

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
HON'BLE SRI JUSTICE KONGARA VIJAYA LAKSHMI

CrI.A.Nos.1291 of 2011 & 481 of 2015

Date:07.8.2018

CrI.A.No.1291 of 2011

Between.

Shaik Khadar Basha (A-2)

.....Appellant

And.

The State of A.P, repto.,

by the Public Prosecutor, Hyderabad.

.....Respondent

Counsel for the appellant: Mrs. C.Vasundhara Reddy

Counsel for the respondent: Public Prosecutor for the State of AP

AND

CrI.A.No.481 of 2015

Between.

The State of A.P, repto.,

by the Public Prosecutor, Hyderabad.

.....Appellant

And.

Shaik Musthafa,

S/o Madarasa and nine others.

.....Respondents/
Accused

Counsel for the appellant: Public Prosecutor for the State of A.P.

Counsel for respondent Nos.1 to 5: Mrs. C.Vasundhara Reddy

For Mr. A.Hari Prasad Reddy

Counsel for respondent Nos.6 to 10: Mrs. C.Vasundhara Reddy

For Mr. S.Harinath Reddy

The Court made the following:

COMMON JUDGMENT: (per Hon'ble Sri Justice C.V.Nagarjuna Reddy)

These two Criminal Appeals arise out of the same judgment, dated 16.9.2011, in Sessions Case No.363 of 2004 on the file of the Additional District and Sessions Judge, Nellore.

Criminal Appeal No.1291 of 2011 is filed by Accused No.2 and Criminal Appeal No.481 of 2015 is filed by the State.

The case of the prosecution in brief is narrated hereunder:

Accused Nos.1 to 11 and the deceased were residents of Atmakur Town. There are long standing disputes and ill-feelings existing between the deceased and the prime accused-Accused No.1 in connection with the maintenance of Sri Sulthan Shaheed Dargah at Atmakur, for which the father of the deceased is the Muzawar-Accused No.1 was inimically disposed towards the family of the deceased as well as the other committee members of the Dargah for the past some time and very often used to level allegations of misappropriation of funds and criticize the performance of the Dargah Committee.

That on the night of 16.3.2003 during the Gandam festival at about 11.30 pm., accused No.1 arrived at the Dargah in a drunken state, picked up a quarrel with P.W-5-Muzawar and other Committee members of the Dargah by abusing them in filthy language, on which, they warned him severely and sent him away from the Dargah and that while leaving the Dargah,

accused No.1 challenged them that he would see their end and was waiting for an opportunity to wreak vengeance.

That on 19.3.2003 at about 1.30 pm., P.W-1 went to the house of P.W-4, which is situated near the house of Accused No.1 at Vundurugunta, Atmakur, to call P.W-4; that on seeing P.W-1 at the house of P.W-4, accused No.1 got irritated and pounced upon him due to previous enmity and the existing differences and abused him in filthy language by saying loudly that P.W-1 arrived; that thereupon, accused Nos.2 to 11 who were at the house of accused No.1 pounced upon P.W-1 armed with knives and axes in a bid to kill him; that accused Nos.5 and 6 came upon him with chilly power; that when P.W-1 ran away for his life into the house of P.W-3, all the accused chased him, trespassed into the house of P.W-3 by hurling filthy language, caught hold of the tuft of P.W-3, pounced upon her and thereby, created a scene of violence; that in the meantime, on coming to know about the incident, the deceased and his younger brother-PW-2 went there to rescue P.Ws.1 and 3 from the clutches of the accused; that all the accused while abusing the deceased and P.Ws.1 and 2 in most filthy language, chased them being armed with deadly weapons like knives, axes; that at about 3.15 pm caught both the deceased as well as P.W-2 at Vundurugunta, the scene of offence near the house of P.W-4; that accused Nos.7 and 11 chased and caught hold of the

deceased firmly in their fold; that immediately, accused No.2 stabbed the deceased with a knife over his right back; that accused No.1 stabbed the deceased over his left hand with a knife twice, as a result of which, the deceased fell down unconscious at the scene; that Accused Nos.8 and 10 chased and caught hold of P.W-2 and when he tried to skulk away from their clutches, accused Nos.5 and 6 poured chilly powder on his face; that accused No.3 axed him at his left knee portion, while accused No.10 stabbed him with a knife over his left thumb; that P.W-2 fell down at the scene due to injuries; that accused No.4 while abusing P.W-2 in most filthy language, pounced upon him and beat him with hands and legs by saying that he should also be killed; that accused Nos.1 and 4 again went onto the injured-PW-2 to kill him by saying loudly that he should not survive at any cost; that the supporters of the deceased suddenly came in and interfered to rescue P.W-2 from their clutches, during which, accused No.1 was beaten up by the outsiders who gathered there and came to the rescue of P.W-2; and that on seeing the supporters of the deceased, all the accused fled away. That P.Ws.1, 3 and 4 took the deceased as well as P.W-2 to S.V.Praja Vydyasala at Somasila Road, Atmakur, where P.W-6 examined the deceased at 4 pm on 19.3.2003 and declared him as dead. That L.Ws.10 to 13 who are the residents of Vundurugunta, Atmakur witnessed Accused Nos.1 to 11 chasing

the deceased as well as P.Ws.1 and 2 from the house of P.W-3 towards Vundurugunta and learnt that the accused killed the deceased and also beat P.W-2 near the house of P.W-4. That P.W.1 gave a report to P.W-16-Sub-Inspector of Police, Atmakur, who registered as a case in Crime No.21 of 2003 and submitted the FIRs to all the officers concerned.

That P.W-15-Circle Inspector, Sattenapalli, took up the investigation, inspected the scene of offence, seized MOs.1 and 4 to 10 in the presence of P.Ws.10 and 11, held inquest over the dead body of the deceased in their presence, sent the dead body of the deceased to P.W-14 for autopsy and got photographed the scene of offence as well as the dead body of the deceased by L.W-14-Shaik Khaja Masthan. P.W-14-Civil Assistant Surgeon, Govt. Head Quarters Hospital, Nellore, who conducted autopsy over the dead body of the deceased, opined that the cause of death was haemorrhage, shock and hypoxia due to injury to right lung. P.W-14 also treated P.W-2 and issued Ex.P-14-Wound certificate and that thereafter, P.W-15 forwarded the material objects to the Director, RFSL, Guntur for analysis and report.

That accused No.4 and 7 were arrested on 23.3.2003 and sent for remand; accused Nos.1 and 5 were arrested on 28.3.2003; that on the voluntary confession of accused No.1, MO-1 was seized at his house in the presence of P.W-12 and

L.W-18-Shaik Rahamthulla under a mahazar. That accused No.2 and 3 were arrested on 02.4.2003 and on the voluntary confession of accused No.2, a blood stained knife was seized at his house in the presence of L.W.19-Md. Nazeer and LW-20 under a mahazar, accused Nos.9 and 11 were arrested on 04.4.2003 while accused Nos.6 to 10 were arrested on 07.6.2003; and that all the accused were sent to judicial custody and that after completion of the investigation and after receiving all the relevant material documents, the charge sheet was filed.

Based on the charge sheet and the material produced before it, the Court below has framed the following charges:

“Firstly, that you A-1 to A-11 on or about the same day, time and place as mentioned in charge No.1, were members of unlawful assembly and did in prosecution of the common object of such assembly to wit, to do away with the life of Shaik Ahammed Basha committed the offence of rioting and at that time, were armed with deadly weapons viz., knives, axes and chilly powder and that you A-1 to A-11 thereby committed an offence punishable under Section-148 IPC and within my cognizance.

Secondly, that you A-1, A-2, A-7 and A-11 on or about the same day, time and place as mentioned in charge No.1, did commit murder by intentionally or knowingly causing the death of Shaik Ahammed Basha by stabbing him with knives over his left hand by you A-1 and over his right back by you A-2 while you A-7 and A-11 caught hold of the deceased firmly and that you A-1, A-2, A-7 and A-11 thereby committed an offence punishable under Section-302 IPC and within my cognizance.

Fourthly, that you A-3 to A-10 on or about the same day, time and place as mentioned in charge No.1, did an act to wit, you A-3 axed Shaik Ahammed Basha on his left knee portion and you A-10 stabbed him with a knife over his left thumb with such intention and under such circumstances, that if by that act you A-3 and A-10 had caused the death of Shaik Saleem, you A-3 and A-10 would have been guilty of murder and that you A-3 and A-10 thereby committed an offence punishable under Section-307 IPC and within my cognizance.

Lastly, that you A-1 to A-11 on or about the same day, time and place as mentioned in charge No.1, were members of an unlawful assembly and in prosecution of the common object of which viz, to do away with the life of Shaik Ahammed Basha, some of the members viz A-3 and A-10 committed the offence against Shaik Saleem punishable under Section-307 IPC which you A-1, A-2, A-4 to A-9 and A-11 knew likely to be committed in prosecution of the common object of the said assembly and you A-1, A-2, A-4 to A-9 and A-11 are thereby under Section-149 IPC guilty of committing the said offence punishable under Section-307 IPC and within my cognizance.”

As the plea of the accused was one of denial, they were subjected to trial, during which, the prosecution examined P.Ws.1 to 16, got Exs.P-1 to P-19 marked and produced M.Os.1 to 10. On behalf of the accused, D.Ws.1 to 6 were examined and Exs.D-1 and D-5 were marked.

On appreciation of the oral and documentary evidence, the Court below has convicted accused No.2 for the offence punishable under Section-302 IPC and sentenced him to suffer

rigorous imprisonment for life and to pay a fine of Rs.1,000/- and in default, to suffer simple imprisonment for three months and acquitted accused Nos.1 to 11 of all the remaining offences for which they were charged. Feeling aggrieved by his conviction and sentence, accused No.2 has filed Criminal Appeal No.1291 of 2011 and assailing the acquittal in respect of all the other accused, the State has filed Criminal Appeal No.481 of 2015.

For convenience, the parties are referred as they are arrayed in the Sessions Case.

Mrs. C.Vasundhara Reddy, learned counsel for accused No.2, submitted that the prosecution has suppressed the genesis of attack and therefore, the case pleaded by it is liable to be disbelieved in *toto*; that Ex.P-1-report was lodged after a long delay which remained unexplained and therefore, the same is fatal to the case of the prosecution; and that while P.W-4, one of the four alleged eye-witnesses examined by the prosecution, turned hostile, the testimonies of P.Ws.1 to 3 are highly discrepant causing a serious doubt on their truthfulness.

Learned Public Prosecutor for the State of Andhra Pradesh strongly opposed the above submissions and argued that the Court below has rightly convicted accused No.2, but erroneously acquitted the accused of the remaining offences for which they were charged.

We have carefully considered the respective submissions of the learned counsel for the parties with reference to the evidence on record.

Elaborating her first submission, the learned counsel for accused No.2, referred to and relied upon Ex.D-5 which *inter alia* related to the case sheet of accused No.1. A perusal of this document would show that accused No.1 was treated by D.Ws.2 and 3. This document includes letter, dated 21.3.2003, addressed by P.W-15-the then Inspector of Police, Atmakur, which reads as under:

"I wish to bring to your notice that the said accused-Shaik Musthafa, S/o Madharsa, aged about 30 years, Muslim, Vundurugunta, A.C.Colony, Atmakur Town, is the prime accused and involved in the above cited murder case of Atmakur town and presently undergoing treatment at Govt. Hqrs. Hospital, Nellore as inpatient. It is to be mentioned here that already an attempt has been made on the life of this prime accused on the day of offence itself and there is every likelihood of taking revenge against him by the deceased group and as such, security has been arranged by posting staff at Govt. Hqrs. Hospital, Nellore.

Therefore, I request you to provide a special room for the said accused in this day light murder case, so as to enable the security personnel to stay exclusively with him and provide guard and security, since it appears some opponents are very often paying visits to Govt. Hqrs. Hospital, Nellore and enquiring about him."

D.W-1, who was working as Medical Superintendent, DSR Head Quarters Hospital, Nellore, deposed that the case sheet shown to him pertains to accused No.1, as per which, he was admitted and treated under the care of D.W-3; that the patient was admitted by Casualty Medical Officer; and that the handwriting on Ex.D-5 appears to be that of D.W-3. The witness added that he is not certain about the same. D.W-2-Civil Assistant Surgeon of DSR Head Quarters Hospital, Nellore, deposed that he has received Referral from the Government Medical Hospital, Atmakur under the cover of Ex.D-5 for admission of accused No.1 and that he was admitted in the hospital and was given treatment by him. He further deposed that accused No.1 was brought by P.C.Nos.1786 and 2281 of Atmakur Police Station; that he has given dressing and administered antibiotic and medicines to accused No.1; and that later the treatment was followed by D.W-3-Civil Surgeon Specialist. D.W-3 deposed that as per Ex.D-5, the patient was admitted in DSR Head Quarters Hospital, Nellore, on 19.3.2003, treated by him and was discharged on 28.3.2003. He admitted the handwriting on Ex.D-5 as belonging to him.

The above evidence produced by the defence would clinchingly establish that on 19.3.2003 itself i.e., the day on which the murder of the deceased took place, accused No.1 was admitted in Government Hospital by two Police Constables and a

letter was addressed by P.W-15 requesting the doctor concerned to take personal supervision over accused No.1 as, he was facing life threat. Surprisingly, the prosecution completely suppressed this part of the occurrence. As it failed to explain as to how accused No.1 has received injuries, it has to be necessarily presumed that in a free fight between two groups, accused No.1 has received injuries. As rightly submitted by the learned counsel for accused No.2, the prosecution has suppressed a vital part of the occurrence, which casts a serious cloud on the whole case set up by it.

As regards the submission of the learned counsel for accused No.2 that the prosecution failed to explain the long delay in registration of FIR, as per the case of the prosecution, the occurrence took place at around 1.30 pm on 19.3.2003. However, Ex.P-1-report is shown to have been given by P.W-1 who claimed to be an eye-witness at about 6 pm. He did not explain as to the reason for his not going to the Police Station immediately or at least within a reasonable time after the incident. Further a perusal of Ex.P-19-F.I.R. shows that the same was received by the Junior Civil Judge, Atmakur, at 12 midnight on 19.3.2003. The defence suggested that Ex.P-1 was not prepared at 6 pm; that it was prepared around mid night; and that thereafter, it was sent to the Junior Civil Judge's Court.

In a catena of decisions, the Supreme Court held that long and unexplained delay in registration of F.I.R. casts a serious cloud on the case of the prosecution as, such delay results in exaggerations and false implications. It has also held that prompt receiving of F.I.R. by the jurisdictional Court ensures that it is not ante-timed and that a presumption could be drawn from the delay in the F.I.R. reaching the Court that the same is ante-timed. (See *Bheemgonda Vs. State of A.P.*¹ and *Mehraj Singh Vs. State of U.P.*²)

As discussed above, no attempt was made by the prosecution to explain the long gap of six hours in P.W-1 lodging the report and further gap of six hours in the F.I.R. reaching the jurisdictional Court. This unexplained delay, as rightly pointed out by learned counsel for Accused No.2, has substantially weakened the case of the prosecution.

As regards the alleged eye-witnesses, P.W-4 who is a crucial witness turned hostile. Therefore, the prosecution is left with the evidence of P.Ws.1 to 3. P.Ws.1 and 2 are the natural brothers of the deceased. The husband of P.W-3 is closely related to the deceased and P.Ws.1 and 2. Being the family members and close relatives, their evidence needs close scrutiny.

¹ 2016 (3) ALT (Crl) 8 (AP)(DB)

² (1994) 5 SCC 188

According to the case set up by the prosecution, P.W-1 is the root cause for the entire incident leading to the murder of his brother. The whole trouble allegedly started with P.W-1 going to the house of P.W-4 who was working under him for asking him to come for work as he did not attend the work on that day; that the house of accused No.1 was situated near the house of P.W-4; that on seeing P.W-1, accused No.1 announced that P.W-1 has arrived and called upon accused Nos.1 to 4 and 7 to 11 to kill him. As per the narration of P.W-1, on being frightened by such announcement of accused No.1, he started running and the accused chased him; that he tried to enter the house of his maternal uncle by name Shaik Rahim, who is the husband of P.W-3; that on seeing him, P.W-3 came out of the house; and that on seeing the accused, P.W-3 allowed P.W-1 into the house and bolted the door from inside. That in spite of protests made by P.W-3, all the accused trespassed into the house of P.W-3, caught hold of her tuft, abused her in filthy language and fisted her. That accused No.7 raised loud voice stating as to who could come to the rescue of the two witnesses and that if any one comes, he would be killed. That the accused chased P.W-1 for about 10 to 15 minutes from the house of P.W-3 to the house of P.W-4.

In her chief examination, PW-3 recounted what she has noticed at the time of the incident. According to her, at about

1.30 p.m. on 19.03.2003, she was at her house; that she heard the commotion raised by PW-1 and others; that on hearing the same, she came out from her house on to the road; that she found PW-1 running and all the accused chasing him; that A1 to A4 and A7 and A11 were holding sticks, knives and axes and A5 and A6 were holding chilly powder while chasing PW-1; that due to fear, PW-1 entered her house when she was alone; that PW-1 told her that the accused were chasing him to kill him and requested her to rescue him from their clutches; that with an intention to save PW-1, she allowed him into her house and bolted the doors; that though she protested, the accused trespassed into her house, caught hold of her tuft, dragged and pushed her on the ground; that in spite of her request not to harm PW-1 and leave the place, the accused did not heed to her request; that they started abusing PW-1 in filthy language and at that time, the deceased and PW-2 came there; and that on seeing them, she opened the door and allowed PW-1 to go outside.

The whole story narrated by PWs-1 and 2 is laced with unnaturality. Both of them were candid in saying that on seeing the accused chasing PW-1, PW-3 allowed the former to enter into her house and thereupon, she bolted the doors from inside. If that be so, it is beyond one's comprehension as to how the

accused could reach PW-3, hold her tuff and drag her. Neither of the witnesses stated that after PW-3 bolted the doors from inside, the accused have broken open the doors and dragged PW-3 to outside the house. As if to explain this impossible event, PW-3 has come out with an improved version in her cross-examination, as per which, the accused waited at her house for two minutes and after arrival of the deceased and PW-2, they proclaimed to kill all the three persons, *i.e.* PW-1, PW-2 and the deceased, and that out of fear, she too ran along with PWs-1, 2 and the deceased. PW-3 has further compounded the inconsistency in her statement in the cross-examination for A7 to A11 by stating that by the time PW-1 came and entered her house, it was about 2 p.m. and 15 minutes thereafter, the deceased and PW-2 came there and the accused did not try to enter the house by breaking the door. She further stated that the accused were not doing anything wrong to her by the time the deceased and PW-2 came there; that by the time she opened the door, the accused were not in the compound; and that at about 5.30 p.m. on 19.03.2003, she was examined by the police in the case. This statement, in our opinion, destroys the case of the prosecution inasmuch as before the F.I.R. was received and registered, the Police have visited the scene of offence and started the investigation by examining PW-3. It is quite evident from the above circumstances that PW-3 was planted by the

prosecution to come out with the story that the accused tried to attack PW-1 at her house and that they chased PWs-1 to 3 and the deceased from her house towards the house of PW-4.

Reverting back to the evidence of PW-1, surprisingly, in the whole transaction leading to the death of the deceased, he emerged unscathed. On his own showing, he was chased for about 10 to 15 minutes by the accused numbering 11, but still he successfully escaped from the onslaught of the accused. Even after he ran out of the house of PW-3, the accused did not cause any harm to him, though he was the main target.

It is not the case of the prosecution that the accused had any special enmity with the deceased. On the contrary, the deceased allegedly went to the rescue of PW-1. This being the admitted case of the prosecution, it defies any reason for the accused to spare PW-1. In his chief-examination, there was no whisper about the accused trying to cause harm to him after he started running from the house of PW-3 towards the house of PW-4.

The falsity of the evidence of PW-1 is further exposed by the fact that he deposed that A-8 and A-10 have caught hold of PW-2, A2 hacked PW-2 with an axe on his left leg and when A-10 tried to inflict a blow with knife, PW-2 tried to ward off the said blow, as a result of which, his left thumb was cut. As per

Ex.P-14—wound certificate, PW-2 has received only one injury i.e. laceration 2 x 1 cm. on left palm, described as simple in nature. Neither axe injury on left leg nor cutting of the left hand thumb of PW-2 was found. This false testimony of PW-1 further falsifies his version and creates a serious doubt about his very presence at the scene of offence and his being an eye witness to the occurrence.

As regards PW-2, he deposed that A8 and A10 have caught hold of him and when he tried to free himself from the clutches of the said accused, A5 and A6 sprinkled chilly powder on his face and A3 gave a blow with axe on his left leg and that when he fell on the ground, A-10 tried to stab him with a knife and when he tried to escape the said blow, he received an injury on his left thumb. As noted hereinbefore, Ex.P-14-Wound Certificate of P.W-2 does not show any injury on the left leg of P.W-2. If PW-2 was coming out with a true version, the prosecution failed to explain about the absence of axe injury on his left leg. Thus, in our opinion, PW-2 is not coming out with the truth as to the manner in which the incident has taken place. For the reasons already discussed supra, the testimony of PW-3 is also highly un-natural and she appears to be an untrustworthy witness, planted only to support the case of the prosecution. Once the Court arrives at the conclusion that

PWs.1 to 3 are not eye witnesses, merely because the overt acts spoken to by these witnesses as regards the injuries found on the deceased are corroborated by the medical evidence, A2 cannot be convicted. It is not difficult to tutor the prosecution witnesses to speak about the injuries on the deceased, based on the medical evidence already available. Once the evidence of PWs.1 to 3 is disbelieved, mere recovery of the weapons from the accused cannot constitute the sole basis for their conviction.

For the aforementioned reasons, we are of the opinion that the prosecution has failed to prove the guilt of the accused beyond all reasonable doubt. While the Court below has rightly acquitted all the accused other than Accused No.2 of all the offences for which they were charged, it has erroneously convicted Accused No.2 for the offence punishable under Section 302 I.P.C.

In the result, Criminal Appeal No.1291 of 2011 is allowed. The conviction and sentence recorded against the appellant in the judgment, dated 16.09.2011, in Sessions Case No.363 of 2004, on the file of the Additional District and Sessions Judge S.P.S.R., Nellore district, for the offence punishable under Section 302 I.P.C., are set aside. The fine amount, if any, paid by him shall be refunded to him. As the appellant is on bail, he is directed to surrender himself before the Superintendent, Open

Jail, Ananthapur, for completing the formalities for his release, if he is not required in any other case or crime. Criminal Appeal No.481 of 2015 is dismissed.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE KONGARA VIJAYA LAKSHMI

07th August, 2018

dr/msb

