

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

HON' BLE SRI JUSTICE P. KESHA RAO

CRIMINAL APPEAL No.349 OF 2011

ORDER :

%Dated 08.12.2017

Gogula Ramanaiah, S/o. Venkat Swamy,
Aged 31 years, Cooli, Venkatapuram Village,
Giddalur Mandal

..... APPELLANT

VERSUS

\$ The State of Andhra Pradesh,
Rep. by its Public Prosecutor,
High Court of A.P., Hyderabad

..... RESPONDENT

! Counsel for Appellant : Ms. Nettem Ammaji, Advocate
(Legal Aid)

^ Counsel for Respondents : P.P. for the State of A.P.

< GIST :

> HEAD NOTE :

? Cases referred :

1. (2004) 5 SCC 389
2. 2007 CrI.L.J. 1767
3. 1999 (2) ALD 383 (DB)

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

CRIMINAL APPEAL No.349 of 2011

Between:

Gogula Ramanaiah

..... APPELLANT

VERSUS

The State of Andhra Pradesh,
Rep. by its Public Prosecutor,
High Court of A.P., Hyderabad

.... RESPONDENT

JUDGMENT PRONOUNCED ON : 08.12.2017

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SRI JUSTICE P.KESHAVA RAO

1. Whether Reporters of Local : Yes/ No
newspapers may be allowed to see
the Judgment ?
2. Whether the copies of judgment may : Yes/ No
be marked to Law Reporters/ Journals
3. Whether Their Ladyship/ Lordship wish : Yes/ No
to see the fair copy of judgment

C. PRAVEEN KUMAR, J

P. KESHAVA RAO, J

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

HON' BLE SRI JUSTICE P. KESHA RAO

CRIMINAL APPEAL No.349 of 2011

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

1) The sole accused in Sessions Case No.12 of 2010 on the file of the Principal Sessions Judge, Ongole, is the appellant herein. He was tried for an offence punishable under section 302 IPC. By judgment, dated 29.10.2010, the Sessions Judge, convicted and sentenced him to suffer "imprisonment for life" and to pay fine of Rs.1000/-, in default to suffer simple imprisonment for a period of three months.

2) The gravamen of the charge against the accused is that, on 18.09.2009, during night time, at the house of the accused, situated at Venkatapuram Village, Giddalur Mandal, the accused caused the death of his wife by hacking her with an axe on her head and neck, leading to her death.

3) The facts, as culled out, from the evidence of prosecution witnesses, are as under:

i) The deceased is the wife of the accused. She was related to PW.3, who was also residing near their house. PWs.5 and 6 are residents of same village. The deceased and accused had three children. PW.4 is the daughter, while Shiva and Ashok were their sons. All of them were living in their house at Venkatapuram. The accused used to quarrel with the deceased by every day by coming to the house in a drunken state. He used to abuse the deceased in filthy language and beat her. The evidence adduced by the prosecution also shows that the accused was

having illicit intimacy with one lady belonging to the community of gold smith and on account of it he used to beat the deceased. In the year 2007, the deceased filed a criminal case against the accused before Giddalur Police Station. Thereafter, a compromise was affected in the presence of PW.5. Subsequent to the compromise, both of them started living together happily and subsequently the criminal case ended in acquittal. It is stated that after the case was ended in acquittal, the accused again started quarrelling with the deceased. On the date of incident, the deceased was lying on a cot with fever. After dusk, PW.4 had her meal. The accused came there in a drunken condition and beat the deceased with stick, she came out of the house and closed the door. The accused remained in the house along with PW4. Thereafter, the accused informed the deceased that he has to go to the forest area for firewood and the deceased may pack food for him to be taken along with him. Then the deceased opened the door and came inside the house, packed food, as requested by the accused. Thereafter, the deceased slept on the cot of Shiva and the accused also slept on the same cot. PW.4 and her brother Ashok also slept on another cot. Some time later, the accused got up on the cot, took an axe from the attic and hacked on the neck and head of the deceased with the said axe. When PW.4 woke up and saw the act of the accused, the accused gave a signal to keep quiet by keeping right hand index finger on his lips. After hacking the deceased, the accused came out of the house along with the axe. Immediately, thereafter, PW.4 went to the house of her junior maternal aunt by name Venkatamma, who was examined as PW.2, and informed about the incident. Immediately, PW.2, along with her husband, PW.3, rushed to the house of the accused and on seeing them the accused ran away from the house. On hearing their cries, the neighbours gathered.

ii) On the early hours of 19.09.2009, PW.1 received a phone call from the village about the death of the deceased. Immediately, he started from Giddalur and proceeded to Venkatapuram on a bike of one Pamana Reddy and on reaching the house of the deceased, found the dead body lying on a cot with injuries, oozing with blood. He enquired the persons present there, including PW.4, as to how the deceased was killed. The accused was not present in the house at that time. After recording the statement of B.Venkateswarlu, who was examined as PW.3 (husband of PW2), he proceeded to the police station and gave a report before PW.9, the Sub-Inspector of Police. Basing on the said report, PW.9 registered a case in Crime No.214 of 2009 for an offence punishable under Section 302 IPC and issued first information report, which was placed on record as Ex.P8. Immediately, thereafter, he informed about the incident to PW.10, the Inspector of Police. At about 8.00 a.m., PW.10 proceeded to Venkatapuram, secured the presence of PW.1 and another and prepared an observation report of scene of offence. Ex.P2 is the observation report. During the said process, he seized Mos.1 to 6 and also got photographed the scene of offence through PW.7. He also prepared a rough sketch of the scene. Ex.P9 is the rough sketch. He, then conducted inquest over the dead body in the presence of PW.1 and another. Ex.P4 is the inquest report. Thereafter, the body was sent to Government Hospital, Giddalur, for conducting postmortem examination.

iii) PW.8, the Civil Assistant Surgeon, Community Health Centre, Giddalur, conducted autopsy over the dead body of the deceased from 3.00 p.m., to 3.45 p.m. Ex.P7 is the Postmortem certificate. The doctor noticed three external injuries on the skull, mandible and left side of the neck. According to him, the cause of death was "due to

injury to skull and damage to brain with intracranial hemorrhage and injury to the neck causing damage to great vessels.”

iv) PW.10, the Inspector of Police, arrested the accused at Chinthamsettypalli Railway Station, interrogated him in the presence of mediators, which lead to recovery of axe and blood stained shirt of the accused, in a bush near Yeguva Bytapalli Junction. Ex.P5 is the relevant portion of the panchanama. The evidence on record also discloses that prior to filing of the charge sheet, the investigating agency got recorded the statement of PW.4 under Section 164 Cr.P.C., through one P.Rajyalakshmi, Principal Junior Civil Judge, Giddalur. After collecting all the relevant material, a charge sheet came to be filed before the Court of Additional Judicial Magistrate of First Class, Giddaluru, who in turn committed the case to Sessions Division under Section 209 of Cr.P.C. On committal, the same came to be numbered as S.C.No.12 of 2010.

4) On appearance, a charge under Section 302 IPC was framed, read over and explained to the accused, to which he denied and claimed to be tried.

5) To substantiate its case, the prosecution examined PWs.1 to 10 and got marked Exs.P1 to P12 and M.Os. 1 to 8.

6) After closure of the evidence, the accused was examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against him, in the evidence of the prosecution witnesses, to which he denied. No oral or documentary evidence was adduced on his behalf.

7) Relying upon the evidence of PWs.2,3, 4 and 6, the Sessions Judge convicted the accused for the offence punishable under Section 302 IPC and sentenced him to suffer imprisonment for life. Challenging the same, the present appeal came to be filed.

8) Learned counsel for the appellant mainly contended that no reliance can be placed on the evidence of PW.4, who is a child witness, and sole eye witness to the incident, since the earlier statement made by her before the Magistrate under Section 164 Cr.P.C., was suppressed. She further contends that the evidence of PW.4 is inconsistent with regard to accused leaving the house. In the absence of any independent witness being examined, more so, when the evidence on record establishes existence of number of houses in the vicinity, she pleads that an adverse inference has to be drawn against the prosecution. She further submits that no credence can be given to the evidence of PW.4, who is a child witness, as there are indications to show that her evidence was a tutored version.

9) On the other hand, learned Public Prosecutor would submit that the question of suppressing the statement recorded under Section 164 Cr.P.C. would not arise, as recording 164 Cr.P.C., statement of PW.4 was mentioned in the charge sheet and also in the evidence of the Investigating Officer. If really, the appellant was aggrieved of non-furnishing the said statement by the concerned Court, he could have as well summoned the same and cross-examined the witness, basing on the said statement. Since such a step was not taken, the appellant cannot now turn back and say that the prosecution has suppressed the material fact. In other words, he pleads that the question of suppression would not arise when the same was disclosed in the charge sheet filed and also in the evidence of PW.10, the Investigating Officer. He also

submits that the Magistrate, who recorded the 164 Cr.P.C., statement, was shown as a witness, in the list of witnesses mentioned in the charge sheet, and hence the accused could have examined her as a defence witness to prove the evidence of PW.4 as not trustworthy. In the absence of the same, the argument that the evidence of PW.4, who is a child witness, has to be excluded from consideration cannot be accepted.

10) A perusal of the evidence adduced by the prosecution would show that the incident took place during night time, on 18.09.2009. The incident took place in the thatched hut of the accused and the deceased. It is also not in dispute that both of them were living together in the said hut, at the time of incident. It is also not in dispute that, out of wedlock, three children were born to them, who were also living along with them in the said hut. It is also not in dispute that PW.4 is a child witness and the entire case revolves around her evidence, coupled with the evidence of PWs.2 and 3, who claimed to have come to the scene of offence, on the information furnished by PW.4, after the accused hacked the deceased.

11) The questions that fall for consideration is 1) whether PW.4, who is a child witness, is speaking truth or whether the evidence of PW.4 is a tutored one; and (2) whether non-furnishing of 164 Cr.P.C., statement of the witness-PW.4 by the Court, along with the charge sheet, amounts to suppression of material, causing prejudice to the accused.

12) The fact that the deceased died a homicidal death cannot be of much dispute. The said circumstance came to be established through the evidence of PW.8-the Doctor, who conducted postmortem examination over the dead body. According to him, there are five

injuries over the body of the deceased, which could have been caused with a weapon like M.O.7-Axe, and the cause of death was “due to injury to skull and damage to brain with intracranial hemorrhage and injury to the neck causing damage to great vessels.” Ex.P7 is the Postmortem certificate, issued by PW.8.

13) The next question that falls for consideration is, as to who is responsible for the said incident.

14) The prosecution mainly relied upon the testimony of PW.4, who is an eye witness and also a child witness, to speak about the disputes between the accused and deceased in the house and also about the manner in which the incident took place.

15) Insofar as the motive aspect, more particularly the earlier incidents, the evidence of PW.4, coupled with the evidence of PW.2, establish the same.

16) In her evidence PW.2 deposed as under:

“The accused Ramanaiah is the husband of my sister Ramanamma (deceased) and their marriage was performed 10 years back and in their wedlock they blessed with a female child by name Rama Devi (LW.8), two male children including LW.9-Siva among another Ashok. My house and house of accused and deceased and three children of them is intervened in between three houses at the same village K.Venkatapuram. The accused after birth of the third child was frequently beating his wife Ramanamma my sister by suspecting her fidelity by coming home under intoxicating. My mother died at childhood. My father neglected our welfare having married another woman and my father’s sister Chinnakka and her husband at our village only used to care for our welfare. My sister there from was complaining the conduct of her husband to my uncle and aunt at the village. Previously for the beating and ill treatment by accused and his wife Ramanamma, a case was filed with police and police called the accused and enquired and the case was registered and he was arrested and submitted to Court custody. After the criminal case filed by my sister Ramanamma against her husband/accused, he by pleading to take care of my sister taken her back to his house with children and the case was thereby compromised. However, only for one or two months he behaved property and later again started ill treatment. Sx

months back, after mid night, my sister was killed by her husband/accused and the daughter of accused and deceased Pama Devi (LW.8) came to our house weeping, woke up and informed the same. Myself and my husband sreenu immediately on information of her, rushed to the house of the accused, however, the accused was fleeing away armed with axe to our noticing from the house after he hacked his wife. It is for our cries, the neighbours gathered. My sister died lying in the house on cot with injuries in pool of blood on cot."

17) Though PW.2 was cross-examined, at length, nothing useful was elicited to discredit her testimony. In fact, it has been elicited that the accused was altercating with her aunt, by name Chinnakka, and her husband as well. It was further elicited that even before the compromise of the criminal case, there was an altercation between the accused and the prosecution party. To a suggestion that since the accused developed acquaintance with the naxalites and was informing the police about the movements of the naxalites, they came to the place to kill the accused, but, in his absence, the wife of the accused was killed, was denied.

18) In her evidence, PW.4 stated that, on the date of incident, her mother was lying on the cot, with fever and after dusk she took her food. Thereafter, her father came in a drunken condition and beat her mother with a stick. She further states that her father was having illicit intimacy with one lady belonging to the community of blacksmiths and on account of it he beat the deceased. After beating her mother, the accused came out and then the door was closed. Thereafter, the accused informed her mother that he has to go to the forest to get firewood and that she may pack the food to be taken along with him. Then, the deceased opened the door, came inside the house and packed the food, as requested by the accused. Thereafter, her deceased mother slept on the cot of Sva and accused also slept on the same cot. PW.4 and one Ashok slept on another cot. After some time, the accused

got up from the cot, took an axe from the attic and hacked on the deceased on her head and neck with an axe. PW.4, who saw the accused removing the axe from the attic, thought that her father was going to forest, but before attacking the deceased, he warned PW.4 not to raise cries by keeping his right hand index finger on his lips. After attacking the deceased, the accused left the house. Thereafter, PW.4 went and informed PW.2 about the incident. Basing on the information given by PW.4, PW.2 and her husband came to the house of the accused and found the deceased lying on cot. It is said that the accused left the house on seeing the arrival of PW.2 and her husband.

19) It is to be noted that PW.4 was cross-examined, at length. In the cross-examination, she admits that after the attack, she did not raise any alarm to attract the people. She also admits that, after the attack, there were no threats to her from her father. It was elicited that after the attack, she went to the house of PW.2 and informed about the incident. She admits that she was examined by the police, on the date of occurrence, and also by the Magistrate in Giddalur. Various suggestions came to be put to PW.4 as to whether she has really seen the incident, but all the said suggestions were denied. However, in her earlier statements, PW.4 did not mention that the accused left the house with the axe after witnessing the arrival of PW.2 and her husband. PW.4 also failed to mention about the existence of bed light in their house and she witnessing the incident, in the said light.

20) The evidence of PW.4 came to be challenged on two grounds; 1) being the child witness, the same cannot be made the basis to convict the accused; and (2) when the 164 Cr.P.C., statement of the said witness is not furnished, an adverse inference has to be drawn against the evidence of that child witness.

21) In *Radhey Shyam v. State of Rajasthan*¹, the Apex Court categorically held that the evidence of child witness must be subjected to close scrutiny to rule out the possibility of tutoring and it can be relied upon if the Court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. It was further held that, as a matter of caution, the Court must find adequate corroboration by other evidence on record, in which event the same can be accepted without hesitation.

22) It is also to be noted here that the statement of PW.4, under Section 164 Cr.P.C., came to be recorded by the Magistrate, who was shown as LW.18, in the charge sheet. There is also a reference to recording of the statement under Section 164 Cr.P.C., on 24.10.2009. It is also not in dispute that the statement of PW.4, recorded by LW.18, was not furnished to the accused. In other words, neither LW.18 was examined as a witness nor the statement recorded by her was furnished to the accused. The fact of recording 164 Cr.P.C., statement was admitted by PW.4 and PW.10 in their evidence.

23) Such being the position, the question is whether non-furnishing of the said statement, which was forwarded to the concerned Court, by the Officer, who recorded the statement, caused any prejudice to the accused and whether the accused should have summoned the said statement from the concerned Court when he was aware about the existence of such statement?

24) As stated earlier, neither the person, who recorded 164 Cr.P.C., statement of PW.4, was examined nor a copy of the same was placed on

¹ (2014) 5 SCC 389

record. But, the fact remains that a statement of PW.4 was recorded under Section 164 Cr.P.C.

25) The learned Public Prosecutor would contend that the question of suppressing the said statement would not arise, as the said statement was recorded by the Magistrate and the said Magistrate must have sent it to the concerned Court, to be furnished along with the charge sheet. Non-supply of the said document by the Court will not cause any prejudice to the accused and the prosecution should not be blamed for the same.

26) The evidence adduced by the prosecution does not anywhere indicate the version set out by PW.4 in her 164 Cr.P.C. statement. She did not state in her evidence that the version given by her in 164 Cr.P.C., statement is similar to what has been deposed in the Court, while giving evidence. In fact, the prosecution has not made any effort to establish that the statement given by PW.4, before the Magistrate was similar to what the witness has deposed in the Court.

27) It is no doubt, true that there is a reference in the charge sheet to the statement of PW.4, recorded under Section 164 Cr.P.C., by the Magistrate, and the said Magistrate was shown as LW.18, in the list of witnesses. But, whether the same is sufficient? Will it cause any prejudice to the accused? Is it necessary that the accused should summon the said document if he feels it necessary.

28) It is well established principles of law that the accused is entitled to have copies of all the statements of witnesses recorded by the prosecution during investigation and referred to in charge sheet even if that particular statement is not relied upon by the prosecution. The investigating agency and the prosecution both represent the State and

every action of the State is legally required to be fair, just and reasonable. In case, the investigating agency and prosecution withhold any material, it is to be presumed that the same was being done, as it was favourable to the accused. Such a procedure is not fair, just and reasonable, with the accused.

29) Article 21 of the Constitution of India also requires that the procedure established by law should be fair and reasonable. A procedure which permits withholding of material which is in favour of the accused from the Court and from the accused, cannot be termed as fair and reasonable. It has been held by the Courts time and again, that in every judicial proceedings, the parties are expected to come to the Court with clean hands. By not producing a document or not furnishing a document to the accused, though referred to existence of such a document, it can be said that the prosecution has not come to the Court with clean hands. The prosecution is expected to reveal truth and nothing but truth to Court. When once a document is withheld from being produced before the Court or furnishing the same to the accused, a presumption is required to be drawn that it was favourable to the accused. Otherwise, there was no reason for the prosecution to withhold the same, after disclosing it in the charge sheet.

30) The law on this aspect came up for consideration in *Angadh Rohidas Kadam and others v. State of Maharashtra and another*². In the said case, the names of the persons, who were sought to be examined was mentioned in the list of witnesses cited, but, however, the prosecution failed to examine some of them and withheld their statement. The Bombay High Court held that the said statements could not be withheld on the ground that they would have strengthen the

² 2007 Cri.L.J. 1767

defence of the accused. It has been further held that the prosecution is not supposed to be interested in ensuring the conviction of the accused in any circumstances. What is expected is to assist the Court in unearthing the truth.

31) Similarly, in *Kota Peda Nagesh v. State of A.P.*,³ a Division Bench of this Court held as under:

“The statements recorded under Section 161 Cr.P.C. could be used by the prosecution as well as the accused. If a witness depose in the Court contrary to his statement made under Section 161 Cr.P.C. before the police, the prosecution could then seek the permission of the Court to declare such witness as hostile to the prosecution and cross-examine him/her. If some new facts are brought on record in the evidence of a witness in the Court which is also contrary to his/her statement made under Section 161 Cr.P.C. before the police, the defence is entitled to mark those contradictions and improvements and can use those contradictions or improvements in favour of the accused. Thus, the statements under Section 161 Cr.P.C. made by the witnesses before the police assume much significance.

In a circumstance, where the prosecution has suppressed documents, it is open to a Court to presume that the statements withheld would become unfavourable to the prosecution if produced.

Non furnishing of the statements recorded under Section 161 Cr.P.C. pertaining to PWs.1 to 4 by PW.14 to the accused, has occasioned great prejudice to the appellant/ accused.”

32) Therefore, from the judgments referred to above (1 to 3 supra) and having regard to the facts in issue, it can be said that non-furnishing of the statement recorded from PW.4, under Section 164 Cr.P.C., during the course of investigation, would definitely cause prejudice to the accused, since a version spoken to by PW.4, before a court and which came to be recorded during the course of investigation, was suppressed.

³ 1999 (2) ALD 383 (DB)

Therefore, we feel that an adverse inference has to be drawn for non-supply of crucial material to the accused.

33) The other circumstance relied upon by the prosecution, is seeing the accused leaving the house with an axe. PWs.2 and 3 claimed to have seen the accused leaving the house with an axe. Their source of information for coming to the scene, is the evidence of PW.4, which is eschewed from consideration. Even otherwise, the evidence of PW.4 would show that, immediately, after the incident, the accused left the house with an axe and thereafter she is said to have gone to the house of PW.2. That being the position, the question of PW.2 witnessing the accused leaving the house appears to be improbable. Further, PW.4, in her earlier statement, made before the police, under Section 161 Cr.P.C., did not state about witnessing the arrival of PW.2 and her husband and the accused leaving the house with an axe, though spoken to by PW.2.

34) The other evidence, relied upon by the prosecution, is the evidence of PW.6. In his evidence, PW.6 deposed that, at about 10.00 p.m., he returned from his field and in the midnight he woke up to pass urine. At that time, he noticed the accused proceeding towards the west with an axe on his shoulder. After passing urine, he came back to his house and slept. On the next day morning, he came to know about the death of the deceased. In the cross-examination, he admits that when he saw the dead body of the deceased in the house, he did not enquire about the accused. He further admits that he did not enquire the accused as to where he was going when he saw him in the mid night. He also admits that, at that time, there was no gathering at the house of the accused. His evidence discloses that PW.2 is his daughter-in-law and PW.3 is his son. He further admits that PW.2 and her husband were

living in other street. From the answers elicited in the evidence of PW.6, it is clear that even if the evidence of PW.4 is believed, it must have taken some time for PW.4 to go to the house of PW.2, woke them up; inform them about the incident and then all of them coming to the house of the accused. Having regard to the above, it would be difficult to believe that the accused would have been in the house till their arrival, more so, when PW.4 in her evidence deposed that he left the house after attacking the deceased. Therefore, the admission of PW.4 in her cross-examination that she has not seen the accused leaving the house in the earlier statement assumes importance.

35) One other fact, which assumes importance, is that PW.6, in his cross-examination, states that he has seen the accused in the midnight with an axe. If the evidence of PW.2 is to be accepted, by the time they went to the house of accused, they noticed the accused leaving the house, on seeing them. If that was so, the evidence of PW.6 that there was no gathering at the house in the midnight when he saw the accused, falsifies the theory of PWs.2 and 3 seeing the accused leaving the house when they went to the house. All these circumstances throw any amount of doubt on the evidence of PWs.2, 3 and 6 seeing the accused leaving the house with an axe.

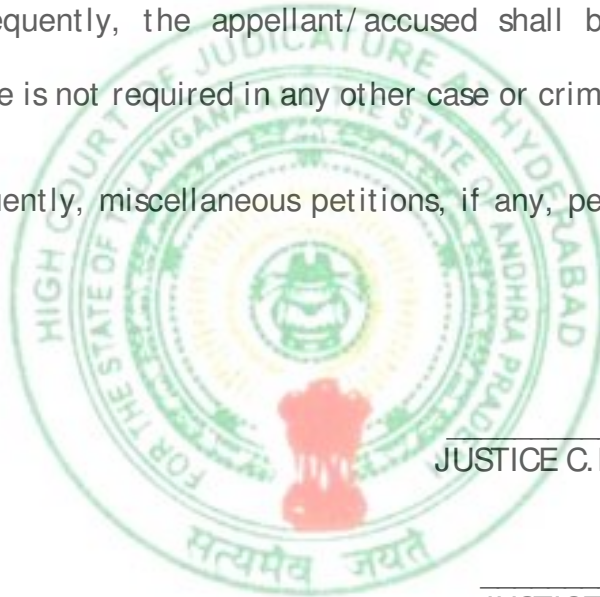
36) The last straw in the argument of the learned public prosecutor is with regard to recovery of axe, at the instance of the accused. Strangely, the independent witness, who was present for the recovery made, pursuant to the disclosure made by the accused, was not examined. Therefore, recovery, basing on the evidence of Investigating Officer, cannot be accepted at its face value in the absence of any witness for the said recovery. Further, the blood stains, which were found on the weapon, though mentioned as human blood, the report

does not say that the blood group found on the weapon was that of the deceased.

37) Since the sole circumstance proved by the prosecution is not sufficient to base a conviction, the conviction and sentence imposed against the accused are liable to be set aside.

38) Accordingly, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant in the judgment, dated 29.10.2010 in S.C.No.12 of 2010 on the file of the Principal Sessions Judge, Ongole, for the offence punishable under Section 302 IPC are set aside. Consequently, the appellant/accused shall be set at liberty forthwith, if he is not required in any other case or crime.

39) Consequently, miscellaneous petitions, if any, pending shall stand closed.



JUSTICE C. PRAVEEN KUMAR

JUSTICE P. KESHA RAO

08.12.2017

Note: L.R. Copy to be marked.
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