

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE MS. JUSTICE J. UMADEVI

CRIMINAL APPEAL No.8 of 2013

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

1) Accused Nos.1 and 2 in Sessions Case No.432 of 2012 on the file of the Principal Sessions Judge, Medak at Sangareddy, are the appellants herein. They were tried for the offences punishable under Sections 302 read with 34 IPC. By its judgment, dated 14.12.2012, the learned Principal Sessions Judge, convicted both the accused for the offence punishable under Section 302 read with 34 IPC and sentenced them to suffer 'imprisonment for life' and to pay a fine of Rs.5,000/- each in default to suffer rigorous imprisonment for a period of three months.

2) The gravaman of the charge against the accused is that in furtherance of their common intention, on 14.03.2012 at 5.00 hours at Inole village, the accused caused the death of one Dappu Yadaiah (hereinafter referred to as "the deceased") by beating him with hands and sticks.

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

i) PW.1 is the wife of the deceased. PW.2 is the brother of the deceased, while the deceased is nephew of PW.3. On the date of incident at about 5.00 a.m., the deceased left the house stating

that he is going to Kanjarla. According to PW.1, she came to know through the deceased that accused Nos.1 and 2 quarreled with him on the ground that he had illicit intimacy with the wife of accused No.1, but PW.1 did not pay much attention to it. On that day at about 6.00 a.m., their caste woman came and informed that accused Nos.1 and 2 beat the deceased and killed him. On that PW.1 went to the house of the accused, by which time the deceased was lying on the road in an unconscious stage and the blood was oozing from the mouth and nose. She shifted the body of the deceased on to her lap and saw a pool of blood underneath the deceased. The wife of accused No.2 brought water and washed up the blood. Out of fear, she laid the deceased again on the ground. Then one Suresh (PW.4) came there. PW.1 wanted to lift the deceased with his help. At that point of time, the accused came there and abused PW.1 saying as to where she would take the deceased. However, with the help of PWs.4 and 5, she brought the deceased to her house, telephoned to ambulance and shifted the deceased to Government Hospital, Sangareddy, where he succumbed to injuries at 11.00 a.m. On the way to the hospital, PW.1 is said to have lodged a report with PW.11-the Inspector of Police. Ex.P1 is the report. Basing on which, a case in Crime No. 82 of 2012 came to be registered for an offence punishable under Section 302 IPC and issued Ex.P6-the first information report. PW.11 recorded the statement of PW.1 and then proceeded to Government Hospital, for recording the statement of PWs.2 and 3. At the hospital, he recorded the statements of PWs.2 and 3 and got

photographed the dead body. He also held inquest over the dead body of the deceased in the presence of PW.6 and another. Ex.P3 is the inquest report. Thereafter, he sent the body to Gandhi Medical College, for postmortem examination.

ii) PW.10-the Assistant Professor, Gandhi Medical College, Secunderabad, conducted autopsy over the dead body of the deceased. According to him, the cause of death was “due to head injury”. Thereafter, PW.11 proceeded to Inole village and conducted scene of offence panchanama and drafted rough sketch of the scene in the presence of PW.6. Ex.P2 is the rough sketch. On 16.03.2012 PW.11 went to the house of accused No.1 and apprehended him. He recorded the confessional statement of accused No.1 in the presence of PW.7. Pursuant to the said confession, PW.11 recovered M.O.1-Stick. On 20.03.2012, PW.11 apprehended accused No.2 at his house and recorded his confessional statement in the presence of PWs.8 and 9. Basing on the said confession he recovered M.O.2-stick. After collecting all the material, PW.11 filed a charge sheet before the Court of Additional Judicial Magistrate of First Class, Sangareddy, who intun committed the case to the Sessions Division under Section 209 of Cr.P.C., wherein it came to be numbered as S.C.No.432 of 2012.

4) On appearance, a charge under Section 302 read with 34 IPC came to be framed, read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

5) To substantiate its case, the prosecution examined PWs.1 to 11 and got marked Exs.P1 to P7 and MOs.1 and 2. After the closure of evidence, the accused were examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against them, in the evidence of the prosecution witnesses, to which they denied. Neither oral nor documentary evidence was adduced on behalf of the accused.

6) Placing reliance on the evidence adduced by the prosecution, the Sessions Judge convicted the accused for the offences, in the manner referred to above. Challenging the same, the present appeal came to be filed.

7) Learned counsel for the appellants mainly submits that there are no eye witnesses to the incident and the entire case is based upon the information said to have been furnished by accused to PWs.2, 3 and 5. According to her, no effort was made by the police to examine the eye witnesses, who were present at the scene of offence, though the incident took place in front of the house of accused. Insofar as the recovery is concerned, it is pleaded that same loses its significance as the panch witnesses deposed that they are not aware about the contents of the panchanama. Since PWs.8 and 9 did not support the case of prosecution, recovery of M.O.2 at the instance of accused No.2 becomes doubtful. Even if the said information falls under Section 6 of the Evidence Act, it is urged that having regard to the nature of injuries found on the body of the deceased and the manner in

which the incident took place, the offence, at the most, would fall under Section 304 IPC. Learned counsel for the appellants places reliance on the Bar the 161 Cr.P.C. statement of PW.2, to show that in the earlier statement he never disclosed about the disclosure made by the accused with regard to killing of the deceased.

8) On the other hand, the learned Public Prosecutor would submit that though there are no eye witnesses to the incident but the fact that the accused immediately disclosed the commission of offence to the witnesses, the same would fall within the meaning of Section 6 of the Evidence Act and can be made the basis to convict the accused, more so when the injuries are on vital parts of the body.

9) The point that arises for consideration is whether the accused are responsible for the death of the deceased, if so, whether they are liable for punishment under Section 302 read with 34 IPC.

10) Admittedly, there are no eye witnesses to the incident. The entire case rests on the evidence of PWs. 1 to 3 and 5. PW.1 in her evidence states that on the date of incident at about 6.00 a.m., one of her caste woman came and informed that accused Nos. 1 and 2 beat and killed the deceased. On that information she went to the house of accused, by which time the deceased was lying un-conscious and blood was oozing from mouth and nose. The caste woman, who is alleged to have disclosed/ furnished the

information about the accused attacking the deceased, was not examined. Even PW.1 in her evidence never disclosed the name of lady, who informed her about the incident. Her evidence is also silent with regard to accused attacking and killing the deceased, but fact remains that the deceased himself is alleged to have gone to the house of accused as the body was lying in front of the house of the accused. Even in the evidence-in-chief, there is no material to show that the accused killed the deceased except that the body being present in front of the house of the accused. Insofar as the information given to PW.1 by her caste woman, it is to be noted that PW.1 did not state before the police about her caste woman informing the manner in which the incident took place and also about the quarrel between accused Nos.1 and 2 and the deceased with regard to illicit intimacy of deceased with the wife of accused No.1 and also about bringing of water by wife of accused No.2 and washing the road where the blood was present.

11) PW.2, who is also a resident of Inole Village and who is younger brother of the deceased, in his evidence states that on the date of incident at about 6.00 a.m., he was informed by PW.1 that she came to know through one woman that accused Nos.1 and 2 beat and killed the deceased. On that, he went to the house of the accused and found the deceased on the road in front of the house of the accused. When questioned, the accused stated that the deceased went into their house, hence they beat him. PW.2 was also subjected to cross-examination, but nothing useful was elicited, except as to the persons, who went to the police station

to give report and also as to who drafted the report. From the evidence of this witness, it is clear that when he questioned the accused, they informed him that they beat the deceased when the deceased entered to their house. His evidence is silent as to the circumstances which made the deceased enter their house. On the other hand, the evidence of PW.1 would show that on earlier occasion there was a quarrel between the accused and the deceased on the ground that the deceased had illicit intimacy with the wife of accused No. 1.

12) At this stage, learned counsel for the appellants placed on record the 161 Cr.P.C., statement of PW.2 to show that in his earlier statement, PW.2 never stated before the police about the accused informing the manner in which the incident took place, more particularly their statement disclosing the commission of offence or attacking the deceased when he tried to enter into their house. According to the counsel, in the interest of justice 161 Cr.P.C. statement may be looked into. It is well established law that, the statement recorded by the police under Section 161 Cr.P.C., can only be used to contradict the maker.

13) In *Tahasildar Singh and another v. State of UP*¹, the Apex Court held as under:

“The intention of legislature in framing Section 162 was to protect the accused against the user of the statements of witnesses made before the police during investigation, at the trial, presumably on the assumption that the said

¹ AIR 1959 SC 1012

statements were not made under circumstances inspiring confidence. The section as well as proviso is intended to serve the interest of the accused. The section, while, it enacts an absolute bar against the statement made before a Police Officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided under Section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It is to be noted here that the said statement cannot be used for corroboration for prosecution or a defence witness or even a court witness. Nor can it be used for contradicting a defence witness or a court witness.”

23) Therefore, the statement of witness made before the Investigating Officer under Section 161 Cr.P.C., can be used for the purpose of contradiction, but not for corroboration. The statement recorded under Section 161 Cr.P.C., is expressly made inadmissible except to contradict the maker thereof, as envisaged under Section 145 of the Evidence Act. The procedure that is to be followed, which would be in conformity with Section 145 of the Evidence Act i.e. to contradict the evidence given by the prosecution witness at the trial, with the statement made by him before the police during the investigation. That is, to draw the attention of the witness to that part of the contradictory statement, which he made before the police and question him whether he in fact made the statement. If the witness admits, having made the particular statement of the police, that admission will go into the evidence and will be recorded as part of the evidence of the witness and can be relied upon by the accused for

establishing the contradiction. However, if, on the other hand, the witness denies to have made such a statement before the police, the particular portion of the statement recorded should be marked for identification and when the Investigating Officer comes into the witness box he should be questioned as to whether such a statement was made to him by the witnesses during the course of investigation. The answers given would prove the statement and the same shall be treated as evidence.

14) In view of the above, the argument of the learned counsel for the appellant, cannot be accepted as its face value.

15) That being the position, the evidence of PW.2 discloses that when he went to the scene of offence, on receipt of information from PW.1, he noticed the deceased lying on the road and when he questioned the accused, they told him that when the deceased went into their house, they beat him. This statement was made by the accused immediately after the incident. Therefore, we feel that the finding of the trial Court that this part of evidence can be brought under the category of *res gestae* cannot be found fault with. Even otherwise, the statement made by the accused voluntarily and not while in the custody of the police, can also be treated as an extra judicial confession. Therefore the statement of PW.2 can also be treated as an extra judicial confession.

16) PW.3 in his evidence states as under:

“About 8 months back at about 5.00 a.m., the daughter PW.1 came and informed me that the accused beat the deceased and that PW.1 went to the house of the accused. On that I also rushed to the said place. I found the deceased lying on the road, near the house of the accused. There were blood stains near the deceased. We questioned the accused as to why they beat him, they stated as the deceased went into their house they beat him.”

17) But, however when the earlier statement of PW.3 was put to PW.11-the investigating officer, admits that PW.3 did not state before him that they questioned the accused as to why they beat the deceased and that they stated that the deceased went into their house and hence they beat him.

18) Similarly, PW.5 in his evidence states as under:

“About 6 months back while I was sleeping, at about 6.00 a.m., PW.1, who is my sister-in-law, came to my house and informed that some Yerukula people were beating the deceased. On that I accompanied her and went to the house of the accused as they are the only Yerukulas in our village. By that time the deceased was lying on the road with bleeding injuries. I also questioned the accused as to why they beat the deceased. They informed that as the deceased came to their house they beat him. Accused No.1 had a suspicion about illicit intimacy between the deceased and his wife and that he always had a grudge against the deceased.”

19) But in his earlier statement recorded by the police during the course of investigation, PW.5 did not state that he questioned the accused as to why they beat the deceased and the

accused informing him that when the deceased tried to enter into their house they beat him.

20) From the evidence of these witnesses, it is clear that PWs.3 and 5 did not state in their earlier statements about questioning the accused and the accused informing them about killing the deceased, when he tried to enter into their house. The said version came out for the first time in the Court. Hence, the same cannot be made the basis to connect the accused with the crime. Similarly, PW.1 in her evidence never stated about any such statement being made by the accused before her and she also never stated about questioning the accused as to why they killed the deceased.

21) If the evidence of PWs.1, 3 and 5 is excluded from consideration, there remains the evidence of PW.2. It may be true that PW.2 might not have stated in his earlier statement about accused disclosing the commission of offence, but such material is not there on record. Evidence Act prescribes as to how a statement recorded under Section 161 Cr.P.C., has to be used. In view of the evidence of PW.2 it can be said that the information disclosed by the accused, informing about the incident by 6.00 a.m., itself can be brought under the category of *res gestae* and can be used to establish the guilt of the accused. Therefore, we feel that the accused are responsible for the incident.

22) But the question is whether they can be convicted for the offence punishable under Section 302 IPC.

23) Admittedly, in the instant case the deceased himself went to the house of accused and when he entered into the house, the accused are said to have attacked him. The person, who was responsible for the incident in question, is the deceased himself. The evidence of PW.1 would show that the deceased was having illicit intimacy with the wife of accused No.1 and that must have been the reason which made him to enter the house of accused No.1, without knowing the presence of accused Nos.1 and 2 in the house which lead to the incident in question.

24) From the evidence available on record, one cannot say as to whether the accused had any intention to cause the death of the deceased. The circumstance of deceased entering the house must have provoked them to attack the deceased. At this stage, we intend to refer to the evidence of the doctor, who issued Ex.P5- post mortem certificate. As per the postmortem certificate, there were six injuries on the body of the deceased, which are as under:

- “1. Contusion of the left upper chest 4 cm about nipple
12 x 4 cm.
2. Contusion of the left back of the Ear 8 x 6 cm
3. Laceration of the chest 2 cm. below the Left lower lip
2 cm x 1 ½ cm
4. Contusion of the Right Occipital parietal scalp 15 x 10
cm.
5. Subdural Heamatoma of the left temporal parietal
lobe.
6. Fracture of the occipital bone 81 cm x 6 cm.”

25) As per the opinion of the doctor, the death was due to head injury, but there was only one contusion on the right occipital parietal scalp and the fracture must have been due to said injury.

26) Having regard to the manner in which the incident occurred, which we have already referred to above and since there was only one injury on the head, we feel that even accepting the entire case, it cannot be said that the accused had any intention or motive to cause the death of the deceased. At the most they may be having knowledge that such injury would lead to death.

27) In *Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat*², the Apex Court held as under:

“When accused had no pre-meditation to kill deceased or cause any bodily harm or injury to deceased, everything happened on 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 Sec.304 Part II instead of Section 302 of IPC.”

28) In view of the judgment referred to above and having regard to the manner in which the incident in question took place, we are of the opinion that the case of the appellants/accused falls squarely under Section 304 Part-II of IPC. Hence, the conviction under Section 302 read with 34 IPC is set aside and the appellants are convicted under Section 304 Part-II IPC and sentenced them to undergo rigorous imprisonment for a period of six years. The period undergone by the accused shall be given set off under

² 2011(2) ALD (Cri.) 238 (SC)

Section 428 Cr.P.C. Consequently, the appellants shall be set at liberty forthwith, if not required in any other case, on completion of six years rigorous imprisonment, including remissions, if they are entitled to.

29) Accordingly, the Criminal Appeal is partly allowed. Consequently, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

23.02.2018
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JUSTICE J. UMADEVI

