the date of incident, while P.W.1 was returning to their house after washing the clothes, noticed thorny bushes being kept across the pathway. P.W.2, who is the father of the deceased, deposed that they removed the thorny bushes and questioned the accused as to why he placed them again in the pathway. The evidence of P.W.4 refers two more incidents, which happened on the date of incident. According to him, on the date of incident at about 8.30 P.M while they were returning home after returning from the shop of one Ramanamma, noticed the accused beating his wife. When the deceased questioned the same, the accused replied that he has no business to question him. After having supper in the house of P.W.1, P.W.4 and the deceased went to the house of P.W.4 to get a blanket and while returning from their house and when they were passing in front of the house of the accused, he called the deceased. The deceased asked P.W.4 to wait there and went to the house of the accused. The accused is said to have attacked the deceased with a tapper's knife, pushed him out of his house and escaped from the back side of the house.

11. It is the evidence of P.W.4 that with the help of a torch light, he noticed the incident, but however, the evidence of P.W.1 is slightly different. Her version appears to be that she was also present at the time of incident; she went towards the house of the accused; when she went there, the accused hacked the deceased on the left side of the neck.

12. When the evidence of P.Ws.1 and 4 is compared, we notice two things. 1) P.W.1, in her deposition, stated that she witnessed the incident, but did not speak about the presence of P.W.4 and the 2) P.W.4, in his deposition, stated that he has seen the incident with the help of torch light and after he raised cries, P.Ws.1 to 3 came to the scene. Admittedly there was darkness, as there was no electricity in the locality, at the time of incident. It is also an admitted fact that there are disputes between both the parties. Though there is some discrepancy with regard to the presence of the witnesses, we feel that their evidence cannot be ignored with regard to the incident in question. Therefore, the arguments of the learned counsel for the appellant that in view of the discrepancy, no reliance can be placed to the evidence of P.Ws.1 and 4, cannot be accepted. The said discrepancy, in our view, does not go to the root of the matter, so as to disbelieve the entire incident.

13. The last question which is urged by the learned counsel for the appellant that since the incident happened in total darkness, and when P.W.4 claims to have switched on his torch light after the entire attack is over, can the appellant be convicted under Section 302 IPC. He pleads that, even assuming that the accused used tapper's knife, which is the weapon available in the house due to his profession, he might not be knowing the place where the blow would land in view of the darkness. But, however, one fact which requires to be noted that even though there was darkness all around, identification of the person cannot be doubted.

14. In **Augustine Saldanha Vs. State of Karnataka**¹, the Apex Court was dealing with a case where the incident took place in dark, but identification of the accused was possible because the victims of the assailants were known to each other. It was also a case where one single blow was given by the accused with a stick which resulted in the death of the accused. In the said judgment, the issue was whether the said offence would fall under Section 302 IPC. After discussing the matter at length, the Apex Court altered the conviction. The relevant paras of the said judgment are as follows:

“21. Undisputedly the incident took place in a dark night when visibility was poor but identification was possible because the victims of the assailants were known to each other. Therefore, there is nothing wrong in P.W.1 identifying the accused persons. The fact remains that in the dark night obviously one cannot move without a torch or some other lighted object. In fact, in Exhibit P-1 also there is mention of a torch.

22. It needs to be noted that only one blow was given in the dark night. Though it cannot be said as a rule of universal application that whenever one blow is given application of Section 302, I.P.C will be ruled out and that even a single blow delivered with a heavy or dangerous weapon on a vital part of the body would make the offence a murder. On the peculiar facts found in the present case, we feel that clause ‘Thirdly’ of Section 300 cannot be applied. The blow was said to have been delivered with a stick and in pitch dark night of time in the forest surroundings of the area where it occurred. It could not reasonably be stated with any certainty that the accused chose that vital part of the body to inflict the injury and that the blow was aimed without any of such specific intention could have landed on the head due to so many other circumstances, than due to any positive intention also. We, therefore, alter the conviction of appellant Augustine Saldanha from Section 302, I.P.C. to Section 304, Part II. Custodial sentence of eight years would meet ends of justice. His appeal is accordingly allowed to the indicated extent...”

...It is not true to suggest that at the time of incident, my son Ramu accompanied Chinnodu LW5, his wife Kanakamma LW11 and their son to the house of accused to kill him with a knife and that in the darkness in an attempt to kill accused

¹ AIR 2003 SC 3843

the knife in the hands of Chinnodu touched the neck of my son and killed him.”

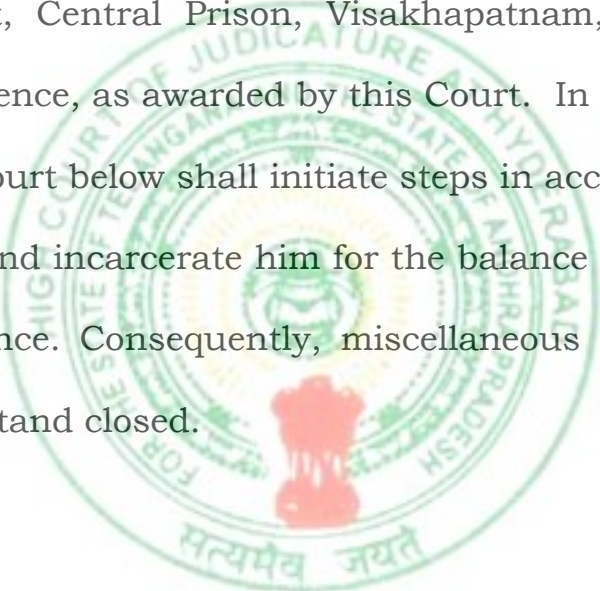
15. In the said judgment, the accused is said to have used a stick and gave a blow on the vital part of the body, which lead to the death. In the instant case, the accused used a tapper's knife (used by him due to his profession as a tapper) and inflicted one single injury on the neck.

16. Under these circumstances, can it be said that the accused has caused the injury with an intention to cause the death of the deceased? The incident admittedly occurred in the dead of night and there was total darkness all around. Even though there were disputes between the parties, it cannot be said that the appellant has hit the deceased with a tapper's knife, on the neck, with intention to cause death. In our opinion, the appellant could not have visualized that the blow given by him would land on the vital part as it was dark all around. It is thus clear that though the evidence adduced by the prosecution is convincing with regard to the incident and the attack on the deceased, but we are of the view that the appellant could not have stabbed the deceased on neck with an intention to cause his death. If really his intention was to cause death, he would have inflicted more number of blows. He would not have stopped with one blow, when the deceased was unarmed. But it cannot be said that he had no knowledge that such a blow would cause death.

17. In the light of the judgment referred to above and in view of the peculiar facts and circumstances of the case, we are of the

opinion that the case of the appellant/accused squarely falls under Section 304 Part-II IPC. Hence, the conviction under Section 302 IPC is set aside and the appellant is convicted under Section 304 Part-II IPC and sentenced to undergo rigorous imprisonment for a period of ten years. The period undergone by the accused shall be given set off under Section 428 Cr.P.C.

18. Accordingly, the appeal is allowed in part. The bail granted during the pendency of the criminal appeal shall stand cancelled. The appellant/accused shall surrender forthwith before the Superintendent, Central Prison, Visakhapatnam, and suffer the rest of the sentence, as awarded by this Court. In the event he fails to do so, the Court below shall initiate steps in accordance with law to apprehend and incarcerate him for the balance period as per the awarded sentence. Consequently, miscellaneous petitions, if any, pending shall stand closed.



C.PRAVEEN KUMAR, J

T.AMARNATH GOUD, J

Date: 31.10.2017
TJMR