

**HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY
AND
HON'BLE SRI JUSTICE T.AMARNATH GOUD**

CRIMINAL APPEAL NO.392 OF 2013

ORDER: (Per Hon'ble Sri Justice M.Satyanarayana Murthy)

The sole accused in Sessions Case No.609 of 2012 on the file of Additional Sessions Judge, Hindupur (for convenience, 'Trial Court') preferred this Criminal Appeal, under Section 374(2) Cr.P.C, assailing the conviction and sentence passed by the Trial Court by judgment dated 25.02.2013 holding him guilty for the offence punishable under Section 302 IPC and sentenced to undergo imprisonment for life and to pay fine of Rs.1,000/- with default sentence of simple imprisonment for six months.

The deceased Chinthala Sankarappa and accused are residents of Somaghatta Village, Chilamathur Mandal, Anantapur District. The parents of the accused, without performing his marriage, performed marriage of his younger brother, due to which, he used to pick up quarrel occasionally. On 22.04.2012, at about 7.30 p.m, as usual, when the accused started quarrelling on the issue of performing marriage of his younger brother without performing his marriage, Sankarappa, who was proceeding towards the elementary school for answering calls of nature, noticed the same and went into their house, chastised the accused severely; on that, the accused got enraged, took up axe and hacked on his head stating that 'who was he to chastise him'; thereby, caused severe bleeding injury which resulted in his death; and, after shifting the injured to

the NIMHANS Hospital at Bangalore, he was declared as brought dead by the doctor at about 10.30 A.M. On 23.04.2012 at about 4.00 p.m. PW.1 presented Ex.P.1 report to PW.8 who, inturn, registered a case in Crime No.21 of 2012 for the offence punishable under Section 302 IPC and issued Ex.P.7 - FIR and investigated the crime. The incident was witnessed by PWs.2 and 3, who are alleged to be the direct witnesses to the murder. On the strength of Ex.P.7, investigation was done by PW.9.

During investigation, PW.9 visited the scene of offence, prepared rough sketch of scene of offence - Ex.P.8, held inquest over the dead body of the deceased in the presence of blood relatives and PW.5 -Ex.P-3, referred the dead body for post-mortem and Ex.P.6 is the Post-Mortem Report. After completion of investigation, MOs.1 to 3 were collected. The accused was arrested on 29.03.2012 at 1.30 A.M and, on interrogation, in the presence of mediator -PW.6, the accused confessed that he committed the offence and led PW.6 - mediator, LW.15 and PW.9 to a tank near Somagutta Village, picked out axe (MO.4) and produced the weapon and seized by PW.9 under the cover of seizure mahazar - Ex.P.5; and Ex.P.4 is the admissible portion of confessional mahazar.

During investigation, MOs.1 to 6 were sent to RFSL; on collecting the entire material, including post-mortem report - Ex.P.6, PW.9 filed charge sheet against the appellant before the Judicial Magistrate of I Class, Hindupur as the offence under Section 302 IPC is triable exclusively by Court of Session registered the same as PRC.No.38 of 2012. The Judicial

Magistrate of First Class committed the case to the Court of Sessions Division, Anantapur, as the offence under Section 302 IPC is exclusively triable by the Court of Sessions. The learned Sessions Judge, Hindupur registered the same as Session Case and later made over to Additional District Judge, Anantapur for trial and disposal of case in accordance with law.

On production of accused, the Trial Court framed a charge against the petitioner for the offence under Section 302 IPC and the contents of the charge were read over and explained to him in Telugu and he pleaded not guilty and claimed to be tried.

During trial, on behalf of prosecution, PWs.1 to 9 were examined, marked Exs.P.1 to P.9 and M.Os. 1 to 6. After closure of prosecution evidence, the accused was examined under Section 313 Cr.P.C. explaining the incriminating material available against him, he denied the same and reported no defence.

Upon hearing argument of both the counsel, the Trial Court found the appellant guilty for the offence punishable under Section 302 IPC and convicted and sentenced him as stated supra.

Aggrieved by the conviction and sentence passed under the impugned judgment in S.C.No.609 of 2012, the present appeal is preferred under Section 374(2) Cr.P.C. mainly on the ground that the Trial Court failed to consider the evidence in proper perspective; the presence of PW.2 is doubtful at the time of alleged commission of murder of the deceased Sankarappa;

apart from that, Ex.P.8 - rough sketch, is silent as to the exact place of scene of offence; the Trial Court committed an error in appreciation of evidence; at best, the offence would fall under Section 304 Part-II IPC, and not under Section 302 IPC; prayed to set aside the conviction and sentence for the offence under Section 302 IPC passed by the Trial Court.

During hearing, Sri B.Parameswara Rao, learned counsel for the appellant, would draw attention of this Court to the testimony of PWs.2 and 3, who are alleged direct witnesses, and their evidence would suffice to conclude that the appellant was clashing with his father for his failure to perform his marriage before performing marriage of his younger brother; in sudden and grave provocation without premeditation, he picked up axe and hacked the deceased Sankarappa resulting into his death; and, therefore, requested to convert the sentence from Section 302 IPC to Section 304 Part II IPC.

Learned Public Prosecutor appearing for the State of Andhra Pradesh supported the impugned judgment in all respects and contend that the accused is guilty of the offence under Section 302 IPC; apart from that, the evidence is consistent that he used to pick up quarrel with his father even prior to the incident; and, as a routine, he started quarrel on the date of incident and caused death of Sankarappa; and, therefore, it would not fall under Section 304 Part II IPC and attracts the offence punishable under Section 302 IPC alone and prayed to dismiss the appeal.

Considering the rival contentions, and perusing the material available on record, the point that arises for consideration is:

“Whether the deceased Sankarappa was murdered in a sudden and grave provocation without any premeditation; and, if so, whether the conviction and sentence passed by the learned Additional Sessions Judge in S.C.No.609 of 2012 for the offence punishable under Section 302 IPC be sustained?”

POINT:

The appeal is preferred under Section 374(2) Cr.P.C. and the jurisdiction of this Court under Section 374 Cr.P.C. is limited. Though the Court is required to appreciate the entire evidence in appeals against conviction or acquittal, the Court has power to interfere with the findings of fact, no distinction being made between judgments of acquittal and conviction, though in the case of acquittals it will not ordinarily interfere with the appreciation of evidence or on findings of fact unless the High Court acts perversely or otherwise improperly (**Himachal Pradesh Administration v. Shri Om Prakash¹**). The above principle has been reiterated by the Apex Court in long line of prospective pronouncements and the position of law that emerges in an appeal under Section 374(2) Cr.P.C, the Court can interfere if the findings are unreasonable or perverse or manifestly illegal or grossly unjust. The mere fact that another view could also have been taken on the evidence on record is not a ground for reversing an order of acquittal. Therefore, it is the duty of the prosecution to prove the cause of

¹ (1972) 1 SCC 249

death to satisfactorily, establish the guilt of the accused for the offence under Section 302 IPC.

Here, the case of the prosecution is based on direct evidence of PWs.2 and 3. P.W.2 is none other than the co-sister of PW.1 and sister-in-law of the deceased Sankarappa. According to her testimony, on the date of incident at about 7.00 p.m. she went to the village to call coolies; on hearing galata from the house of the accused, she went to his house, found the accused, his parents and deceased quarrelling with each other; the reason for quarrel was that his parents have not performed his marriage but performed the marriage of his younger brother; the deceased Sankarappa told the accused that since he was not doing any work, his marriage was not performed; on that, the accused hacked on the head of the deceased with axe saying that 'who was he to interfere'; Sankarappa received bleeding injury on the head; and, immediately, the accused ran away from the house. This piece of evidence is consistent to hold that PW.2 is a direct eye-witness to the incident. In the cross-examination, it is elicited that she went to the village at 7.00 p.m. to engage coolies. This fact was not denied by putting any suggestion. At about 7.30 p.m. she heard galata from the house of the accused; she had no disputes with the accused; and, immediately, she went inside the house and found the incident. Thus, the cross-examination of PW.1 further supports the case of prosecution as the defence set up by the prosecution was not put to the witnesses. When specific defence is set up by the accused –

appellant, unless it is put to the witness, more particularly, direct witnesses, the same cannot be believed. In view of the law declared by the Apex Court in **M.B. Ramesh (D) by L.Rs. v. K.M. Veeraje Urs (D) by L.Rs.**² and Calcutta High Court in **A.E.G. Carapiet v. A.Y. Derderian**³, putting a suggestion to the witness and getting denial by the witness is no evidence but the statement of fact recorded by the Trial Judge as to what had happened is conclusive and the conviction shall be placed on accused by considering all relevant circumstances and evidences of case. At the same time, it is the duty of the defence counsel to suggest to the witness who spoke about the incident at a particular time. When the counsel failed to put such suggestion to the direct witness, the defence set up by them cannot be accepted since the prosecution has no chance of explaining the incident.

The second direct witness to the incident is PW.3 who is the neighbour of the deceased. Even, according to his testimony, nine months ago, at about 7.30 p.m. while he was going to school towards his house, he heard galata from the house of the accused; immediately, he went inside the house of the accused; the neighbour of the accused viz. Adinarayanamma, told that the accused was quarrelling with his parents as his parents performed the marriage of his younger son without performing his marriage; in the meanwhile, LW.4 and PW.2 also came there; when the deceased

² AIR 2013 SC 2088

³ Air 1961 Cal 359

Sankarappa asked the accused as to why he was quarrelling with his parents, the accused hacked on his head with an axe causing bleeding injury saying that 'who was he to interfere' and ran away with the axe; and PW.3 identified MO.4 axe which was used for causing bleeding injury on the deceased Sankarappa. Even, in the cross-examination, except eliciting that there are no street lights in front of the house of the accused, nothing was elicited to disprove the presence of accused at the time of causing murder of Sankarappa with an axe. A suggestion was put to the witness that he did not witness the incident. Putting suggestion and getting denial is of no consequence. Hence, the evidence of PWs.2 and 3 is consistent as to causing bleeding injury with an axe – MO.4 on the head of Sankarappa due to his interference in the quarrel between the accused and his parents. The factum of homicidal death of Sankarappa is not disputed by the appellant but, on the other hand, homicidal death is established by examining the doctor – PW.7 who conducted post-mortem examination and issued Ex.P.6 – Post-Mortem Certificate opining that the cause of death was due to hack injury on the head. At the same time, inquest report – Ex.P.3, held in the presence of PW.5 and blood relatives, also discloses that the cause of death was due to injury caused on the head with MO.4. The inquest panchayatdars unanimously opined that the cause of death was due to injury on head. Therefore, the prosecution established the homicidal death of Sankarappa.

The evidence collected by investigating agency - PW.9 i.e. recovery of MO.4 and material objects, including blood stained cement floor piece and control cement floor piece, marked as MOs.5 and 6, and collected MOs.1 to 3 after conducting post-mortem examination and referred the same for the opinion of expert; and finding blood on MOs.1 to 3 and MOs.4 and 5 is another additional factor to establish that the death of Sankarappa was homicidal.

The accused on his arrest, during interrogation, made a confessional statement that he would show the weapon used in commission of offence, if anybody accompany him, and marked as Ex.P.4, admissible portion of confessional mahazar in the presence of PW.6 and LW.15. PW.6 supported the prosecution case in toto, more particularly, confession leading to discovery and production of MO.4 - axe in his presence before PW.9. This fact was not disputed and, in the entire cross-examination of PW.6, nothing has been elicited to disbelieve the evidence of PW.6 with regard to seizure of weapon based on confession leading to discovery under Section 27 of the Indian Evidence Act (the Act). The house of the accused was not accessible to anyone except to his family members. Though recovery of MO.4 is not a substantive piece of evidence, it is one of the circumstances to be taken into consideration to decide the complicity of the accused.

The confession leading to discovery is referred under Section 27 of the Act, and it is an exception to Section 25 of the

Act. The conditions necessary for invoking the aid of the Section are as follows.

- a) there must be a discovery of a fact albeit relevant fact in pursuance of an information received from a person in police custody;
- b) the discovery of such fact must be deposed to ;
- c) at the time of giving information the accused must be in police custody;

Then the effect is that so much of the information as relates distinctly to the fact thereby discovered is admissible. What is allowed to be proved is the information or such part thereof as related distinctly to the fact thereby discovered.

But it is not a substantive evidence, as held by the Bombay High Court in **Dinakar v. State**⁴.

Similarly, in **Inspector of Police, Tamil Nadu Vs. Balaprasanna**⁵, the Apex Court held as follows:

“Law is well settled that the prosecution while relying upon the confessional statement leading to discovery of articles under Section 27 of the Evidence Act, has to prove through cogent evidence that the statement has been made voluntarily and leads to discovery of the relevant facts. The scope and ambit of Section 27 of the Evidence Act had been stated and restated in several decisions of the Supreme Court. However, in almost all such decisions reference is made to the observations of the Privy Council in *Pulukuri Kotayya vs. Emperor*, AIR 1947 PC 67. At one time it was held that the expression 'fact discovered' in the second is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in *Pulukuri Kotayya's* case. The various requirements of the section can be summed up as follows:-

- 1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
- 2) The fact must have been discovered.
- 3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.
- 4) The person giving the information must be accused of any offence.
- 5) He must be in the custody of a police officer.
- 6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
- 7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.”

⁴ AIR 1970 BOMBAY 438

⁵ 2009(1) ALD (CrI.) (SC) 113

In view of the principle laid down in the above decision, when a fact is discovered in pursuance of confession leading to discovery is only relevant piece of evidence, but it is not a substantive piece of evidence.

In the latter judgment, in **Brijesh Mavi Vs. State of NCT of Delhi**⁶, the Apex Court, held that recovery evidence is not sufficient to prove culpability of accused as there is no direct evidence connecting accused to murder. Recovery of weapon of offence at the instance of accused two years after incident is not believable. Mere recovery of weapon, therefore, not sufficient to convict the accused for the offence of murder under Section 302 IPC.

Thus, in view of the law declared by the Apex Court in judgments referred supra and Bombay High Court, recovery of weapon used in commission of offence itself would not suffice to hold the accused guilty. Even, if circumstantial evidence is ignored, the direct evidence of PWs.2 and 3 is sufficient to hold that the accused perpetrated the murder of Sankarappa due to his interference while he was quarrelling with his father for performing the marriage of his younger brother without performing his marriage. There was no enmity or premeditation to kill Sankarappa but it occurred due to his intervention in the quarrel between him and his parents and provoked to cause such injury. Therefore, the offence committed by the petitioner

⁶ 2012(2) ALD (CrI)865 (SC)

is not premeditated and had no intention to kill Sankarappa but, in a spur of moment, the incident occurred.

It is the consistent case from the beginning that the deceased Sankarappa interfered while accused was quarrelling with his parents and, suddenly, the accused hacked with an axe –MO.4 on the head of Sankarappa. Till then the accused had no intention to kill Sankarappa but, on account of his sudden interference in the quarrel, he hacked him but the Trial Court found the accused guilty of the offence punishable under Section 302 IPC.

Section 300 IPC deals with 'Murder' and the following are the circumstances to constitute murder:-

Firstly Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing or-

Secondly- If it is done with intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly - If it is done with the intention of causing bodily injury to any person and the bodily intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death of such injury as aforesaid.

According to the ingredients of clause (1) of Section 300 IPC, there must be an intention for causing homicide, whether the offence is murder or homicide not amounting to murder. Here, it is not the case of prosecution that, at any stage, the accused-appellant had any intention to kill Sankarappa with pre-meditation but the reason for causing fatal injury on the head of Sankarappa was due to his interference in the quarrel.

In such case, the prosecution case would fall within part II of Section 304 IPC.

When accused had no pre-meditation to kill deceased or cause any bodily harm or injury to Sankarappa, everything happened in a spur of moment, possibility of accused losing self-control on some provocative utterances of deceased cannot be ruled out and, in such case, the accused is liable to be convicted under Section 304 Part II IPC instead of Section 302 IPC (**Yomeshbhai Pranshankar Bhatt v. State of Gujarath**⁷).

In the facts of the above decision, the deceased was working in the house of accused as a maid. As she was absent from duties, accused visited her house, asking her to rejoin duty and when she refused to join duty, altercation ensued between them. Then, accused allegedly picked can of kerosene lying nearby, poured kerosene on the deceased and lit fire on her body, which resulted in death of servant-maid. The incident occurred only due to utterances between the accused and deceased and not pre-meditated to kill the deceased or cause injury over the body of deceased, thereby the Apex Court concluded that the accused is liable to be convicted for the offence punishable under Section 304 Part-II of Indian Penal Code.

In **Veeran v. State of M.P**⁸, the Apex Court had an occasion to decide the case with similar facts and held as follows:

“When there was a fight between parties not pre-meditated and the incident occurred at spur of moment following heated arguments and altercations between parties, such incident could be

⁷ 2011(2) ALD (CrI.) 238 (SC)

⁸ 2011(2) ALD (CrI.) 344 (SC)

the result of grave and sudden provocation without any intention in mind of accused to commit murder of deceased. The accused were not aware that injuries caused by them were sufficient in ordinary course of nature to cause death. Therefore, the case falls under Exceptions 1 and 4 of Section 300 of IPC and held guilty for the offence punishable under Section 304 Part-I of IPC.”

When the incident of murder preceded by some altercation taking place on deceased objecting to construction of drain by accused and others in violation of an injunction order in operation, on which three appellants, one armed with Gandasi and other two with Dangs caused injuries to deceased. The weapons used were, in fact, implements of common use which are normally carried by villagers. Accused had used Gandasi from its blunt side, as would be clear from evidence of doctor. Therefore, prior intention to commit murder cannot be inferred and liable for the offence punishable under Section 304 Part-II of Indian Penal Code. (vide **Gurdial Singh and others Vs. State of Punjab**⁹) .

Thus, the view expressed by the Hon’ble Apex Court in **Yomeshbhai Pranshankar Bhatt v. State of Gujarat**¹⁰ and **Veeran**⁸ referred supra, are a little bit conflicting, but the larger bench judgment reported in **Gurdial Singh**⁹ referred supra, is totally in consonance with the principle laid down in the decision **Yomeshbhai Pranshankar Bhatt**¹⁰. However, the larger bench judgment is binding on the Courts. In the facts of the present case, as discussed above, accused had no intention to kill the deceased Sankarappa but, suddenly, the deceased Sankarappa interfered while accused was having altercation

⁹ 2011(2) ALD (CrI.) 136 (SC)

¹⁰ 2011(2) ALD (CrI.) 238 (SC)

with his parents. As such, the act of accused is not pre-meditated and the incident of hacking ensued suddenly in grave provocation.

Applying the principle to the present facts of the case, the incident of causing hack injury on the deceased Sankarappa took place only due to provocative utterances between Sankarappa and the accused but, ultimately, resulted in death of Sankarappa. There is absolutely no evidence that the accused/appellant had any intention to kill him or pre-meditated to kill Sankarappa. Therefore, the prosecution proved that the accused/appellant caused hack injury on the vital parts of the body of deceased Sankarappa i.e. head with a dangerous weapon MO.4 – axe which led to his death but not with an intention to kill. Thereby, we hold that the accused is guilty of culpable homicide not amounting to murder punishable under Section 304 Part II IPC. Therefore, the conviction recorded by the Court below for the offence punishable under Section 302 IPC is set-aside, converting the conviction of the accused/appellant from Section 302 IPC to Section 304 Part-II IPC.

In the result, the Criminal Appeal is partly allowed, setting aside the conviction and sentence in Sessions Case No.609 of 2012 passed by the Additional Sessions Judge, Hindupur, finding the accused not guilty for the offence punishable under Section 302 IPC, while finding him guilty for the offence punishable under Section 304 Part-II IPC, sentencing him to undergo rigorous imprisonment for a period

of ten (10) years with fine of Rs.2,000/- (Rupees Two Thousands only) with default sentence to undergo simple imprisonment for six months. The appellant is entitled to set-off under Section 428 Cr.P.C.

Miscellaneous applications pending if any, shall stand closed.

M. SATYANARAYANA MURTHY,J

T.AMARNATH GOUD,J

Dated:24.02.2018
usd

