

HON'BLE SRI JUSTICE SANJAY KUMAR

AND

HON'BLE Dr. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No.216 OF 2011

JUDGMENT: (Per Hon'ble Dr. Justice Shameem Akther)

1. This Criminal Appeal, under Section 374(2) of Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') is preferred by the appellants/accused Nos.1 and 2 challenging the judgment dated 16-04-2007 passed in Sessions Case No.478 of 2006 by the IV Additional Metropolitan Sessions Judge, Hyderabad (for short, 'the trial Court'), whereby the appellants 1 and 2 were convicted under Section 235(2) of the Cr.P.C and sentenced to suffer imprisonment for life and also to pay a fine of Rs.500/-, in default, to suffer simple imprisonment for a period of two months, for the offence under Section 302 read with 34 of the Indian Penal Code, 1860 (for short, 'I.P.C.').

2. Heard Smt.K.V.Rajasree, learned counsel for the appellants/accused Nos.1 and 2, and the learned Public Prosecutor (T.G.), appearing for the respondent-State, and perused the record.

3. The case of the prosecution, in brief, is as follows: On 08.07.2006 at 20:30 hours, P.W.1 D.Prasanna Kumar, Sub-Inspector of Police, Rein Bazar police station, Hyderabad, received information with regard to killing of one boy in Azmath Nagar locality and there was lot of commotion at that place. Immediately, he along with L.W.2 G.Raja Gopal Reddy, S.I. of Police, Rein Bazar police station, rushed to the spot and found a boy *i.e.*, Mohd. Matheen (Hereinafter referred to as 'the deceased'), aged 4 years, died in the water sump of the house of appellants 1 and 2. On enquiry,

P.W.1 came to know that when the deceased came out of his house and playing on the road, appellants 1 and 2 took him to their house at about 07:30 p.m., which was witnessed by P.W.4 Kumari Jyothi, aged 6 years. In the meantime, when P.Ws.2 and 3 parents of the deceased were searching for him, P.W.4 informed them that the appellants 1 and 2 took the deceased into their house. On that, P.Ws.2 and 3 went into the house of appellants 1 and 2 and caused enquiries with regard to missing of the deceased, the appellants 1 and 2 confessed that they have assaulted and forcibly pushed the deceased into the water sump in their house and kept the cover on it, due to which Matheen died on the spot and as P.Ws.2 and 3 were not in a position to lodge any report, himself lodged Ex.P-1 report requesting to take necessary action.

4. On receipt of the above report from P.W.1, P.W.8 M.Malla Reddy, Inspector of Police, Rein Bazar police station, registered the same as a case in Crime No.128 of 2006 under Section 302 r/w 34 of I.P.C. and took up investigation. P.W.1 and L.W.2 G.Raja Gopal Reddy, S.I. of Police, Rein Bazar police station, rescued the appellants 1 and 2 and produced them before P.W.8 at 22.10 hours on 08.07.2006 and 2nd appellant was referred to Osmania General Hospital, Hyderabad, as he was assaulted by the unruly mob alleging that the appellants are responsible for the offence. 2nd appellant was treated as out patient in O.G.H. and was discharged on the same day. Subsequently, both the appellants were sent to judicial remand on 09.07.2006. During course of investigation, P.W.8 examined and recorded the statements of P.Ws.1 to 5, 7 and L.W.2 G.Raja Gopal Reddy, L.W.6 Kalampet Ashok, L.W.9 Syed Azzad, L.W.10 Md. Sadath Hussain, L.W.11 Dr. Sri Shailu and L.W.12 Shaik Lateef Ahmed and conducted inquest panchanama over the dead body of deceased in the presence of L.W.13 Syed Md. Abdul Azeem, L.W.14

Syed Aquil and also conducted scene of offence panchanama at the place of occurrence in the presence of same mediators and got photographed the scene of offence and also the dead body of deceased through L.W.12 Shaik Lateef Ahmed. P.W.6 Dr. Narayana Reddy, Professor Forensic Medicine, Osmania Medical College, Hyderabad, conducted autopsy over the dead body of deceased on 09.07.2006 and issued post-mortem examination certificate Ex.P-3 opining that the cause of death was due to drowning. After completion of investigation, P.W.8 laid charge sheet against the appellants 1 and 2 herein for the offence punishable under Section 302 r/w 34 of I.P.C.

5. In support of its case, the prosecution examined P.Ws.1 to 8 and marked Exs.P-1 to P-9. On behalf of the defence, none were examined and no documents were marked. M.Os.1 to 3 were got marked in this case.

6. On appreciation of the oral and documentary evidence, the trial Court held that the prosecution proved the guilt of the appellants 1 and 2 for the offence under Section 302 r/w 34 of I.P.C. convicted and sentenced them as stated hereinabove.

7. Learned counsel for the appellants/accused Nos.1 and 2 would submit that the findings of the Court below are contrary to law and facts of the case. The appellants are convicted and sentenced on presumptions, surmises and conjectures, there was only a petty quarrel between the appellants 1 and 2 and the family of the deceased, there was no intention for the appellants to kill the deceased for the trivial reason. The trial Court erred in believing the evidence of child witness (P.W.4), most of the witnesses did not support the case of prosecution. The drowning in this case may be accidental, there are no direct witnesses, the entire case of

the prosecution is based on circumstantial witnesses, which is insufficient to hold the guilt of the appellants for the offence under Section 302 r/w 34 I.P.C. and ultimately prayed to acquit the appellants 1 and 2 of the charge under Section 302 r/w 34 of I.P.C. by setting-aside the impugned judgment.

8. On the other hand, learned Public Prosecutor (T.G.) appearing for the respondent-State would contend that PW.4 who is a child witness, has given rational answers and is capable of deposing and categorically deposed about the appellants 1 and 2 taking the deceased along with them on the date of incident. The accusation against the appellants 1 and 2 is proved beyond all reasonable doubt for the offence under Section 302 r/w 34 I.P.C. The link establishing the guilt of the appellants 1 and 2 is complete. Under these circumstances, there is nothing to take a different view and ultimately prayed to confirm the conviction and sentence recorded against the appellants 1 and 2 in the impugned judgment.

9. In view of the contentions put forth by both sides, the following **points** have come up for determination:

- 1. Whether the death of Mohd. Matheen (deceased) is homicidal?**
- 2. Whether the appellants 1 and 2 caused the death of the deceased?**
- 3. Whether the conviction and sentence recorded against the appellants 1 and 2 is liable to be set-aside?**

10. **POINT Nos.1 to 3:** Admittedly, the entire case of the prosecution is based on circumstantial evidence. There are no direct witnesses to the offence alleged to have committed by the appellants 1 and 2. Under these

circumstances, it is apt to refer the decision of the Hon'ble Supreme Court in ***Sharad Birdhichand Sarda Vs. State of Maharashtra***¹, wherein it was held as hereunder:

"When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- (iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

- (i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
- (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (iii) the circumstances should be of a conclusive nature and tendency;
- (iv) they should exclude every possible hypothesis except the one to be proved; and
- (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent

¹ AIR 1984 SC 1622

with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

11. The conditions required to prove the guilty of the accused based on circumstantial evidence are enunciated in the following cases:

"1. Hanumant Govind Nargundkar Vs. State of M.P.: **AIR 1952 SC 3442.**

2. Sharad Birdhichand Sarda Vs. State of Maharashtra : **(1984) 4 SCC 116 : AIR 1984 SC 1622.**

3. C.Chenga Reddy Vs. State of A.P.: **(1996) 10 SCC 193."**

11. It is apt to place the evidence on record. The evidence of P.W.1 D. Prasanna Kumar, who was the Sub-Inspector of Police at the relevant period, reveals that on 08.07.2006 he received a message that a boy was killed in Ahmed Nagar locality and there was commotion, then he rushed to the spot with his staff and came to know that a boy by name Mohd. Matheen, aged 4 years, came out of his house and was playing on the road, meanwhile appellants 1 and 2 took him to their house at about 07:30 p.m., which was witnessed by a 6 years old baby by name Jyothi (P.W.4). Subsequently on the information given by P.W.4, the parents of the deceased went inside the house of the appellants, caused enquiries about their missing son, appellants 1 and 2 informed the parents of the deceased that they assaulted Matheen and forcibly pushed him into the water sump in their house and covered sump, due to that Matheen died on the spot. Parents of the deceased shifted the Matheen to the hospital where the doctors declared him brought dead. The deceased was brought back to his house. As the parents of the deceased were not in a position to give report, he prepared Ex.P-1 report and also took the appellants 1

and 2 into custody. Ex.P-1 report corroborates with the evidence of P.W.1, Sub-Inspector of Police. In cross-examination P.W.1 stated that some unknown person telephoned him about the incident. P.W.1 stated that he lodged a report in this case on the information given by the locality people and parents of the deceased. He received information at 08:30 p.m. and stated that he took the appellants 1 and 2 into custody at 09:00 p.m. The appellants 1 and 2 were in panic condition as they were assaulted by local people. He gave other details of the commission of the offence in this case. Nothing is attributed to P.W.1 to discard his testimony. There is no reason for P.W.1 to give a false report against the appellants 1 and 2 under Ex.P-1.

12. The evidence of P.W.2 Mohd. Imtiaz Ahmed reveals that on 08.07.2006 at about 07:00 p.m. his son Matheen asked him money to purchase chocolates, he gave Rs.10/- to him and went to a clinic of doctor Jaffar Ali at Moghalpura and when he returned at 08:15 p.m., found gathering in front of his house. On enquiry, he came to know that appellants 1 and 2 killed his son by throwing him into water sump of their house. The same was informed to him by the appellants 1 and 2, his mother-in-law and neighbours. He further stated that when the deceased was taken to Durre Shewanar Hospital, the doctors informed him that the deceased was brought dead. He stated that 4 to 5 months earlier to the incident, there were petty quarrels between the family of the appellants and his family and the appellants 1 and 2 threatened him with dire consequences. He was examined by the police. In cross-examination P.W.2 stated that he did not state to police that he gave Rs.10/- to his son. The house of P.W.4 Jyothi is at a distance of 50 yards from their house and he saw the deceased and Jyothi playing in front of their house but did not know which game they were playing. He did not lodge any report to

the police with regard to the earlier quarrels. He denied that he was deposing false.

13. The evidence of P.W.3 Malleka Begum reveals that the deceased was her son and aged 4½ years. On 08.07.2006 at about 07:00 p.m. her husband gave Rs.10/- to the deceased to purchase chocolates, after some time, when she started searching for her son, P.W.4, her neighbour, informed that the appellants took her son into their house. Then, she along with her mother went inside the house of the appellants and asked about her son, both the appellants informed that they have thrown her son into the water sump of their house and people gathered there removed the cover of the water sump and lifted her son from sump. Her mother and others took the deceased to the hospital. On return of her husband, she went to the hospital along with her husband and came to know that the doctors declared his son dead, they have returned with the dead body of the deceased to house. Police enquired her and took the appellants 1 and 2 into their custody. There were quarrels between the family of the appellants and the deceased. She was subjected to lengthy cross-examination, wherein she has reiterated what she stated in her chief-examination. She also stated that when she went into the house of the appellants 1 and 2 and woke them up, appellants 1 and 2 were pretending as they were sleeping by putting off all the lights. She denied a suggestion that appellants 1 and 2 were not present in their house at that time. She stated that the distance between her house and house of the appellants is 6 or 7 yards, P.W.4 informed her about the appellants 1 and 2 taking her son inside the house of the appellants. She denied a suggestion that the deceased died accidentally by falling into the water sump, while playing. She denied that she was deposing false.

14. The evidence of P.W.4 Jyothi, who was examined on 13.02.2007, reveals that she was aged about eight years as on the date of her examination and that she being a child witness, she was not administered oath, however, she has answered all the questions put to her by the trial Court Judge. The learned trial Court Judge on being satisfied that P.W.4 is capable of giving answers put to her, proceeded to record her evidence. P.W.4 stated in her chief-examination that P.Ws.2 and 3 are her neighbours and the deceased Matheen is their son, aged 4 years. She used to play with Matheen and the Matheen is no more. On the date of incident, at about 07:00 p.m. when P.W.3 and others were searching for Matheen, she informed PW.3 that she saw Matheen, having Rs.10/- in his hand, being taken by the appellants 1 and 2 into their house. The witness had shown the appellants 1 and 2 pointing with her finger. Later she came to know that Matheen died. She was examined by the police. In cross-examination PW.3 stated that police requested her to come to the Court to give evidence and she came to the Court from her house by auto along with P.Ws.2 and 3 and one Mukarram, P.Ws.2 and 3 told her to give evidence when she was coming to the Court by auto. She stated that after completion of home work, she used to play from 06:00 p.m. to 07:00 p.m., she knew Matheen, who was a small boy, her father was doing dry cleaning work and she did not remember the date of death of Matheen. She played with Matheen 4 or 5 days before his death, she informed PW.3 that Matheen was carried by the appellants and she denied the suggestion that she was deposing false.

15. The evidence of P.W.5 Md. Mateen reveals that he knew P.Ws.2, 3 and 4, who are all his locality people, he knows the deceased in this case. He stated that on 18.07.2006 (*sic*) at about 07:30 p.m. after completing his prayer on his return to his house, he found huge gathering in front of the

house of the appellants, then he went into the house of the appellants and noticed the mother of the deceased weeping. Before his reaching the house of the appellants, the cover placed on the sump was removed, he found small chappal inside the sump, then he went inside the sump and found the dead body of Matheen and removed the same from the sump and handed over to P.W.3. M.O.1 is the chappal found in the sump and Ex.P-2 is the photos of the deceased boy, whom he removed from the sump. In cross-examination he reiterated the same. He stated that P.Ws.2 and 3 are not related to him, when he reached the house of the appellants, there were twenty people and there was electricity. He denied that he was deposing false.

16. The evidence of P.W.6 Dr. M.Narayan Reddy reveals that he conducted autopsy over the dead body of the deceased on 09.07.2006 at 09:30 a.m. On examination, he found an abrasion with contusion of 1 x 0.5 c.ms. on the fore-head 5 c.ms. above the front nasal junction, frothy makers present in the wind pipes about 150 m.l. of bloodstain fluid present in the pleural cavities, the lungs were bulky, water logged with frothy exudates on the cut surface and other internal organs were congested, the stomach contain about 60 m.l. of semi digested food with no suspicious smell. He stated that the cause of death was due to drowning and approximate time of death was 12 to 18 hours prior to his examination. He issued Ex.P-3 post-mortem examination certificate. In cross-examination he stated that he found one minor injury on the fore-head of the deceased, which can be caused, while coming into contact with any rough surface.

17. The evidence of P.W.7 Nusrath Jahan reveals that she is the mother of P.W.3 and the deceased is her grand son. She specifically stated that P.W.5 Md. Mateen entered into the sump and removed the

deceased from the sump and found one chappal and her taking the deceased to the hospital and the doctors examined the deceased and declared the deceased as dead. Her evidence corroborated with the evidence of P.Ws.2, 3, 4 and 5 with regard to material particulars. In her cross-examination she reiterated the same. She denied the suggestion that she was deposing false.

18. The evidence of P.W.8 M.Malla Reddy, Inspector Police, reveals that he conducted scene of offence panchanama, inquest panchanama over the dead body of deceased and seized M.Os.1 to 3 in this case and after completion of investigation, laid charge sheet against the appellants 1 and 2 for the offence under Section 302 r/w 34 of I.P.C. M.Os. 1 and 2 are chappals of the deceased and M.O.3 is iron lid of the sump. Ex.P-4 is the F.I.R., Ex.P-5 is medico legal case report of 2nd appellant, Ex.P-6 is inquest report, Ex.P-7 is the scene of offence panchanama, Ex.P-8 is the rough sketch and Ex.P-9 is the seven photos of the scene of offence.

19. P.W.4 is a child witness. The learned Magistrate has satisfied with regard to the rational understanding of the questions posed by the Court, waived the administration of oath and recorded her evidence. As envisaged under Section 118 of the Indian Evidence Act, 1872 (for short, 'the Act'), all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, because of their tender age, extreme old and disease. P.W.4 withstood the cross-examination conducted on behalf of the appellants 1 and 2. No deficiency, material contradictions or omissions are found in the evidence of P.W.4. Therefore, the evidence of P.W.4 cannot be discarded on the ground of her tender age. There is no reason for P.W.4 to give false evidence and

implicate the appellants 1 and 2 in this case. Reliance is placed on the decisions of the Hon'ble Supreme Court in ***State of Karnataka Vs. Shantappa Madivalappa Galapuji and others***², ***K.Venkateshwarlu Vs. State of Andhra Pradesh***³ and a decision of this Court in ***Goulla Appaiah Vs. State of Andhra Pradesh***⁴.

20. P.W.5 is a neighbour of the appellants and the deceased. Though he was subjected to lengthy cross-examination, nothing was elicited to discard his testimony. There is no reason for P.W.5 to give false evidence against the appellants 1 and 2. The specific evidence of P.W.5 is that after completion of his prayer on return to his house, he found huge gathering in front of the house of the appellants, then he went inside the house of the appellants and noticed the mother of the deceased weeping. Before his reaching the house of the appellants, the cover placed on the water sump was removed. He found small chappal inside the sump and he identified the said chappal as M.O.1. He went inside the sump and found the dead body of Matheen, lifted the dead body of Matheen from water sump and handed over the same to P.W.3 (mother of the deceased). He identified Ex.P-2 photographs of the deceased whom he removed from the water sump. He has also stated in cross-examination that P.Ws.2 and 3 are not his relatives and there was electricity at that time. The evidence of P.Ws.2, 3 and 7, who are the parents and grand mother of the deceased, has corroborated with his evidence. There is also evidence of P.Ws.2 and 3 that there were small quarrels between the family of the appellants 1 and 2 and their family and the appellants have threatened them with dire consequences. There is also specific evidence of P.W.4 Jyothi who informed P.W.3 that the deceased boy was taken by the appellants 1 and

² AIR 2009 SC 2144

³ (2012) 8 SCC 73

⁴ 2010 (1) ALT (Crl.) 15 (AP)

2 on that evening. There are no omissions and contradictions in the evidence of P.Ws.2 to 5 and 7.

21. There is specific evidence of the witnesses that the appellants 1 and 2 were present in their house and were pretending as they were sleeping by putting off all the lights at that time. When P.Ws.1, 3, 5, 7 and others entered into the house of the appellants and the dead body of the deceased was taken out from the water sump of their house, the appellants 1 and 2 were present in their house. When this entire incriminating evidence was put to them, under Section 313 Cr.P.C. examination, they have simply stated false (abaddam) and do not know (teliyadu) and they were not at fault. 2nd appellant was beaten by the neighbours on that evening and his wound certificate is marked as Ex.P-5. Appellants did not lead any defence evidence to rebut the evidence on record.

22. As per Section 106 of the Act, the appellants are required to explain the facts within their knowledge. Section 106 of the Act reads as follows:

"106. Burden of proving fact especially with knowledge –
When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him
illustrations:

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

23. In ***State of M.P. Vs. Ratan La⁵***, the Hon'ble Supreme Court held that in a case where various links have been satisfactorily made out and the accused did not offer any explanation consistent with their innocence,

⁵ AIR 1994 SC 458

the absence of such explanation itself is an additional link which completes the chain. Similar are the circumstances in the case on hand. The answers given by the appellants 1 and 2 *i.e.*, false, do not know and they were not at fault will go a long way in completing the chain of circumstances in establishing their guilt.

24. P.W.1, Sub-Inspector of Police, Begum Bazar police station, stated that he visited the scene of offence, found the appellants 1 and 2 and took them into custody and brought to the police station. When P.Ws.2 and 3 were not in a position to give any report, he prepared Ex.P-1 report and P.W.8 issued Ex.P-4 F.I.R. The conduct of P.W.1 is natural and it cannot be disbelieved. There is no reason for P.W.8, Inspector of Police, to prepare false report and implicate the appellants 1 and 2 falsely for causing the death of the deceased. There is also the evidence of P.W.3 that the deceased was taken away just before the dead body was removed from the water sump. There is also evidence on record that the relations between the family members of the deceased and the appellants were strained and the appellants 1 and 2 had earlier threatened the parents of the deceased with dire consequences. There is also the evidence of P.W.6, doctor, who conducted autopsy over the dead body of the deceased and issued Ex.P-3 post-mortem examination report opining that the cause of death of the deceased was due to drowning. Ex.P-3 corroborates with the evidence of P.W.6. There is nothing to disbelieve the evidence of P.W.6. Though there are no direct witnesses to the commission of the offence in this case, the evidence of prosecution witnesses establishes the guilt of the appellants 1 and 2 for causing the death of the deceased due to small family disputes as contended by the prosecution and no other view is possible. The evidence on record is very clear with regard to the presence of the appellants 1 and 2 at their house

when the dead body of Matheen was removed from the water sump. The evidence of P.Ws.1 to 7 and 8, investigation officer is consistent, cogent and there are no material contradictions and omissions and their evidence cannot be discarded and can safely be relied on. No hypothesis or accusation is possible with regard to the innocence of the appellants 1 and 2. The evidence of the prosecution witnesses is consistent. The time gap of the deceased being found in the company of appellants 1 and 2 and his dead body being found in the sump of their house is hardly an hour. The appellants 1 and 2 did not explain the circumstances that what made them to take the deceased into their house. After the appellants taking the deceased into their house, the deceased was not seen alive by any person. The appellants 1 and 2 were assaulted by the mob on that evening when the dead body was taken out of the water sump of their house. The quarrel between the family of the deceased and the appellants 1 and 2 establishes the motive for commission of offence in this case. The chain to complete the guilty of the appellants 1 and 2 is complete.

25. There is ample evidence on record to prove that the death of deceased in this case is homicidal and the appellants 1 and 2 have caused the death. The trial Court has analyzed the entire evidence on record, assigned cogent and convincing reasons and also held that in order to take revenge against the mother of the deceased, the appellants 1 and 2 took the deceased boy into their house, assaulted and thrown him into the water sump and placed the cover on the water sump and thus caused the death of the deceased. The said finding is supported by the evidence on record. There is no infirmity in the judgment of the Court below. All the requirements of the charge under Section 302 r/w 34 I.P.C. are proved by the prosecution beyond all reasonable doubt. Accordingly, all the points are answered against the appellants 1 and 2 and in favour of

the prosecution. The Appeal is devoid of merits and is liable to be dismissed, confirming impugned judgment.

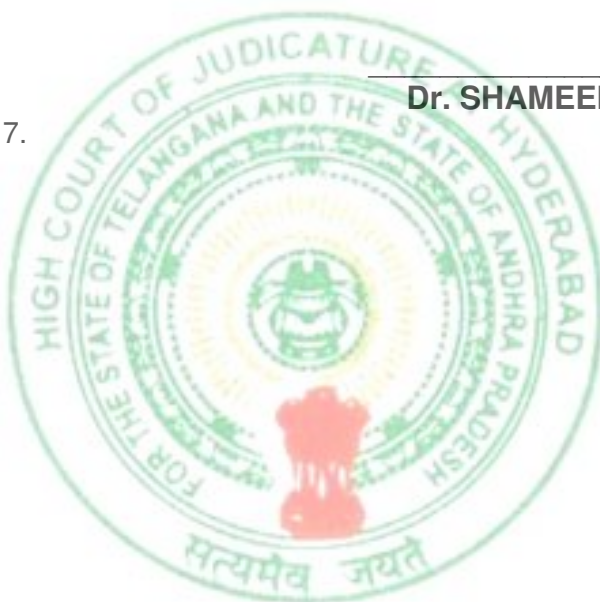
26. In the result, the Criminal Appeal is dismissed confirming the conviction and sentence recorded against the appellants 1 and 2 for the offence under Section 302 r/w 34 I.P.C.

27. In consequence, miscellaneous petitions, if any, pending in this appeal, shall also stand dismissed.

SANJAY KUMAR, J

Dr. SHAMEEM AKTHER, J

Date: 29-08-2017.
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HON'BLE SRI JUSTICE SANJAY KUMAR

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CRIMINAL APPEAL No.216 OF 2011

(Judgment of the Division Bench delivered by
Hon'ble Dr. Justice Shameem Akther)

Date. 29-08-2017

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