

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SRI JUSTICE P.KESHA RAO

CRIMINAL APPEAL No.825 of 2011

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

1) Assailing the judgment dated 27.10.2010, passed in S.C.No.316 of 2010, on the file of Metropolitan Sessions Judge, Hyderabad, wherein the sole accused was found guilty for an offence punishable under Section 302 IPC, the present Criminal Appeal is filed.

2) The gravamen of the charge against accused is that on 15.11.2009 at about 11.30 p.m., the accused is alleged to have caused the death of one Shankar @ Kodi (herein after referred to as 'deceased') on a footpath, in front of an ATM centre at SD Road, Secunderabad. The accused was found guilty for an offence punishable under Section 302 IPC and sentenced to undergo 'Imprisonment for life' and to pay a fine of Rs.100/- in default to undergo simple imprisonment for a period of one week.

3) The case of the prosecution as culled out from the evidence adduced by the prosecution is as under:

The accused and the deceased are said to be beggars sleeping on a foot path in front of an ATM centre near Basara hotel, Secunderabad. It is stated that the deceased used to sleep on footpath along with PW1 and accused. On the date of incident,

in the midnight between 11.00 p.m. to 12.00 p.m., the accused is said to have come to the said place, in a drunken condition and beat the deceased with a granite stone, leading to his death. The watchman of the ATM centre informed about the incident to the police on phone. Pursuant thereto, PW4 proceeded to the spot, recorded the statement of the watchman by name Anand David, wherein he is alleged to have stated that the accused beat the deceased with a stone and that the person who is standing at the distance is the accused. Immediately, the police apprehended the accused, took him to the police station and thereafter a case in Crime No.415 of 2009 came to be registered under section 302 I.P.C. Ex.P4 is the statement of watchman and Ex.P5 is the First Information Report. Subsequent investigation was taken over by PW.6, who is the Circle Inspector of Police, Gopalapuram Station. It is stated that on 16.11.2009, the police conducted a panchanama of the scene of offence in the presence of PW3 and another. Ex.P2 is the panchanama and Ex.P3 is the rough sketch of the scene. Ex.P7 is bunch of photographs of scene of offence. PW.6 also seized MO1, blood stained earth and controlled earth and a pair of chappals (MO.2), the shirt (MO.3), the pant (MO.4) and the shorts (MO.5), from the scene of incident. At 09.30 a.m., PW6 visited the hospital and held inquest over the dead body of the deceased in the presence of PW2 and another. Ex.P1 is the inquest panchanama. During the inquest, one full hands white colour blood stained shirt, one black colour pant, one black colour underwear were seized from the dead body of the deceased.

Thereafter, PW5 - the Professor, Dept. of Forensic Medicine, Gandhi Medical College/ Hospital, Secunderabad, conducted autopsy over the dead body and issued Ex.P6 the Post Mortem Examination Report, wherein he opined that the cause of death was "due to head injury". After completing the other formalities, PW.6 filed the charge sheet before the Court of X Additional Chief Metropolitan Magistrate, Secunderabad, who inturn committed the case to the Sessions Division under Section 209 of Cr.P.C. On committal, the same came to be numbered as S.C.No.316 of 2010.

4) On appearance, charge under Section 302 was framed, read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

5) To substantiate their case, the prosecution examined PWs.1 to 7 and got marked Exs.P1 to P8 and M.Os.1 to 5. After the closure of prosecution 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 behalf of the accused in support of his defence.

6) After considering the oral and documentary evidence on record, the learned Sessions Judge convicted the accused in the manner referred to above. Challenging the same, the present appeal is filed.

7) Learned counsel for the appellant mainly submits that there is no legal evidence to show that the accused has committed any offence. According to him, at the time of incident, the accused was in a drunken condition and as such he is entitled for the benefit under Section 84 of IPC. It is urged that in the absence of any motive or intention for the accused to kill the deceased, the trial Court erred in convicting the accused under Section 302 IPC.

8) The same is opposed by the learned Public Prosecutor. According to him, no prejudice would be caused to the accused if the person who lodged the report is not examined by the prosecution. He would submit that the statement of PW1, who was present at the scene of offence, is sufficient to convict the accused as his evidence with regard to the manner in which the incident occurred, remained unimpeached.

9) It is no doubt true that the person who lodged the report Ex.P4, is not examined by the prosecution. The evidence of PW7, would show that inspite of forming a special team, to trace out the informant, who was shown as a first witness, in the list of witnesses cited, they could not trace him. But, at the same time, it is to be noted that pursuant to the telephonic message received from the watchman/informant, PW4, the SI of police proceeded to the scene, recorded the statement of the watchman and apprehended the accused at the spot. Pursuant thereto, the above crime came to be registered. It is true that there are some minor procedural irregularities, but in the given fact situation, the

same shall not go to the root of the matter so as to doubt the incident itself. The evidence of PW1, who was present at the scene of offence, cannot be brushed aside, as false. In his evidence, he deposes about the manner in which the incident took place. In the FIR (informant not examined) it was mentioned that there was some altercation between the handicapped person and other person and when the informant went to pacify the situation, the handicapped person threw a granite stone on the deceased, resulting to his death. But PW1 in his evidence deposed that the accused came there in a drunken condition and hit the deceased with a stone. The evidence of PW1 is silent as to the quarrel, motive and intention on the part of the accused, to cause the death of the deceased. But one fact which stands established, from the evidence of the prosecution witnesses, is that the accused was in a drunken condition at the time of incident.

10) Therefore, the issue that arises for consideration is whether the Court below was justified in convicting the accused for the offence punishable under Section 302 of IPC, when the accused assaulted the deceased in a drunken condition, without having any intention or motive to kill?

11) The case on hand is somewhat identical to the case which came up for consideration before this Court in *Mirza Ghani Baig Vs. State of A.P. represented by public prosecutor*¹ wherein the Division Bench of this Court while dealing with Sections 85 and 86 of IPC held as under:

¹ Laws (APH) 1996 10 75

5.....The trial Court after assessing the entire evidence, found that the charge leveled against he accused was proved beyond reasonable doubt. Accordingly, he was convicted under Section 302 of IPC. Aggrieved by the same this appeal is filed by the accused.

6.....the accused also received burn injuries and was in the hospital for about two months; (5) the deceased while making dying declaration stated that the accused was in a drunken state of mind. She did not say anything as to harassment earlier to the incident or demanding dowry or was treating the deceased cruelly. As such the plea of drunkenness on the part of the accused should have been taken into consideration by the trial Court. If that was considered, the finding would have been that the accused had no intention or knowledge to murder or to cause the death of the deceased; thus entitled for acquittal.

7...

8.....The scrutiny of the evidence referred to above makes it clear that the deceased died because of burn injuries and the person responsible for causing burn injuries is the accused. This fact has been proved. Now, the question is whether the trial Court is justified in convicting the accused under Section 302 IPC or for some other offence?

9.....At no point of time there was quarrels between the deceased and the accused and there is no evidence to show that the accused was ill-treating the deceased or harassing her or demanding dowry. On the other hand, the evidence is to the effect that they were living happily and gave birth to three children. As far as the fact of drunkenness is concerned that has been confirmed by the dying declaration of the deceased Ex.P7 a portion of which is marked in Ex.D3. But the fact as to the accused coming fully drunk is silent in the dying declaration recorded by PW4. As to the act done by the accused is concerned, there is clear information. The correctness or otherwise of the conviction and sentence ordered by the trial Court depends upon how far the drunkenness is established..... To

seek excuse under drunkenness, several factors are to be taken into consideration and one has to establish the ingredients as contemplated under Sections 85 and 86 of IPC. Section 86 reads as follows:

“Offence requiring a particular intent or knowledge committed by one who is intoxicated: In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

An act done is not an offence unless done with a particular knowledge or intent. A person who does an act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

10.....

“However, in view of Section 86 of IPC, the accused should be imputed with the knowledge of his act. This takes out his case from the rigour of a case of murder to one of culpable homicide not amounting to murder.”

.....Under Section 86, prosecution has to prove that in spite of drunkenness the person had intention to commit the act forbidden by law or that he had the knowledge that on committing the said act, it will result in the death of the person on whom he has attacked.....Whether the plea of drunkenness can be taken as defence for claiming acquittal or for lessening the sentence has been elaborately dealt with by the Privy Council in Director of Public Prosecutions Vs. Beard (1920 0 LRAC 479), wherein it was held:

“Notwithstanding the difference in the language used I come to the conclusion that (except in cases where insanity is pleaded)

these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of that crime. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder."

13....Though he was in a drunken condition, there was no intention on the part of the accused to kill the deceased, yet he had the knowledge that such an act will definitely be dangerous to the life of the deceased. If this was considered properly by the trial Court, the finding would have been that the accused, though responsible for causing the death of the deceased, is guilty only for the offence under Section 304 Part II of IPC and not under Section 302 IPC.

14. In the result, the conviction and sentence awarded by the Court below under Section 302 IPC are set aside and in its place we order that the accused be convicted, for an offence under Section 304 Part II IPC and sentence him for five years Rigorous Imprisonment."

12) In the instant case also, there is no evidence to show that there was an intention or motive to kill the deceased. None of the witnesses, examined by the prosecution speak about the accused having any intention or motive to kill the deceased. Even the

witnesses do not depose about any quarrel preceeding the act. But at the same time, it cannot be said that the accused has no knowledge, about the consequences of his act.

13) In view of the above circumstances and the judgment referred to above, we are of the opinion that the case of the appellant/ accused would fall squarely under Section 304 Part-II of IPC.

14) In the result, the Criminal Appeal is allowed in part by altering the conviction from Section 302 to Section 304 Part II of IPC and accordingly the sentence Imprisonment for life awarded by the Metropolitan Sessions Judge, Hyderabad, against the appellant/ accused namely Alakunta Venkateswarulu, in S.C.No.316 of 2010, is reduced to that of the period of imprisonment already undergone by the petitioner.

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

JUSTICE C. PRAVEEN KUMAR

JUSTICE P. KESHAVA RAO

05.10.2017
vhb