

**HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE M.S.K.JAISWAL**

CRIMINAL APPEAL No.437 of 2011

JUDGMENT : (Per Hon'ble Sri Justice Suresh Kumar Kait)

Vide the present appeal, the appellant/accused No.2 has assailed the judgment dated 15th March 2011, in S.C.No.355 of 2004 on the file of II Additional District and Sessions Judge, West Godavari at Eluru.

2. By the aforesaid judgment, the appellant/A-2 was found guilty for the offences punishable under Sections 302, 324, 341, 506(2) r/w.34 of IPC. Consequently, he was convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.500/-, in default, to suffer simple imprisonment for one month for the offence under Section 302 of IPC. He was further sentenced to undergo Rigorous Imprisonment for one year and to pay a fine of Rs.500/-, in default, to suffer simple imprisonment for one month for the offence under Section 324 of IPC. Both the sentences were to run concurrently. Since the appellant was sentenced under Section 302 of IPC, no separate sentences were imposed under Sections 341 and 506(2) of IPC.

3. Case of the prosecution was that on 23rd July 2002 at about 9 a.m., accused 1 to 3 visited the house of the deceased/Dara Yesupadam, and at that time, as he was attending a phone call, asked the accused to wait. After half an hour, at around 9.30 p.m., the deceased came out on the road in front of his house to meet the accused. On that, the accused asked the deceased as to why he did not pay money on demand. They attacked

the deceased with knives and stabbed indiscriminately on his chest and abdomen. Dara Suvarna/PW-1 i.e. the wife of the deceased, on observing it, raised alarm and tried to rescue her husband. But, she was resisted by accused No.3 by holding her hand while accused No.2 inflicted an injury over her left arm with a knife. On hearing distress cries of PW-1, Dara Rama Rao (PW-2), Janupati Gracemma (PW-4) and neighboring residents came out of their houses and saw accused No.2 inflicting injury on PW-1. When they rushed to the scene, the accused fled away. They found Dara Yesupadam lying soaked with blood. Kothapalli Krishna (PW-5), who was returning home from work, saw accused No.1 attacking the deceased and the presence of accused No.2 at the scene. Thereafter, immediately, Dara Rama Rao (PW-2) approached Chavatapalli Ramesh (PW-6), an Auto Driver and brought him along with his auto to shift the victim and injured to the hospital. PW-6 came to the scene and also seen the deceased in the pool of blood and injury on the hand of PW-1. PW-6, victim/deceased, injured/PW-1, PW-2 and brother-in-law of the deceased boarded the auto for shifting the victim to the Government hospital, Eluru. PWs.4 and 5 followed them. While they were on the way, at Tangellamudi bridge, again the accused wrongfully restrained the auto of PW-6 with an intent to prevent them from getting medical treatment and threatened to kill PWs.1 and 6, if they proceed further. However, on arrival of PWs.4, 5 and other people, the accused escaped from the scene. Thus, they took the victim/deceased and injured/PW-1 to the hospital, where, Medical Officer incharge declared Dara Yesupadam dead after examination. PW-1 was given

treatment by Dr.J.Lotorna Devi/PW-11 and issued wound certificate/ Ex.P-8. The hospital authorities sent death intimation to the Police under Ex.P-9. On receipt of such information, K.Satyanaranana, ASI/PW-14 proceeded to the hospital and recorded the statement of PW-1 in Ex.P-1 and he sent the statement to Eluru II-Town Law and Order Police Station. On receipt of Ex.P-1, M.Sudhakar Rao, the then S.I. of Police/PW-12 registered a case in Crime No.155/2002 and issued Ex.P-10/FIR and forwarded the same to all concerned.

4. On receiving FIR/Ex.P-10, G.S.J. Raja Babu/PW-13, the then Inspector of Police, Eluru II-Town Law and Order Police Station, took up investigation. Immediately, he proceeded to the hospital and recorded the statements of Pws.1, 2 and some other relatives under Section 161 Cr.P.C. On 24th July 2002 at 6.30 a.m., he proceeded to the scene of offence along with mediators Annavarapu Venkateswara Rao/PW-8 and another. In their presence, scene was observed and seen observation report/Ex.P-2 was scribed by PW-8 and material objects i.e. M.O.5/white colour chappals, M.O.6/Spectacles and M.O.8/ball pen and also controlled earth were seized. Thereafter, the investigating officer along with mediator/PW-8, proceeded to the 2nd scene at Tangellamudi bridge. He verified the scene, however, no material was seized. Further, they proceeded to the hospital and the investigating officer/PW-13 got conducted inquest over the dead body of deceased in the presence of mediators and other blood relatives of the deceased. Ex.P-3 is inquest report scribed by PW-8. During the inquest, material objects M.O.3/shirt, M.O.4/Pant, M.O.7/leather belt and M.O.9/banian of the

deceased were seized. Then the body was sent for postmortem examination. Dr.Pelli Bala Prakasa Rao/PW-10 conducted autopsy over the dead body and issued postmortem report/Ex.P-7. Further, the investigating officer has examined PWs.4 and 5 and recorded their statements under Section 161 Cr.P.C.

5. On credible information, on 25.07.2002, the investigating officer along with mediators i.e. Munnula Gurunath @ John/PW-9 and another, proceeded to Mamaiahgari garden situated at Tangellamudi road, where, accused Nos.1 and 2 were found. They were taken into custody and were enquired separately in the presence of mediators. On questioning, A-1 confessed about committing of offence. Then A-1 and A-2 took the investigating officer and mediators to a burial ground in Tangellamudi. From the bushes situated there, A-1 took out and handed over a butcher knife and it was seized as M.O.2. Thereafter, A-2 took out another knife and handed over to the investigating officer and it was seized as M.O.1. The confession and seizure panchanama of A-1 and A-2 was drafted by PW-9 under Ex.P-6. The relevant admission portions of confessional statements are marked as Exs.P-4 and P-5. As A-1 and A-2 informed the investigating officer that they were wearing the same clothes worn by them at the time of commission of offence, those clothes were also seized as M.Os.11 to 14. The seized material objects were referred to RFSL along with Ex.P-11/letter of advise and Ex.P-12/covering letter. Ex.P-13 is RFSL report.

6. To explain the motive, prosecution put-forth the hypothesis that the accused were involved in cattle theft and used to deposit the money

with the deceased and he used to solve the problems encountered by the accused in their activities. Some time before the occurrence of offence, the accused committed theft of one buffalo of Chinta Sambasiva Rao/PW-7 and sold its flesh. PW-7, after knowing that the accused committed the offence, approached the deceased for settlement and the deceased said to have asked the accused to pay the amount to PW-7. In turn, the accused asked the deceased to pay the amount from out of the amounts deposited by them. When the deceased refused to pay the amount, the accused developed grudge and thought that the deceased betrayed them. As a result, they committed the offence.

7. After completion of investigation, Police filed charge sheet against all the three accused for the offences punishable under Sections 302, 307, 341, 506(2) r/w. 34 of IPC.

8. The cognizance of this case was taken by the learned II Additional Judicial Magistrate of First Class, Eluru for the offences punishable under Sections 302, 307, 341, 506(2) r/w.34 of IPC against the accused. After production of accused, the learned Magistrate, by following the procedure contemplated under Section 209 Cr.P.C., committed the case to the Principal Court of Sessions, West Godavari at Eluru under P.R.C.No.15 of 2004 as the alleged offence under Section 302 of IPC is exclusively triable by the Court of Sessions. The Principal Sessions Judge, West Godavari at Eluru, in turn, after numbering the case as S.C.No.355 of 2004, made over the same to the Court mentioned above for trial in accordance with law.

9. It is pertinent to mention here that A-1 died even before committal of the case. As such, case against A-1 was abated. A-3 has been acquitted by the trial Court by giving benefit of doubt. However, A-2, who is appellant before this Court, has been convicted for the offences mentioned above and is sentenced to undergo imprisonment for life.

10. We note, A-3 was acquitted on the ground that no prosecution witness spoke about his overt acts in the incident. Presence of A-3 was stated only by PWs.1 and 4, and no other prosecution witness referred to his presence. PW-1 stated that A-3 caught hold of her while A-2 hacked her on hand. The case argued by the counsel on behalf of A-3 was that involvement of A-3 i.e. holding hand of PW-1 was an improvement as it was not mentioned in the 161 Cr.P.C. statement of PW-1. Statement of PW-1 and its contradictions were referred to the investigating officer and also admitted by him. As sharing of intention by A-3 with A-1 and A-2 was not established, and further, as there was no evidence to prove specific overt acts of A-3 in the occurrence, he was given benefit of doubt.

11. Learned counsel appearing on behalf of appellant/A-2 submitted that Ex.P-1/FIR was recorded on the statement made by PW-1. PW-1 was admitted in the hospital, but her statement was recorded without certification from the Doctor that she was fit to give statement. Therefore, in the absence of Doctor certificate, the said statement cannot be taken into consideration, however, the Court below has ignored this fact. Moreover, at the time of recording the statement, the neighbours

and relatives of PW-1 were present. Thus, the said statement was tutored one and away from the reality. PW-1 is an interested witness and there is no corroboration to her evidence. The occurrence took place at 10 p.m. None of the witnesses in their statements recorded under Section 161 Cr.P.C. had mentioned about light in the street. However, the witnesses improved their versions during the course of their deposition recorded before the Court and mentioned that there was a light in the street. The rough sketch prepared by the Police is suppressed and is not marked for the reasons best known to the prosecution. No one had visited the scene of offence and it was only a table evidence. Therefore, there is no fair investigation by the Police.

12. Learned counsel for appellant further submitted that framing of charge is also defective. Though the case of the prosecution was that three persons participated in the commission of offence, but no charge was framed under Section 34 of IPC against them. The opinion of the trial Court is also vague and defective on the said issue.

13. Learned counsel further submitted that there were 12 injuries on the body of the deceased, however, it was not elicited from the Doctor as to any one of such injuries was sufficient to cause death or whether death was the result of all the injuries. There was no specific opinion to this effect. Thus, the postmortem report is vague. Learned counsel submitted that A-2 alone cannot be convicted for the offence punishable under Section 302 of IPC, while acquitting A-3 by giving benefit of doubt. PW-1 specifically stated that all the 3 accused attacked her

husband. Therefore, when the prosecution failed to prove its case against A-3, appellant/A-2 alone cannot be convicted basing on the same evidence. The statement of PW-6/Auto driver is contrary to the statement of PW-2. There is no independent witness in the present case, as all the witnesses are relatives and their caste people. At the instance of A-1 and A-2, two knives were seized, one small and one big knife. M.O.1 is small knife and M.O.2 is the big knife. As per the statement of PW-10/Doctor who issued postmortem report, it was not specifically recorded in the said report as to whether the death was the cumulative result of all the injuries. The benefit of such doubt was given to A-3, but not to A-2. Since there was no charge for the offence under Section 302 r/w. 34 of IPC, the appellant/A-2 cannot be convicted under Section 302 of IPC, especially when A-3 has been acquitted. At the most, the case against the appellant/A-2 would be under Section 326 of IPC, but in any stretch of imagination, the appellant cannot be convicted for the offence under Section 302 of IPC.

14. On the other hand, learned public prosecutor submitted that A-1 to A-3 had developed grouse against the deceased as they thought that the deceased betrayed them by asking to pay amount to PW-7. This displeasure and strained relations between the accused and deceased had resulted in resentment. Therefore, the accused, with an intention to do away with the life of the deceased, visited the house of deceased on 23rd July 2002 at about 9.30 p.m. and attacked him. The prosecution relied upon ocular evidence to prove the guilt of accused. PW-1/wife of the

deceased is the eye witness to the entire occurrence and PWs.2 to 6 are neighbours who also witnessed the occurrence.

15. The learned Public Prosecutor further submitted that PW-1 in her testimony, has clearly stated that on 23rd July 2002, at around 9 p.m., the accused came to their house and at that time, her husband was talking on phone. Therefore, he asked them to wait. After finishing his phone call, her husband went to meet them. On that, the accused questioned her husband as to why he failed to pay amount inspite of their demands, and thereafter, they attacked her husband. She also stated about the accused restraining her at Tangellamudi bridge and their threatening to kill her. She un-equivocally stated about the occurrence taking place on 23rd July 2002 at around 9.30 p.m. and the involvement of appellant in that incident. PWs.2 and 4 are the neighbours, who rushed to the scene immediately after hearing the cries of PW-1. They deposed that they saw A-1 and A-2 hacking PW-1. PW-4 stated about the presence of A-3. PW-5, who is a resident of same locality, deposed that while proceeding to his house after work, he witnessed A-1 stabbing the deceased in the presence of A-2. PW-6, the Auto driver who shifted the victim and neighbours to the hospital, also deposed about the occurrence and his witnessing injuries on PW-1 and victim/deceased. PW-3/Dara Yesuraju also stated knowledge of occurrence. PWs.2 and 4 to 6 in their oral evidence, categorically stated that while victim/deceased, injured/PW-1 were being shifted to hospital along with neighbours, the accused intercepted the auto and threatened to kill PWs.1 and 6. Thus, the prosecution witnesses i.e. PWs.1 to 6 have consistently stated that the

occurrence tookplace on 23rd July 2002 at around 9.30 p.m. and they had seen the accused. PWs.1 and 4 mentioned the presence of all 3 accused, whereas, PWs.2 and 5 mentioned the presence of A-1 and A-2. The allegation against A-3 was that he caught hold of PW-1 while A-2 hacked on the hand of PW-1. Two weapons were recovered in the present case, one at the instance of the appellant herein. No weapon was recovered from A-3. If the injuries received by the deceased are considered cumulatively, it is homicide case. PW-1 also suffered injuries in the attack. She knows all the accused well by faces and names. Therefore, the deposition of PW-1/injured is material one and it successfully establishes that A-2 along with other accused, attacked her husband and A-2 stabbed her husband as well as caused injury to her. Non-marking of rough sketch is not fatal to the case of the prosecution, for the reason that the scene observation report was prepared and that is on record. He further submitted that the learned Sessions Judge did not frame the charge under Section 34 of IPC with reference to Section 302 IPC, but framed charge under Section 34 IPC with reference to 307 of IPC. As per the settled law, when more than one person commits an offence and when benefit of doubt is given to some of them, still, one amongst them can be convicted under Section 302 of IPC with the aid of 34 IPC.

16. Considering the facts that PW-1 and deceased were shifted to the hospital, PW-1 was treated by PW-11/Doctor on 23rd July 2002 at 10.30 p.m., sending Ex.P-9/death intimation to the Police by the hospital authorities, recording the statement of PW-1 by PW-14 and registering

the case in Crime No.155 of 2002, it can be safely concluded that there was occurrence on 23rd July 2002 at around 9.30 p.m. PWs.1 to 6 deposed that the victim/deceased, after receiving injuries, was shifted to hospital. PWs.1 and 5 stated about the accused stabbing the deceased and PWs.2, 4 and 6 stated that they have seen the deceased in a pool of blood. PW-3 stated that he had seen the deceased in the hospital with stab injuries all over his body. Inquest report/Ex.P-3 shows that there were injuries all over the body of the deceased. Postmortem certificate/ Ex.P-7 shows that there were 12 ante-mortem injuries on the dead body. PW-10/Dr.Pelli Bala Prakasha Rao deposed about 12 ante-mortem injuries found on the dead body of the deceased, as under :

- “1. 5 inches length 1 C.M. width deep to peritoneal cavity incised wound left side of epigastria. Small intestines came out through the wound.
2. An incised wound of 5 x 1 inches deep to ribs over left side lower chest.
3. An incised wound of 5 x 1 inches deep to ribs near left axilla.
4. Incised wound of 3 x 1 inches, deep to ribs just below left side nipple.
5. Incised wound of 3 x 1 inches deep to peritoneal cavity over spleen area.
6. Incised wound of 2 x 1 inch over left flank muscle deep.
7. Incised wound of 3 x 1 inch over lower sternum deep to mediastinum fracture sternum.
8. Incised wound of 2 x 1 inches deep to peritoneal cavity over liver area.
9. Incised wound of 2 x 1 inches to peritoneal cavity over liver area.
10. Incised wound of 2 x 1 inches deep to peritoneal cavity over liver area.

11. *Incised wound of ½ x ½ inches deep to muscle over left flank.*

12. *Incised wound of 5 x 1 inches over left lumbar region, muscle deep.”*

17. In the postmortem report/Ex.P-7, PW-10 opined that the deceased died due to shock and haemorrhage due to multiple injuries on vital organs i.e. heart, liver and lungs. He further deposed that the injuries noted in the postmortem report can be caused by using knives M.Os.1 and 2. The evidence of PWs.1 to 6, coupled with the entries in Exs.P-3 and P-7 clearly proves that the death was not natural and it was homicidal death. Further, the evidence of PWs.1, 2, 4 and 6 coupled with the testimony of PW-11/Dr.J.Lotorna Devi, who treated PW-1, and entries in wound certificate/Ex.P-8 are sufficient to believe that PW-1 received injuries in the incident.

18. The prosecution has examined PWs.1 to 6 to prove the offence committed by the accused. PW-1 is the wife of the deceased. She is also injured witness and she is the only person who witnessed the entire occurrence. The incident occurred at around 9.30 p.m. at the residence of the deceased. It is quite natural that PW-1 was at her home at that time and to observe the happenings in her house, particularly, when herself and her husband were only inmates. She is a natural witness. PWs.2 to 6 are residents of same locality. PWs.2, 4 and 6 were at their houses and PW-5 was returning from work. It is natural to be at home at that time and to proceed to the place of occurrence on hearing the hue and cry especially in the night. PWs.2 and 4, on such alarm, rushed to the scene. PW-5, while was coming back to home, witnessed the incident. Calling

PW-6/Auto Driver for shifting the victim/deceased and neighbours to the hospital, is the probable natural reaction. The accused were not strangers to the prosecution witnesses, as all of them were residents of the same locality. All the witnesses have asserted the fact of the presence of illuminated street light at the scene of occurrence. As there was previous acquaintance between the accused and prosecution witnesses, their identifying the accused even on a glimpse, cannot be doubted. Therefore, the evidence of PWs.2, 4 and 5 can also be considered without suspicion.

19. It is important to note that the occurrence was at two places. The main act of the accused was at the residence of the deceased. PW-1 deposed that the accused attacked her husband and stabbed him indiscriminately on his chest and abdomen. But, she has not given the detailed account of attack. PW-1 is the wife of the deceased. When an unexpected thing was happening to her husband, the natural reaction will be a shock with fear, and on the other hand, she made an attempt to save him. This will be a perplexed situation to the onlooker, especially a wife. Thus, she cannot be expected to narrate the details of attack as to in what way and which accused inflicted which injury. Thus, excluding specific overt acts of the accused, an attack on the deceased can be believed. PW-5 is the other witness who deposed about his knowledge of accused attacking the deceased. PW-5 specifically stated that he saw A-1 stabbing the deceased and also he asserted the presence of A-2. PW-1 stated that she raised cries and also attempted to rescue her husband and that A-3 hold her hand while A-2 inflicted injury over her left forearm.

PWs.2 and 4, in their evidence, stated that on hearing the outcries of PW-1, they came out from their houses and have seen A-2 hacking on the hand of PW-1. But, they have not referred to any overt act of A-3. In addition to above, PWs.1, 2, 4 to 6 in one voice, stated that when the deceased and injured were being taken to the hospital in the auto of PW-6, the appellant restrained the auto at Tangellamudi bridge and threatened PWs.1 and 6. PW-1, in her evidence, specifically stated that after stopping the auto, A-1 once again stabbed the deceased. However, this fact was not supported by any other witness.

20. Admittedly, there are five charges framed by the learned trial Court. Charges under Sections 302, 341 & 506(2) of IPC are framed against all the accused. Charge under Section 307 of IPC is framed against A-1 and A-2. Charge under Section 307 r/w.34 of IPC is framed against A-2 and A-3. It is not in dispute that the accused are not tried for the offence under Section 302 r/w.34 of IPC. However, A-2/appellant herein is convicted for the offences under Sections 302, 324, 341 and 506(2) r/w.34 of IPC. The contention of counsel for appellant/A-2 is that since there was no charge under Section 302 r/w.34 IPC, the case cannot rest upon common intention of the accused. But, it is a fact that A-1 and A-2 used knives/M.Os.1 and 2 and inflicted 12 injuries to the deceased. In addition to above, PW-1 also received injuries due to stabbing by A-2/appellant herein. The accused persons arming with deadly weapons, inflicting multiple injuries over vital organs i.e. heart, liver etc., proves that the death was not natural and it was homicidal death. Though benefit of doubt is given to A-3 as there are no specific overt acts against

him and no weapons were recovered from him, the same benefit is not available to A-2/appellant herein.

21. In the case of **Harshad Singh Pahelvan Singh Thakore v. The State of Gujarat [(1976) 4 SCC 640]**, the Hon'ble Supreme Court held that when a murderous assault by many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstances that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively.

22. After going through the evidence of the prosecution witnesses and the opinion of the trial Court while convicting A-2 for the offences punishable under Sections mentioned in the impugned judgment, we find no illegality or perversity in the said judgment.

23. Finding no merit in the instant appeal, the same is accordingly dismissed.

Pending miscellaneous applications, if any, shall stand closed.

SURESH KUMAR KAIT, J

M.S.K. JAISWAL, J

22nd December, 2017
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