

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

Criminal Appeal No.16 of 2012

Date: 07.08.2018

Between:

1. Mudavath Many (A.1)
2. Ket havath h Bandya Naik (A.2)

...Appellants

And

State of A. P., rep. by its
Public Prosecutor, Hyderabad

..Respondents

Counsel for the Appellants: Mr. P. Prabhakar Reddy

Counsel for the respondent: Public Prosecutor (TG)

The Court made the following:



JUDGMENT: (per Hon'ble Smt. Justice Kongara Vijaya Lakshmi)

This Criminal Appeal is filed by the accused in Sessions Case No.440 of 2010 on the file of the Special Sessions Judge for trial of cases under SCs and STs (POA) Act-cum-VII Additional Sessions Judge, Mahabubnagar, against the judgment, dated 15.12.2011, whereby, the learned Sessions Judge convicted the accused for the offences under Sections 394 and 302 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for a period of TEN years and to pay a fine of Rs.1,000/- each, in default, to suffer simple imprisonment for one month for the offence punishable under Section 394 of IPC and also sentenced them to suffer rigorous imprisonment for LIFE for the offence punishable under Section 302 of IPC.

2. The case of the prosecution, as reflected from the charge sheet, is as follows:

On 03.02.2010 at about 13.00 hours, the *de facto* complainant Mudavat Shankar-PW.1 lodged a complaint-Ex.P.1 at Timmajipet Police Station stating that on the night of 02.02.2010, his grand father Katravat Chinna Sandhya (hereinafter referred to as 'deceased') went for watching groundnut crop at their field; at about 11.30 p.m., on hearing voice from the field, he along with the Tanda people went to the spot and found the deceased with severe bleeding injuries on the head; on enquiry with Pedda Sandhaya-PW.2, who was present nearby informed that while they were watching the harvested groundnut crop, at about 11 p.m. four unknown offenders attacked them, beat the deceased with stones, caused severe injuries and stolen cash of Rs.700/- from him; immediately PW.1 gave a complaint to the Station House Officer, Timmajipet PS-PW.10, who registered it as Cr.No.9 of 2010 for the

offence under Section 394 of IPC and sent express FIR-Ex.P.7 to all concerned.

ii) PW.11 Circle Inspector of Police, who took up investigation, visited scene of offence, examined PW.1, PW.3. PW.4 and PW.5 and recorded their statements, secured the presence of PW.7, PW.8 and LW.9, conducted *panchanama* of scene of offence. As the deceased was in unconscious state of mind, he admitted him at Osmania General Hospital, Hyderabad for treatment.

iii) On 11.02.2010 at about 07.00 hours, PW.11 arrested accused 1 to 3 were at Nethaji Chowk, Badepally and when interrogated, they stated that on 02.02.2010, A.1 to A.4 gathered at the agricultural bore well of A.1, hatched a plan to commit theft of sheep, consumed liquor at Vattam and Pothireddipally villages; at about 9.30 p.m. they reached Parvathapur village and committed theft of electric starter, iron pipes and cable wire; thereafter they went to another agricultural bore well and committed theft of electric starter and iron pipe pertaining to Cr.No.4 of 2010; thereafter all the accused went to Laxmi Thanda at about 11 p.m. and found the deceased and another sleeping near groundnut heaps; all the accused attacked the deceased and PW.2, threatened with dire consequences, beat the deceased with stones, caused severe injuries and committed theft of cash of Rs.700/-; thereafter, at about mid night, all the accused in order to commit theft of goats, took sticks and went to G.Gutta Thanda; on hearing voice of goats from a house, they threw stones on tractor at the house of PW.1 to create panic and havoc to commit theft of goats; on finding the doors opened, A.2 caught hold of PW.4 and beat her with stick; A.1 to A.4 entered into the house, threatened PW.1 assaulted and beat him with

stones; while they came out, the villagers gathered and chased them, all the accused left the goat and lambs and fled away; A.4 Vadthyavth Phoolya died when chased by the villagers of G.Gutta Thanda on the intervening night of 2/ 3.02.2010 (pertains to the case in Cr.No.8 of 2010 under Section 302 of IPC of Thimmajipet PS); and on questioning, they confessed to have committed the offence; PW.11 recovered a sum of Rs.400/- under Exs.P.3 to P.5 from the possession of A.1 to A.3 in the presence of mediators PW.8 and LW.11; thereafter, PW.11 forwarded A.1 to A.3 to the Court of the Judicial Magistrate of First Class, Nagarkurnool, for judicial remand.

iv) On 19.02.2010, PW.11 filed a requisition before PW.12 Junior Civil Judge, Kollapur for conducting test identification parade; on 06.03.2010 PW.12 conducted test identification parade of Accused 1 to 3, where PW.2 identified the accused. Ex.P.10 is the test identification parade proceedings.

v) On 01.03.2010, PW.11 received intimation from out post Police Station of Osmania General Hospital that the deceased succumbed to the injuries, he submitted section alternation memo before the Court under Ex.P.8, secured the presence of PW.9 and LW.13 and conducted inquest Ex.P.6 over the dead body of the deceased and sent the dead body of the deceased to PW.13 for autopsy; PW.13 conducted autopsy on the dead body of the deceased and issued Ex.P.11 post-mortem certificate, opining that the deceased received 13 external and internal injuries and he died due to the said injuries;

vi) Accused No.3 Kethavath Mohan Naik died in the Sub Jail, Nagarkurnool on 19.03.2010 while in judicial custody.

vii) After the completion of the investigation, PW.11 filed the charge sheet against A.1 and A.2 for the offences punishable under Sections 394 and 302 of IPC.

3. The Judicial Magistrate of First Class, Nagarkurnool, has taken the case on file as PRC No.33 of 2010 for the offences under Sections 394 and 302 of IPC and furnished the copies to the accused under Section 209 Cr.P.C. and committed the case to the Court of Sessions, as the offence under Section 302 of IPC is exclusively triable by the Court of Sessions.

4. The learned Sessions Judge, Mahabubnagar has taken the case on file as SC No.440 of 2010 and made over the same to the Court of Special Sessions Judge for trial of cases under SCs and STs (POA) Act cum VII Additional Sessions Judge, Mahabubnagar.

5. As the plea of the appellants is one of denial, the Court below has framed the following charges:

“Firstly: That you A.1 and A.2 on or about 2.2.2010 at about 11.30 p.m. in the fields of Katrvath Chinna Sandhya in the limits of Pothireddipally village, while committing robbery of Rs.700/- from the possession of Katrvath Chinna Sandhya and caused hurt to him and that you thereby committed offence punishable under Section 394 of IPC and within the cognizance of the Court of Sessions.

Secondly: That you A.1 and A.2 on or about the aforesaid place, date and time mentioned in charge No.1 did commit murder by intentionally causing death of Katrvath Chinna Sandhya by beating him with stones on his head and that you thereby committed offence punishable under Section 302 of IPC and within the cognizance of the Court of Sessions.”

6. During trial, the prosecution has examined PWs.1 to 13, marked Exs.P.1 to P.11 and produced MOs. 1 to 3. On behalf of the defence, no evidence has been adduced.

7. On appreciation of the oral and documentary evidence, the Court below has disposed of the Sessions Case in the manner as observed above.

8. At the hearing, Sri P. Prabhakar Reddy, learned counsel for the appellants, contended that the trial Court erred in placing reliance on the testimony of PWs.1 to 6, who are highly interested witnesses, that the trial Court erred in placing reliance on the evidence of PW.2, who is an old man, and who has a very poor vision and would not have been able to identify the accused, that if really PW.2 is an eye witness to the alleged incident, he ought to have made attempts to alert nearby persons by raising hue and cry but he did not do so and hence his evidence does not inspire confidence that he was present at the time of incident along with the deceased, that the identification parade was conducted after one month of the occurrence which can not be given any credence to, that though the deceased has undergone treatment from 03.02.2010 to 28.02.2010 in Osmania General Hospital, Hyderabad, the prosecution has not recorded the dying declaration of the deceased during the course of treatment, that the Investigating Officer recorded the statement of PW.2 after fifteen days of the incident, that had he been an eye witness to the incident, no explanation, whatsoever is forthcoming from the police for not examining the alleged eye witness for fifteen days and hence, the trial Court erred in finding the accused guilty for the offences under Sections 394 and 302 of IPC basing on the version of PW.2. He finally contended that the prosecution has miserably

failed to prove the said charges and the appellants are liable to be acquitted.

9. On the other hand learned Public Prosecutor contended that the evidence of PWs.1, 3 to 6 is sufficient to hold the appellants guilty of the charges, that PW.12 Junior Civil Judge, who conducted the test identification parade of the accused, categorically deposed that PW.2 identified the accused as the persons who attacked him and the deceased on the date of incident and that the trial Court has rightly found the accused guilty for the offences under Sections 394 and 302 of IPC and needs no interference by this Court.

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

11. To prove its case, the prosecution examined PWs.1 to 13. PW.1 is the *de-facto* complainant and the grand son of the deceased; PW.2 is one of the eye witnesses; PW.3 is the wife of the deceased; PWs.4 and 6 are son and daughter of the deceased; PW.5 is one of the circumstantial witnesses; PW.7 is the *panch* witness for scene of offence; PW.8 is the *panch* witness for apprehension of the accused and recovery of amount of Rs.400/-; PW.9 is the inquest *panchayatdar*; PWs.10 and 11 are the Investigating Officers; PW.12 is the then Magistrate, Kollapur, who conducted test identification parade and PW.13 is the doctor, who conducted autopsy over the dead body of the deceased.

12. According to PW.1, the deceased is his maternal grand father and PW.2 is his father's co-brother. That on the date of incident, the deceased and PW.2 went to the fields for watching the ground nut crop

and at about 11 p.m. he heard barking of dogs, suspecting something, he along with LW.3 went to the fields and found his maternal grand father lying with injuries on head and when he enquired with PW.2, he informed that four persons came and beat the deceased and snatched away Rs.700/- . His evidence further shows that thereafter, he went to the police station and gave report in Ex.P.1.

13. PW.2 is the eye witness to the incident. According to him, on the date of incident, he along with the deceased went to groundnut fields and at about 11 or 11.30 p.m. four persons came there and asked him to give cell phone and he replied that he has no cell phone, that thereafter A.1 and A.2 went to the deceased, hurled big stone on his head, they took away Rs.700/- from his pocket and ran away. That on hearing his cries, PW.1 and PW.3-wife of the deceased, came there and he informed them about the incident. He further deposed that he identified the accused persons in the District Jail, during test identification parade. In the cross examination he admitted that the police recorded his statement fifteen days after the incident and that the accused are not the residents of their Thanda.

14. PW.3 wife of the deceased deposed that PW.2 informed her that some thieves killed her husband. PW.4 who is the son of the deceased also deposed that when he went to see his father in the hospital, he told him that some unknown persons attacked him. PW.5 deposed that on the date of incident at about 11.30 p.m. he went to the scene of offence and found the deceased lying with injuries, PW.2 was also present there and when he enquired, PW.2 stated that some thieves came and attacked the deceased with boulders. PW.6 did not speak anything about who attacked his father.

15. According to the prosecution, police arrested the accused in the presence of PW.8, before whom they confessed the offence. But this witness was treated hostile by the prosecution, as he has not supported the case of the prosecution.

16. PW.12, the then Magistrate, deposed that on the request of PW.11, he conducted the test identification parade of the accused in the Sub Jail premises of Nagarkurnool, where PW.2 identified the accused. In the cross-examination, he stated that the witness is aged more than 70 years and that he has not stated about the identity particulars of the suspects. He admitted that he did not conduct test identification parade of each accused separately.

17. Learned counsel for the appellants mainly contended that though the deceased was admitted in the Osmania General Hospital immediately after the incident, where he underwent treatment for about 25 days, the police have not taken any steps to record his statement or dying declaration and that no explanation is forthcoming from the prosecution for not recording the dying declaration. He further contended that the offence took place in the mid night of 2/3.2.2010 and PW.2 being aged more than 70 years, his evidence to the effect that he could identify the accused in the test identification parade conducted by PW.12 cannot be believed. He further contended that in the dark night, it is not possible for any one to see the accused clearly, except when there was prior acquaintance.

18. The prosecution mainly relied on the evidence of PW.2 to prove the case of the prosecution. But the evidence of the prosecution witnesses i.e., PWs.1, 3, 4 to 6 shows that PW.2 had informed them that some unknown persons came and attacked the deceased. According to

the evidence of PW.2, on the date of the incident, at about 11 or 11.30 p.m. about four persons came there and A.1 and A.2 attacked the deceased and caused injuries. He admitted in the cross-examination that the accused are not the residents of his Thanda and that the police examined him after fifteen days of the incident. As rightly contended by the learned counsel for the appellants that if really PW.2 was an eye witness to the incident, the police ought to have examined him immediately after the incident. But, for the reasons best known to them, the police have examined PW.2 and recorded his statement after fifteen days and there is no explanation forthcoming from the prosecution for not examining PW.2 immediately after the incident. This throws any amount of doubt on the case of the prosecution. Further, according to PW.12, PW.2 identified the accused in the test identification parade. He however deposed that the accused stated to him after identification parade that they were known to PW.2 much prior to the date of offence and that they had acquaintance with each other.

19. PW.2 admitted that the incident took place during mid night. PWs.3, 4 and 6 deposed that PW.2 told them that some unknown persons attacked. PW.4 deposed that his deceased father himself told him that some unknown persons attacked him. PW.1 in his complaint Ex.P.1 also stated that some unknown persons attacked his grand father. Even in his evidence, he stated the same thing. When PW.2 could not identify the assailants who attacked him and the deceased on the date of incident, as they are unknown persons, it is not known as to how he identified them in the test identification parade conducted after one month of the incident. Further, PW.2 stated that the accused are not the residents of his Thanda or his neighbouring Thanda. Thus, the evidence of PW.2 is

untrustworthy and unacceptable about the identification of the accused in the test identification parade conducted by PW.12. Except the evidence of PW.2, there is no other evidence adduced by the prosecution connecting the accused to the alleged offence. The other witnesses examined by the prosecution have not spoken anything against the appellants.

20. On a holistic consideration of the evidence adduced by the prosecution and circumstances of the case, we are of the opinion that the prosecution has miserably failed to establish the case against the appellants beyond reasonable doubt and the Court below erred in convicting the appellants for the offences with which they were charged.

21. In the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellants/ Accused Nos.1 and 2 for the offences punishable under Sections 394 and 302 of IPC in the judgment, dated 15.12.2011, in Sessions Case No.440 of 2010, on the file of the learned Special Sessions Judge for Trial of Cases under SCs and STs (POA) Act cum VII Additional Sessions Judge, Mahabubnagar, are set aside. Consequently, the appellants/accused shall be set at liberty forthwith, if they are not required in any other case or crime and the fine amount, if any, paid by them shall be refunded to them.

C. V. NAGARJUNA REDDY, J

KONGARA VIJAYALAKSHMI, J

Date: 07.08.2018
BSS/ NSR

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