

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

THE HON'BLE SMT JUSTICE T. RAJANI

CRIMINAL APPEAL No.1268 of 2011

JUDGMENT: (*per Hon'ble Smt Justice T. Rajani*)

This appeal is preferred by appellants against the judgment of the I Additional Metropolitan Sessions Judge, Visakhapatnam in S.C.No.87 of 2009 dated 31.03.2011 convicting and sentencing them to undergo life imprisonment each and to pay a fine of Rs.1000/- each in default to undergo rigorous imprisonment for a period of one month for the offence punishable under Section 302 read with 34 of the Indian Penal Code and also sentenced to undergo rigorous imprisonment for a period three years each and to pay a fine of Rs.1000/- each in default to suffer rigorous imprisonment for a period of one month for the offence punishable under Section 307 IPC.

2. The facts of the case, briefly, as per the charge sheet are as follows:

On 04.07.2008, at about 10 PM, the deceased, A1 and A2 went to Eagle Wines, for consuming liquor and while they were consuming liquor, two persons, known to the deceased, came there and altercated with A1 and also manhandled him. The deceased did not interfere and attack the two persons on behalf of A1. Thereupon, the accused returned to the railway station auto stand and picked up an altercation with the deceased for not interfering with the said two persons and attacking them on behalf of him. While so, on 07.07.2008, at about 11 PM, the deceased and L.W.7 and two others came to the railway station auto stand and enquired about A1 and in the meanwhile,

A1 came there. L.W.7 questioned A1 for picking up a quarrel with the deceased and at that juncture, they had heated arguments and they had a scuffle and the deceased and L.W.7 beat A1 with hands and later they all dispersed. The accused bore grudge against the deceased and L.W.7 and hatched a plan to do away with the lives of the deceased and in pursuance of their common object, both the accused secured G.I pipe and hide the same in the auto of A1 and both the accused were waiting for an opportunity to wreck vengeance against the deceased and L.W.7.

While so, on 08.07.2008, at about 1.00 Hrs, L.W.1 was at the railway station, the deceased, L.Ws.2, 3, and 7 came in an auto and enquired L.W.1 about the accused and L.W.1 replied that he does not know about them and he expected that both the accused might be at RTC complex. The deceased and L.Ws.2, 3 and 7 requested L.W.1 to accompany them and when they reached Eagle Wines in the said auto, found the accused consuming liquor by the side of the road and on seeing them, L.Ws.1, 2, 3, 7 and the deceased stopped the auto and got down. The deceased and L.W.7 went to A1 and requested him to apologise them for the earlier incidents. Then, A1 picked up a G.I water pipe from his back and beat the deceased with the G.I pipe over the head, as a result, the deceased sustained bleeding injury and fell down. Then A1 beat L.W.7 with the G.I pipe over his head, as a result of which, L.W7 also sustained bleeding injury and fell down. Further, A1 and A2 also beat the deceased and L.W.7 with an iron rod on their heads and person. When neighbours i.e. L.Ws.1 to 4 and others tried to rescue the deceased and L.W.7, the accused aimed the

GI pipe and iron rod towards them and out of fear, they could not rescue the deceased and L.W.7. Later, the accused fled away from that place and then all the injured were shifted to the hospital in an ambulance.

On 08.07.2008, based on a report given by L.W.1, a case in Cr.No.355 of 2008 under Sections 307 read with 34 IPC was registered. During the course of investigation, death intimation was received with regard to the deceased, on 09.07.2008 at 1.05 PM, and then Section 302 IPC was added. In the course of further investigation, the scene of offence panchanama was conducted; inquest and post mortem examination were conducted on the dead body of the deceased. The accused were arrested and their confessional statements were recorded and weapons were seized in pursuance of the said statements. The accused were sent for judicial custody and after concluding investigation, the charge sheet was laid for the same offences.

On appearance of the accused, the I Additional Chief Metropolitan Magistrate, Visakhapatnam, after complying with the required legal formalities, committed the case to the Sessions Division by virtue of orders in PRC.No.32 of 2008 dated 23.03.2009. The Sessions Judge, in turn, made over the case to the I Additional Metropolitan Magistrate, Visakhapatnam for trial and disposal in accordance with law. The Court below, on appearance of the accused, framed the charges against them for the same offences and after recording the plea of not guilty by the accused, conducted the trial of the case and examined P.Ws.1 to 11, Exs.P1 to P18 and M.Os.1 to 5

on behalf of the prosecution. After concluding the prosecution evidence, the accused was questioned about the incriminating circumstances appearing in the prosecution evidence, which they denied and they did not choose to examine any witness on their behalf.

3. The Court below, after appreciating the evidence on record and considering the material on record, passed the impugned judgment against which the present appeal is preferred on the following grounds:

The Court below ought to have seen that P.W.2 did not mention the name of the assailants as A1 and A2, before the doctor; the Court below ought to have seen that in Ex.P7 wound certificate of P.W.2, the names of A1 and A2 are not found; the Court below failed to see that the offence took place during the night time and that there was no sufficient light at the scene of offence; the Court below ought to have seen that there was no scope for P.Ws.1 and 2 to identify the accused in the dark night; the Court below failed to see that the medical evidence did not support the prosecution version regarding number of injuries and it also ought to have seen that the conduct of P.W.1 is very abnormal.

4. Heard learned counsel for the appellant and the learned Public Prosecutor.

5. The counsel for the appellants contends that there was no intention on the part of the accused, as even according to the case of the prosecution, the accused did not go and attack the deceased.

It is only when the deceased approached the accused that they, in a fit of anger, attacked the deceased and P.W.2. Hence, the case cannot be brought under Section 300 IPC and punishment cannot be awarded under Section 302 IPC. The counsel further contends that the injuries, as stated by the witnesses and as found on the body of the deceased, as stated by the Doctor, who conducted the post mortem examination, do not correspond and the injuries found on the body of the deceased at the time of post mortem examination are many, while so many injuries were not stated by the witnesses.

6. Learned Public Prosecutor, on the other hand, contends that the evidence of the witnesses would show that they left the scene of offence after the initial attack on the deceased and P.W.2 and hence, it has to be assumed that the injuries were caused subsequent to their leaving the scene of offence and hence, they could not testify about the said fact. He also contends that the intention can be developed on the spot and hence, simply by the fact that the accused did not go and attack the deceased and P.W.2, it cannot be said that they did not have intention to commit the murder of the deceased.

7. Keeping the above arguments in view and the material on record, we frame the following points for determination:

1. Whether the accused had intention to commit the murder of the deceased and P.W.2.
2. Whether the evidence adduced by the prosecution would suffice to arrive at a doubtless conclusion that the accused committed the offences alleged against them.
3. To what result.

POINT No.1:

8. P.W.1 narrates about the events earlier to the incident also and states that he is an auto driver by profession and keeps his auto rickshaw at Visakhapatnam Railway Station. On 07.07.2008, at about 11 PM, his friend Krishna, P.W.2, who is also an auto driver, called him over phone and informed that he beat one person by name Krupa, A1, and that A1 went to the police station to lodge a report against him. Krishna asked him to come to the railway station to effect compromise between them. He was in a cinema theatre at that time and hence, after watching the movie, when he reached home, P.W.2, the deceased, one Karun Kumar and one Vara Kumar were present in his house. When he asked P.W.2 as to why he beat A1, P.W.2 informed that on 04.07.2008 when A1, A2 and the deceased were taking alcohol in the bar, some third persons by name Pratap and Nagesh beat A2 and that the deceased did not interfere to question the assailants and as such, A1 blamed the deceased for not coming to his rescue in the said altercation. P.W.2 further informed that he went to question A1 as to why he is **blaming** the deceased and then, in the process, he beat A1.

9. P.W.1 further stated that thereafter, all of them went to Visakhapatnam Railway Station and by that time, their friend Durga Rao was present and when they enquired regarding the whereabouts of A1 and A2, Durga Rao informed them that P.W.2 beat A1 and that he was present at that time and he further informed them that A1 and A2 beat him also, as he did not interfere to rescue A1 when P.W.2 beat A1. Hence, they took Durga Rao along with them and they were all

going to the RTC complex, expecting A1 and A2 to be at that place, for the purpose of compromise and on the way to RTC complex, P.W.2 informed them that A1 and A2 might be at Eagle Bar and Restaurant and as such, they went there and found A1 and A2 sitting on the pavement, in front of the said bar, which is situated on the road leading to Sri Kanya theatre from the railway station. After seeing A1 and A2, they stopped the auto and all of them got down and requested A1 and A2 to enter into a compromise. Immediately, A1 took one GI water pipe, hidden inside his shirt, on his back side and beat the deceased on the back of his head, with the said iron pipe. The deceased fell unconscious on the road. Thereafter, A1 beat P.W.2 with the same pipe on the right side of his temporal region, over the right ear and he also fell unconscious after sustaining the said injury. Thereafter, A2 also took an iron rod from the back side of his shirt and beat P.W.2 on his head with the said iron rod. Thereafter, A2 beat the deceased on his head with the said iron rod. The accused also tried to attack them with the said iron rods and out of fear, they ran away from the said place. A1 and A2 went away from the scene of offence, in the auto of A2. After they left the scene of offence, they came there and informed the ambulance, which came to the spot. Vara Kumar, who is their friend, took the deceased and injured P.W.2 to K.G. Hospital in the said ambulance. P.W.1 identified the GI pipe used by A1 and iron rod used by A2, which are marked as M.Os.1 and 2.

10. P.W.1 further stated that he knew A1 and A2 very well and had acquaintance with A1 and A2 since last seven years and they were also auto drivers by profession. He explained that there was a street light

of municipal corporation at the scene of offence and the lighting of the Srilekha lodge and the lighting of the nearby petrol bunk was also available at that time and it was not dark at that time and there was sufficient lighting at the scene of offence.

11. In the cross-examination, he stated that when A1 and A2 tried to attack them also, after beating the deceased and P.W.2, they ran away due to fear. He explained that A2 beat the deceased on the right leg after he fell down. A2 beat P.W.2 on his head after he fell down and sustained two injuries. The deceased sustained only one injury on his head. He further stated that the deceased fell down in a prostrate position towards his front side. After they ran away, he did not know whether the accused again beat the deceased or not, who fell down in an unconsciousness state. After they got down from the auto, on seeing A1 and A2 on the pavement, first discussion took place among them and A1 beat the deceased with the said pipe from his back side by standing behind him. The deceased sustained injury on the back of his head. P.W.1 and Durga Rao ran away towards Sri Kanya theatre and the other persons Karun Kumar and Vara Kumar ran away towards new colony area. After the deceased and P.W.2 were taken in the ambulance by Vara Kumar, P.W.1 and Durga Rao and Karun Kumar went away in our auto. They did not inform the personnel of the ambulance over phone and after they ran away, they again reached the scene of offence after arrival of the ambulance. He did not see A1 and A2 leaving the scene of offence and he did not know whether they left M.Os.1 and 2 at the scene of offence or not. He did not know whether police took A1 and A2 to the police station on

that day. He admitted that the deceased was initially admitted in K.G. Hospital and from there he was shifted to Aditya Critical Care Unit. Regarding the source of light, he stated that, as the police did not ask him about the same, he did not state to the police about the source of light. The suggestion given to P.W.1 would reflect the defence taken by the accused, which is that after they got down from the auto, Durga Rao first beat A1 on his face; the deceased questioned Durga Rao as to why he beat A1 and Durga Rao beat the deceased and that when P.W.2 interfered, said Durga Rao beat P.W.2 also and while the deceased and P.W.2 were running towards petrol bunk on the road, the deceased was beaten by Durga Rao and after sustaining injuries, the deceased fell opposite to the petrol bunk and P.W.2 fell on the other side of the road near the bus stop. It was suggested that A2 was not at all present at the scene of offence.

12. P.W.2 is the injured witness and he corroborated the evidence of P.W.1 on all aspects. According to his evidence, he fell unconscious after sustaining injuries in the hands of A1 and A2, on his head and he regained consciousness only after four days after the incident and came to know that the deceased died. He also identified M.Os.1 and 2.

In the cross-examination, he admitted that the deceased is his close friend and an admission was also taken from him that A1 and A2 are also his friends. He further admitted that a case under Section 307 IPC was filed and pending against him. But he denied the suggestion that other cases were also pending. It was further elicited that when A1 first beat him with an iron pipe, he fell down on the pavement and again got up and thereafter, A2 beat him with an iron rod on his head,

then he fell down and lost conscious and hence, he cannot exactly say whether he fell down on the pavement or on the road after receiving the blow from A2. When A1 beat the deceased, he was standing opposite to the deceased and A1 went behind the deceased and beat him on his head. The deceased was standing on the road by the side of the pavement at that time and he fell down on the road in a prostrate position. P.W.1, Karunakar, Durga Rao and Vara Kumar went backwards when A1 and A2 beat the deceased. He stated that when A2 beat him on his head with iron rod, he fell on the road towards right side. He sustained two injuries on his head and one injury below chin and another above throat. He further stated that in total he sustained three injuries. Speaking about Durga Rao, he stated that he knew him since last two years prior to the date of the incident and he is also an auto driver and he died during the pendency of the case. He admitted that Durga Rao is also called Pichi Durga Rao as he got mental certificate with him. He could not say whether any criminal case was pending against Durga Rao. The omissions pointed out are that he did not state in the earlier statement that A1 beat the deceased on the back of his head, A1 beat him on the right side of his head and that A2 beat the deceased on his leg. Same suggestions were given to P.W.2 also and one strange suggestion was given, that as Durga Rao is his friend and as he beat him, he did not disclose his name before the Doctor and stated that unknown persons beat him. Again an admission was taken that Durga Rao is also his friend and further, it was suggested that he colluded with Durga Rao and got foisted this false case.

13. From the suggestions given to P.W.1 and 2, which is the material evidence, it can be understood that the accused developed grouse against the deceased for not supporting A1 when he was attacked by some assailants. From the fact that they had iron pipes in their possession and were hiding them in their back, it can be understood that they were waiting for an opportunity to attack and kill the deceased. There is an incident in which P.W.2 also beat A1 and the evidence of P.W.1 shows that A1 was about to lodge a report against P.W.2. Hence, the intention to kill P.W.2 can also be assumed, more so, coupled with the manner in which the attack was made.

14. The argument of the counsel for the appellants that there is no intention, as the accused did not go by himself and attack the deceased and P.W.2, cannot be accepted, as the arming of A1 and A2 with the iron rods is one factor, which shows that they had intention to attack the deceased and P.W.2, if not at that point of time, at some point of time. The evidence only shows that opportunity had come to them at that time and they attacked the deceased and P.W.2. Even otherwise, the intention can develop on the spot. The manner of attack does not anywhere allow us to opine that there was no intention on the part of A1 and A2.

15. The evidence of the Doctor, P.W.9, who conducted the post mortem examination, also can be read together with the evidence of P.Ws.1 and 2 in order to understand whether the attack was to do away with the deceased and P.W.2 or not. The evidence shows that there was a contusion present on the right side of the head 2 cms above the right ear; a sutured wound of 5 x ½ cms with five stitches

present horizontally on the right side of back of head on upper ½ of occipital region, with surrounding contusion of 3x3 cms; bone deep laceration of 4x1 ½ cms on back of upper ½ of centre of head, with surrounding contusion of 2x2 cms and other abrasions. There is also bruising of 12 x 8 cms of all the underlying tissues of right parietal occipital scalp; fissured fracture of 10 cms long on right temporal parietal bones of vault of skull extending into base of skull; diffuse subdural and subarchanoid traumatic haemorrhage present all over the brain, more on right parietal and left temporo parietal region of the brain, with haemorrhagic contusion in brain stem region and fissured fracture of 6 cms long on right front fossa of base of skull as continuation of fissured fracture of injury No.13. The injuries are stated to be possible by a blunt object with heavy force. The Doctor testified that M.O.1 could cause such injuries and the cause of death is respiratory and circulatory failure due to injury to the brain, due to head injury.

16. The evidence of P.W.9 and P.Ws.1 and 2 read together would clearly show that after P.W.1 left the spot and after P.W.2 became unconscious, A1 and A2 continued to attack and caused the injuries, which are not spoken to by P.Ws.1 and 2, which are seen on the dead body of the deceased. That would make it clear that the attack made by A1 and A2 was with an intention to cause the death of the deceased.

17. The evidence of P.W.8, another doctor, who examined P.W.2, shows that P.W.2 sustained a laceration over the tempora parietal region; a laceration on the right ear and the CT scan revealed that

there is a depressed right parietal haematoma on right parietal area and fracture of right parietal area.

18. From the fact that P.W.2 became unconscious, A1 and A2 might not have continued to attack P.W.2 further but the manner of attack would certainly show that they have attacked P.W.2 with the same intention with which they attacked the deceased. Hence, we conclude that the accused attacked the deceased and P.W.2 with an intention to commit their murder.

The point is answered accordingly.

POINT No.2:

19. The suggestions given to P.W.2 are as absurd as absurdity can be. When it is proved from the evidence of P.Ws.1 and 2, that the accused are also their friends, more so, when it was brought forth in the form of an admission, which means that it is the case of the accused also, there is absolutely no reason that can be assumed for P.Ws.1 and 2 to exonerate Durga Rao, who really attacked the deceased and P.W.2 and implicate A1 and A2, who stand on the same pedestal, in terms of friendship. The understanding of any prudent person would go on the lines that a victim would not leave the real culprit. Moreover, the evidence of P.W.1 shows that Durga Rao also accompanied them to question the accused. Hence, there can absolutely be no reason for Durga Rao to attack P.W.2 and the deceased. Thus, we are of the opinion that most of the suggestions are made in the air, without any basis.

20. P.W.5 is a witness for the seizure of the weapons, at the instance of A1 and A2, in pursuance of their confession. The cross-examination of P.W.5 does not throw any doubt on the veracity of the witness. The evidence of P.W.5 shows that they accompanied the police and on seeing them, the accused tried to run away and they were apprehended by the police. The conduct also supports the ocular evidence.

21. We do not see any merit in the argument as regards source of light. Accused are known to the victims and witnesses. The place of offence is a public road near a bar, where the presence of light can be clearly assumed.

22. The argument regarding the conduct of PW.1 is not sound, when appreciated vis-à-vis natural human conduct. If he was a planted witness, he could have testified to the whole happenings and lent support to the case. To our understanding, he projects as a natural witness. He was interested in saving himself rather than staying and taking the risk of being attacked. He is a direct witness to the emotional flare of the accused and hence his fear and consequent conduct stands to be natural.

23. The mentioning of unknown persons as the attackers, in the wound certificate of PW.2 is, no doubt, a considerable aspect. But it would not hold the strength of overruling the cogent evidence. It can, sometimes, be attributed to the wrong noting by the concerned. We feel that giving much weight to the said aspect, in the light of the other evidence, more particularly, the evidence of an injured witness,

which stands on a higher plane of credibility, which proves the guilt of the accused, is not in the spirit of right appreciation of things.

The point is accordingly answered.

POINT No.3:

Hence, with the above trustworthy evidence speaking about the complicity of the accused in the alleged offences, we do not find any reason to interfere with the verdict of the Court below.

In the result, the criminal appeal is dismissed, upholding the conviction and sentence imposed on the appellants/accused in SC.No.87 of 2009 dated 31.03.2011 by the I Additional Metropolitan Sessions Judge, Visakhapatnam. The period of detention/imprisonment undergone by the appellants/accused before trial and after trial shall be set off against the term of imprisonment. The appellants/accused, who are on bail, are directed to surrender before the trial Court, which shall commit them to the concerned jail for undergoing the remaining period of imprisonment.

As a sequel, the miscellaneous applications, if any pending, shall stand closed.

C. PRAVAEEN KUMAR, J

T. RAJANI, J

July 11, 2018
DSK