

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI

CRIMINAL APPEAL No.1325 of 2011

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

Originally A1 to A6 in S.C.No.51 of 2011, on the file of VII Additional District and Sessions Judge, Madanapalle were tried for the offences under Sections 302, 354, 324 and Section 323 read with Section 34 IPC.

2. Vide judgment dated 15.11.2011, the learned Sessions Judge passed the following:

Convicted A2 for offence punishable under Section 354 IPC for outraging the modesty of one Padmalatha (PW8) and sentenced him to undergo rigorous imprisonment for a period of 5 years;

Convicted A3 for the offence punishable under Section 302 IPC in lieu of the offence punishable under Section 302 read with Section 34 IPC for causing injuries to PWs.2 and 3 and sentenced him to suffer imprisonment for life;

Acquitted A1, A2, A4 to A6 for the offences punishable under Sections 302, 302 read with Section 34, 324 and 323 of IPC respectively, whereas, A3 was found not guilty for the offences punishable under Sections 323 and 324 of IPC.

Challenging the conviction and sentence passed against A2 and A3, the present appeal came to be filed.

3. The gravamen of the charge against accused is that on 30.07.2009 at about 07.30 a.m., at Hanumantharayanidinne village, A2 is said to have misbehaved with one Padmalatha by catching hold of her saree and attempted to outrage her modesty. Thereafter at about 09.00 p.m., the incident in question took place, wherein the accused is alleged to have stabbed the deceased below his throat, on his back apart from pressing his neck and throat by A3.

4. The case of the prosecution in brief is as under:

(i) PWs.7 and 9 are parents of PW8. PW3 is the cousin brother of the deceased. PW.1 is the son of junior paternal uncle of PW2.

(ii) On the date of incident at about 07.30 a.m., PW8-Padmalatha and her mother went to the sunflower crop raised by them to flew away the birds. When the mother of PW8 went to collect grass for the cows, A2 came to her, caught hold of her hand and dragged her with an intention to commit rape. On hearing cries of PW8, her mother came to the spot and on seeing her, A2 ran away. Thereafter, PWs.8 and 9 narrated the entire incident to PW1, who is uncle of PW8. On the same day at about 08.00 p.m., on coming to know about the incident, the father of PW8 proceeded to the house of A2 and demanded for holding a panchayat. Thereafter, PW7 along with PWs.1,2,3 and deceased went to the house of A1 and demanded for a panchayat. At that time, A5 and A6 brought chilly powder and threw on them. In the meantime, A5 brought kitchen knife and

attempted to kill PW1 but he escaped from the attempt. A1 snatched the knife from the hands of A5 and stabbed the deceased. He also stabbed on the right shoulder of the deceased due to which he fell down on the ground. Thereafter, A3 is said to have put his leg and pressed the neck of the deceased. A4 beat the deceased with iron rod on the knees of the deceased, A3 fisted PW3 on his back, while A4 beat PW3 with iron rod on his flank. Thereafter, A2 brought a cycle chain and beat PW2 on his earlobes and on the backside. On hearing the cries, the villagers gathered and took the injured/ deceased to the Government hospital, Punganur, for treatment, where the doctor declared the deceased as brought dead. All the injured were admitted in the hospital for treatment. Pursuant thereto, PW1 prepared a report and lodged the same before PW20, basing on which a case in Crime No.148 of 2009 came to be registered for an offence punishable under Section 302 IPC read with Section 34 IPC and issued Ex.P12 the FIR. Further investigation in this case was taken up by PW21 the Inspector of Police, Punganur. After receiving a copy of FIR, he instructed PW20 to guard the scene through posting constable to prevent law and order problem in the village. On the next day, at about 07.00 a.m., PW21 visited the scene of offence, observed the dead body of the deceased and in the presence of witnesses and panchayathdars, conducted inquest over the deadbody of the deceased. Ex.P5 is the inquest report. During inquest, PWs.1,2,3, 4, 5, 6 and 7 were examined and their statements were recorded under Section 161 Cr.P.C. In the presence of PWs.8 to 13, PW21 prepared a rough sketch of the scene of offence under

Ex.P13, observation report, which is placed on record as Ex.P6. Thereafter, he seized blood stained knife, cycle chain and iron rod, which are marked as MOs.2, 3 and 1 respectively, including chilly powder from the ground. He also got photographed the scene of offence under Ex.P14. Subsequently, the body of the deceased was sent for post mortem examination. PW18 the Civil Assistant Surgeon, Community Health Center, Punganur, conducted autopsy over the body of the deceased and issued Ex.P9 the post mortem certificate. According to him, the cause of death was due to Asphyxia due to throttling, shock and hemorrhage with multiple injuries. On 03.08.2009 at about 01.00 p.m., while PW17 the VRO was present in his house, A1 to A6 are said to have come to him and confessed about the commission of offence and asked him for help. Accordingly, PW17 prepared a report and took the accused to the concerned police station where the CI of police arrested the accused under Ex.P8. On interrogation, the accused are alleged to have confessed about the commission of offence. After collecting all the material objects a charge sheet came to be filed which was taken on file as PRC No. 5 of 2010, on the file of Judicial Magistrate of First Class, Punganur.

(iii) On appearance, copies of documents were furnished to the accused as contemplated under Section 207 of Cr.P.C. On committal under Section 209 Cr.P.C., the case was taken on file as S.C.No.51 of 2011 on the file of VII Additional District and Sessions Judge, Madanapalle. On the basis of the material available on record, the aforementioned charges came to be framed, read over and explained

to the accused, to which they pleaded not guilty and claimed to be tried.

(iv) In support of its case, the prosecution examined PWs.1 to 21 and got marked Exs.P1 to P15 and M.Os.1 to 10. Out of 21 witnesses examined by the prosecution, PWs.10 and 11 did not support the prosecution case and were treated hostile by the prosecution.

(v) 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. Ex.D1 is the portion of 161 Cr.P.C. statement of PW1 which came to be marked on behalf of defence.

(vi) Basing on the evidence of PWs.1 and 2, the learned Sessions Judge convicted A2 for the offence punishable under Section 354 IPC and A3 for the offence punishable under Section 302 IPC. He acquitted A1, A2, A4 to A6 for all the charged framed against them. He also acquitted A3 for the offences punishable under Sections 323 and 324 IPC respectively. Challenging the conviction and sentence awarded against A2 and A3, the present appeal came to be filed.

5. Learned counsel for the appellant mainly submits that having acquitted the other accused of all the charges, the learned Sessions Judge erred in convicting A3 for the offence punishable under Section 302 IPC read with Section 34 IPC, moreso, when the oral evidence of PWs.1 and 4 is inconsistent with the medical evidence. He further

submits that in the FIR lodged by PW1, who went to the house of A1 along with PW7, where the incident in question took place, there is no reference to the role of A3 in the commission of offence. In other words, he pleads that Ex.P1 does not refer to A3 pressing the neck of the deceased, with his leg. Apart from that, learned counsel for the appellants would submit that the finding of the trial Court that PWs.1, 5 and 7 are interested witnesses to speak about the attack on the deceased is sufficient to throw out the case even against A3. Insofar as A2 is concerned, learned counsel tried to rely upon the admission made by PW8 in his cross examination wherein he admitted that the son of one Changalrayappa misbehaved with her and the deceased beat him.

6. On the other hand, learned Addl.Public Prosecutor submits stating that though the trial Court erred in acquitting other accused, but when the evidence of PWs.1 to 4 is consistent with regard to the participation of A3, there is no justification to interfere with the findings of the trial Court. He also took us to the evidence of PWs.1 to 4 in particular, to show that their evidence is consistent with regard to participation of the accused. Apart from that, he would contend that when the witnesses, who went there sustained injuries, there is no reason to discredit their evidence.

7. In order to appreciate the rival submissions, it would be just and proper to extract FIR and also the evidence of the witnesses. Before that, it would be appropriate to extract the findings of the

learned Sessions Judge in para Nos.18 to 20 of the judgment, which are as under:

18. PWs.1 to 5, 7 and 12 are interested witnesses to the case of prosecution and they are related to each other. PWs.6,10 and 11 did not support the case of prosecution. The evidence of PW13 is not reliable because she did not state the specific overt acts of each accused, except the presence of A2 and A5. According to PW13, A2 pulled the kitchen knife from the hands of A5 and tried to stab PW1. If really she was present at the time of the incident, she would have spoken that A1 took knife from the hands of A5 and stabbed the deceased Venkata Ramana. The only available evidence on record is the evidence of PW1 to PW4 and PW7, the interested witnesses.

19. The evidence of PW18 coupled with Ex.P9 made it clear that the deceased would appear to have died of Asphyxia due to throttling, shock and hemorrhage with multiple injuries. PWs.1 to 3 and PW7 stated that A3 pressed the neck of the deceased with his leg. If the medical evidence is taken into consideration, it can be said that A4 is the person responsible for the death of the deceased Venkata Ramana, because the death was not caused due to the kitchen knife said to have been used by A1 at the time of commission of the act. In view of the evidence of PWs.1 to 3 and PW7, A1 stabbed with kitchen knife near the neck of the deceased Venkata Ramana. It is a simple injury and measurements could not be taken as per the medical evidence. No blood was oozed out from the center of the neck. No blood was found on MO2, the kitchen knife. Intention of A1 to kill the deceased Venkata Ramana with MO2 kitchen knife was not proved by the prosecution, because the prosecution failed to explain how A1 received injury on his head. That too it is the version of prosecution that A5 brought the kitchen knife but not A1. So, A1 is not liable for punishment under Section 302 of the IPC. Since the prosecution has failed to explain the head injury received by A1 at the time of the incident, A2, A4 to A6 are not liable for the offence punishable under Section 302 read with Section 34 of IPC.

20. PW3 admitted that MOs.1 and 2 do not contain blood stains. The case of prosecution is that the blood oozed out from the body of the

deceased due to MOs.1 and 2 was not proved. PW18 did not notice cycle chain impressions on the neck of the deceased. The doctor stated that the injuries 6 to 9 found on the body of the deceased are not possible by MOs.1 to 3. The prosecution has failed to explain as to how the deceased received injury Nos.6 to 9 as mentioned in Ex.P9. As per Ex.P1, A5 and A6 brought chilly powder and thrown on them who went to the house of A1. PWs.1 to 3 stated that A6 thrown the chilly powder, but they did not state that A5 also thrown the chilly powder. There are different versions in the evidence of PWs.1 to 3, PWs.7, 12 and 13 with regard to throwing the chilly powder. So the acts of A1, A5 and A6 were not proved by the prosecution beyond all reasonable doubt.

21. PW18 did not notice the foot impression mark on the neck of the deceased, but it cannot be taken into consideration, because the death caused to the deceased was only by Asphyxia due to throttling, shock and hemorrhage with multiple injuries. Though Ex.P1 does not speak A3 pressed the neck of the deceased with his leg, it cannot be said that A3 did not commit such offence, because when the matter had to be reported to the police immediately, PW1 might have forgotten to mention the said fact in the complaint. A3 cannot take advantage of the said fact because all the injured persons stated about the pressing of the neck of the deceased by A3. The doctor's evidence clearly discloses that due to the acts of A3 only the deceased Venkata Ramana died.

22. As per Ex.P1, A2 beat PW2 with cycle chain on his right ear, back and left cheek. As per the evidence of PW1, that PW2 received injury on his fore head, ear lobes and back side, but as per the evidence of PW19, PW2 was found abrasion on the external ear and left scapular area of the back skin deep. PW2 stated that the blood oozed out from the injury, but as per the evidence of doctor and Ex.P11, the injury No.2 did not ooze blood. PW2 informed to the doctor that he was assaulted with sickle. The doctor did not notice any injury on the fore head of PW2. As per Ex.P1, A4 stabbed PW3 with iron rod and caused bleeding injury. PW1 stated that A4 brought iron rod and stabbed PW3 on his left flank. PW3 stated that he received bleeding injury due to stab with iron rod by A1. As per the medical evidence, an abrasion $\frac{1}{2}$ X $\frac{1}{2}$ left lateral aspect of

abdomen was found, but the doctor did not notice any bleeding injury and the said injury was simple. In view of the contradictions in the evidence of PWs.1 to 3, I feel that there was violent fight in a public place and the injuries might have been caused other than the version of prosecution, that is the reason why, no independent witness came forward to speak what was really happened as to whether PWs.1 to 4, deceased and Munuswamy went to the house of A1 only to question about the morning incident or they went to attack them with sickles and sticks at 09.00 p.m. I consider the authorities submitted by the learned advocate for accused only to that extent and benefit of doubt can be extended only to A1, A2, A4, A5 and A6, on the incident that took place at 9 p.m. But the entire evidence of the prosecution cannot be thrown out, because PWs.2 and 3 are the injured persons and their evidence can be considered to hold that the death caused to Venkata Ramana was only due to the acts of A3 who pressed the neck of the deceased with all force till his death and the acts of A3 clearly proved his intention to kill the deceased and the same was corroborate by the medical evidence.”

8. A reading of the above would show that PWs.1 to 5, 7 and 12 were treated as interested witness to the case of prosecution, more particularly, with regard to the attack on the deceased and the evidence of witnesses was found to be inconsistent with each other with regard to overt act attributed to the accused. Though the evidence of the witnesses and the FIR would show that A1 attacked the deceased with knife by taking it from the hands of A5, the Court below, for the reasons stated above, acquitted all the accused, except A2 and A3, for the offences stated above. Coming to the conviction of A3, the learned Sessions Judge held as under:

“Though Ex.P1 does not speak A3 pressed the neck of the deceased with his leg, it cannot be said that A3 did not commit such offence, because when the matter had to be reported to the police immediately, PW1 might have forgotten to mention the said fact in

the complaint. A3 cannot take advantage of the said fact because all the injured persons stated about the pressing of the neck of the deceased by A3. The doctor's evidence clearly discloses that due to the acts of A3 only the deceased Venkata Ramana died".

9. Having rejected the evidence of PWs.1 to 5, 7 and 12 with regard to the participation of all the accused, except A3, in attacking the deceased on the ground that they were interested witness, the point which is now to be seen whether the evidence of these witnesses can be accepted to base a conviction against A3. PW1 is the person who accompanied PW7 to the house of A1, to question him about misbehavior of A2 against his daughter (PW8). At that time i.e., at about 09.00 p.m., the incident in question took place. At about 10.30 p.m., PW1 is said to have lodged a report with PW20. In the FIR which was given by PW1, who claims to be an injured witness, did not mention the participation of A3 namely, putting his leg on the neck of the deceased and pressing it. The said fact is not disputed. The Investigating Officer in his cross examination states that PW1 did not state in Ex.P1 that A3 placed his leg on the neck of the deceased and pressed it. But, coming to the oral evidence now adduced, all the witnesses in one voice depose about presence and participation of all the accused including A3. It would be appropriate to refer to relevant portion in evidence of all witnesses, which is as under:

PW1 in his evidence in chief deposed as under:

"..When we went to the house of accused, Kalavathi (A6) spilled chilly powder against us. It fell on to the eyes of Rajappa, Gangadri and deceased Venkataramana. In the meantime, A5 brought kitchen knife from the house and made attempt to stab me on my flank. I escaped from the attempt.

Krishnappa pulled knife from the hands of A5 and stabbed the deceased near the neck. Due to the injury Venkataramana fell on the ground and received injury on the back. He also sustained injury on his legs and knees. In the meantime, A2 brought cycle chain and beat Rajanna and the deceased. Therefore, Rajanna received injury on his fore head, ear lobes, backside. Venkataramana received cycle chain injuries on his legs. A3 pressed with his leg on the neck of deceased when the deceased fell down on the ground. A4 brought iron rod and stabbed Gangadri on left side flank. On hearing the cries, the villagers gathered and took all of us to Government hospital, Punganur for treatment.”

Similarly, PW2, in his evidence stated as under:

“..On that myself, deceased Venkataramana and PW1 Venkataramana, Gangadhara and one more Gangadhara went to the house of accused to call them to the panchayth. Kanakaraju told me that his father Venkatappa not available in the house and to talk on the matter subsequently. Then I told him that the matter is to be talked atleast on the next day. Immediately Kalavathi (A6), brought chilly powder and spilled towards us. The chilly powder fell on my head and not in my eyes. In the meantime, A5 brought kitchen knife from the house to stab PW1 Venkataramana. He escaped from the attempt. By the time the deceased Venkataramana was behind me, A1 stabbed my brother Venkataramana after snatching the knife from A5. The deceased Venkataramana fell down due to the injury. A3 pressed the neck of the deceased by putting his leg on the neck. A2 Kanakaraju beat me with cycle chain on my right earlobe and back. A4 brought iron rod and stabbed Gangadhara on his flank (left side). Then we all went to Government hospital, Punganur. The doctor declared that Venkataramana was brought dead.”

So does the evidence of PWs.3,4 and others. Though all the witnesses speak about the presence of all the accused in commission of offence, for the reasons referred to in the judgment, the trial Court rejected their evidence to fix the culpability of the accused.

To test as to whether these witnesses are speaking the truth with regard to participation of A3, it would be appropriate to refer to the evidence of PW18, the doctor, who conducted post mortem examination. The doctor in his post mortem report refers to number of injuries on the body of the deceased including transferred linear cut in between the center of the neck and all neck structures being congested. Hyoid bone was fractured on both sides. Further, in the cross examination he states as under:

“As I noticed alcohol in the stomach of the deceased, he must have consumed alcohol within one hour and half an hour prior to his death. If a person is pressed with foot or leg on the neck the compression marks of foot or leg appears or will be found. If a person is pressed with MO3 on his neck by putting on front side of the neck or around the neck the impression marks of cycle chain will be found. I did not notice impressions of foot or leg or cycle chain on the neck and around the neck of the deceased. If a person is pressed with foot or leg on his neck and around his neck, there will be collection of blood in the neck muscles. Similarly if the neck of a person pressed with cycle chain on it and around it, same will happen, in the neck muscles. In case of Asphyxia, death by pressing on the neck, the pupils will be dilated. In case of throttling the tongue might be procluded. I did not notice foot impression mark, cycle chain impression on the neck of the deceased except nail scratch. In case of throttling with hands, there will be impressions of thumb and fingers on the neck.”

10. From the answers elicited in the cross examination, it is clear that he did not notice any foot impression mark, cycle chain impression mark on the neck of the deceased, except nail scratch. He however states that if the person is pressed with foot or leg on and around the neck, there will be collection of blood in the neck muscles. But the doctor neither found foot impression on the neck

nor any collection of blood on the neck. Therefore, the version of the eye witnesses with regard to A3 pressing the neck, because of which the deceased died, appears to be doubtful. It may be true that the medical evidence is the only evidence but in the fact situation, we have no other option to look into it, so as to test the veracity of the witnesses. As observed earlier, in the instant case, the trial Court did not believe the evidence of PWs.1 to 4 with regard to the presence and participation of the other accused in causing the death of the deceased. The Court connects A3 with the crime since the death was due to throttling and oral evidence of witnesses say that A3 pressed the neck of the deceased. But the said oral evidence of PWs.1 to 4 with regard to participation of A3 in causing death of the deceased by pressing on the neck with his leg, is not supported by medical evidence and the same does not find place in the FIR. Having regard to the above, we feel that the testimony to PWs.1 to 4 cannot be taken into consideration, to convict A3. Coming to the arrest of the accused, PW12 in her evidence deposed that all the accused were arrested on the night of the incident itself. Whereas, PW1 in his cross examination admits that the accused were arrested on the fourth day of incident. PW4 in his cross examination states that A3 and A4 came from Punganur and were arrested on that night. The evidence of the investigating officer would show that the arrest was made pursuant to the extra judicial confession made before PW17, who is said to have produced them before him on 03.08.2009, which was about four days after the incident. When the date of arrest is inconsistent, even the extra judicial confession has to be

viewed with suspicion, for the reason that the presence of the accused in illegal custody at the time of making extra judicial confession cannot be ruled out.

11. In view of these discrepancies pointed out, we feel that it is not safe to convict A3 for the offence punishable under Section 302 IPC and accordingly, he is acquitted for the charge under Section 302 IPC.

12. Insofar as A2 is concerned, he is convicted under Section 354 IPC and sentenced to suffer rigorous imprisonment for a period of five years. The case of the prosecution is that on 30.07.2009, at about 07.30 a.m., while PW8 was in her fields to flew away the birds in the sunflower crop, A2 came there, held her hand and dragged her with an intention to rape. When she raised cries, her mother reached there and on seeing her, A2 ran away. Though PW8 was cross examined at length, nothing useful came to be elicited. Relying upon the admission made by PW8 in the cross examination, wherein she stated stating that because the son of Chengalrayappa i.e., Venkatesu misbehaved and that deceased Venkataramana beat him, the counsel tried to contend that it was the son of Chengalrayappa, who is responsible for the incident and not A2. The said circumstance appears to be in relation to some other incident where the deceased is said to have beat Chengalrayappa. But on the date of incident, it was A2, who tried to misbehave with PW8 which is spoken to by PW9, also, who is the mother of PW8 and who came to the scene of offence immediately after the incident. The evidence on record further shows that immediately after the incident, the same was informed to

PW1, who asked them to wait till the arrival of his father. After arrival of her father, PWs.1 and 7 and other villagers went to the house of A1, and questioned behaviour of A2 where the incident of attacking the deceased took place. Merely because the incident that took place in the night was rejected, it does not by itself mean that the incident which occurred in the morning should also be rejected. False in one thing cannot be false in everything. We feel that there are no reasons to disbelieve the evidence of PWs.8 and 9 with regard to the incident which took place in the morning, when the same finds place in the FIR as well. Though the learned counsel for the appellant tried to contend that when the evidence of PWs.1,2,5,7 and 12 is disbelieved, even the evidence of PWs.8 and 9 should be disbelieved, but in the absence of any circumstance to disbelieve the presence of PWs.9 and 8, which version is consistent right from the FIR till trial and merely because the evidence of PWs.1 to 5 was rejected insofar as other accused, does not by itself mean that the evidence of PWs.8 and 9 has to be rejected.

13. In view of the above findings, the Criminal Appeal is allowed in part. The conviction and sentence recorded against appellant No.2/ accused No.3 in S.C.No.51 of 2011 on the file of the VII Additional District and Sessions Judge, Madanapalle, for the offence punishable under Section 302 IPC is set aside. Consequently, appellant No.2/ accused No.3 shall be set at liberty forthwith, if not required in any other case. However, the conviction and sentence recorded against appellant No.1/ accused No.2 in S.C.No.51 of 2011 on the file of the VII Additional District and Sessions Judge, Madanapalle,

for the offence punishable under Section 354 of IPC is confirmed. This Court, vide its order dated 24.11.2011 in CrI.A.M.P.No.2019 of 2011, directed the release of appellant No.1/accused No.2 on bail on certain terms and conditions mentioned therein. In view of confirmation of conviction and sentence, appellant No.1/accused No.2 in this Criminal Appeal shall surrender before the concerned, to serve out the sentence. Further, the Magistrate concerned shall also take immediate steps for apprehending the accused.

14. Miscellaneous petitions, if any, pending shall stand closed.

27.06.2018
vhb



JUSTICE C. PRAVEEN KUMAR

JUSTICE KONGARA VIJAYA LAKSHMI