

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

Criminal Appeal No.869 of 2011

DATED:11-06-2018

Between:

Malleboina Chalamaiah
and another ... Appellants

And

The State of A.P.,
Rep. by its Public Prosecutor
High Court of A.P.,
Hyderabad ... Respondent

COUNSEL FOR THE APPELLANTS: Smt. A. Gayatri Reddy

COUNSEL FOR THE RESPONDENT: Public Prosecutor (AP)

THE COURT MADE THE FOLLOWING:

JUDGMENT: *(per the Hon'ble Sri Justice C.V. Nagarjuna Reddy)*

Accused Nos.1 and 2 in Sessions Case No.57 of 2007 on the file of the III Additional District and Sessions Court, Prakasam Division, Ongole, have filed this appeal, aggrieved by its judgment dt.28.06.2011 in convicting accused No.1 for the offence under Section 302 of Indian Penal Code (IPC) and sentencing him to undergo imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of the fine, to undergo rigorous imprisonment for a period of six months, and convicting accused No.2 for the offence under Section 302 read with Section 34 IPC and sentencing her to undergo imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of the fine, to undergo rigorous imprisonment for six months. For convenience, appellant Nos.1 and 2 will be referred to as accused Nos.1 and 2 respectively.

2. (a) The case of the prosecution as reflected from the charge sheet, in brief, is stated as under:

Accused No.1 is the paramour of accused No.2, who is the wife of one Mithukula Koteswara Rao (hereinafter referred to as "the deceased"). Accused No.3 is a close associate of accused No.1. The marriage of the deceased was performed

with accused No.2 about eight years ago and they were blessed with two female children. The deceased was the maternal uncle of accused No.2 and she was unwilling to marry the deceased, but agreed on the compulsion of the elders. About one year prior to the occurrence, accused No.1 purchased a house opposite to the house of the deceased in Kankanampadu Village and was residing in it. Thereafter, accused No.2 developed illicit intimacy with accused No.1. In this regard, P.W.1, who is the mother of the deceased, admonished accused No.2 several times, in vain. To avoid bad reputation, the deceased joined as worker in the cement brickyard of P.W.5, who is his cousin, at Kanigiri, shifted his family and was residing in a small house in the brickyard of P.W.5. On 27.11.2006, accused No.2 requested P.W.4, who is her younger sister, to come to her house at Kanigiri to look after her children, as she had to go to Kandukur for treatment from P.W.13 – Retired Civil Assistant Surgeon. P.W.4 went to the house of the deceased and thereafter accused No.2 left the house to go to Kandukur in the morning hours by taking Rs.200/- from P.W.5 for expenses. As planned earlier, accused No.1 met accused No.2 at the RTC Bus Stand, Kanigiri and both of them went to Kandukur in a bus. P.W.8 witnessed

them while they were in the bus and P.W.9 also witnessed accused Nos.1 and 2 talking together near RTC Bus Stand, Kanigiri, on the previous day. After taking treatment from P.W.13, accused Nos.1 and 2 returned to Kanigiri and on the way, accused No.1 convinced accused No.2 to kill the deceased as he became an obstacle for them. P.W.4 went back to Kankanampadu Village after the return of accused No.2 from Kandukur.

(b) On the night of 27.11.2006 after having supper, accused No.2, her elder daughter - P.W.3 and younger daughter slept on a separate cot under the same roof. At about 8.30 p.m., accused No.2 met accused No.1 and accused No.3, who were waiting in the bushes, purchased two cigarettes from the shop of P.W.6 and gave them to accused No.1. At about 11.00 p.m., accused Nos.1 and 3 entered into the house of the deceased and accused No.3 was watching outside the house. At the instance of accused No.1, accused No.2 brought a crowbar, gave it to accused No.1 and switched off the lights. Accused No.2 caught hold of the legs of the deceased and accused No.1 beat the deceased with the crowbar on his head and body indiscriminately with an intention to kill him, as a result of which the deceased sustained severe bleeding injuries and

fracture to the head. Accused No.1 picked up a plastic electrical wire and throttled the deceased. On hearing the noise, P.W.3 woke up and witnessed the occurrence. Accused No.2 instructed P.W.3 not to reveal the incident to anybody and asked her to tell the incident as robbery. After the incident, accused Nos.1 and 3 went away with the crowbar, by taking black beads gold chain and gold *talibotlu* of accused No.2 to create it as a case of robbery and rape on accused No.2 and absconding. Accused No.2 came out along with her children, and went to the house of P.W.5 and informed him that robbery took place in their house and that when she was being pulled away, the deceased tried to rescue her and sustained injuries. On that, P.W.5 along with P.W.7 went to the house of the deceased, and shifted him to Government Hospital, Kanigiri, in the auto rickshaw of P.W.7 at about 03.30 a.m. on 28.11.2006.

L.W.18 – Dr. V.S. Koti Reddy, Medical Officer, Community Health Centre, Kanigiri, who examined the deceased, declared him dead and sent the intimation to the Station House Officer, Kanigiri Police Station.

(c) On receipt of the hospital intimation, P.W.17 – In-charge Inspector of Police, Kanigiri Police Station, rushed to the Government Hospital, recorded the statement of accused

No.2 and registered the case in Crime No.169 of 2006 under Section 302 IPC, and P.W.18 – Inspector of Police, Kanigiri took up the investigation. During the course of investigation, P.W.18 visited the scene of offence, prepared the rough sketch and seized the material objects - bloodstained stone, bangle pieces, electrical plastic wire etc., under the cover of observation report duly attested by P.W.11 and L.W.15 – Kalukuri Vijaya Kumar, and got the scene of offence photographed by P.W.12. On 28.11.2006 at about 09.30 a.m., P.W.18 held inquest on the dead body of the deceased in the mortuary of the Government Hospital, Kanigiri, in the presence of P.Ws.10, 11 and L.W.15 and sent the dead body of the deceased for autopsy. During the investigation, P.W.18 examined P.Ws.1 to 7, 8, 9 and 13, and L.W.8 – Narana Ankaiah and recorded their statements. After examination of L.W.8 and others, P.W.18 suspected the participation of accused No.2, who is the complainant, and kept her under surveillance in the house of P.W.5.

(d) While so, on 08.12.2006 accused No.1 approached P.W.14 – who was the Panchayat Secretary of Kottalapalli Village at the relevant point of time, and gave voluntary confession about the offence, which was recorded by P.W.14.

Accused No.1 requested P.W.14 for help as the Police were searching for him. Thereafter, P.W.14 handed over the confessional statement of accused No.1 along with his report to P.W.18 at Kanigiri for necessary action. P.W.18 examined P.W.14 and recorded his statement. P.W.18 secured P.W.15 – Panchayat Secretary, Kanigiri and L.W.17 – Pydipati Hema Surya Nageswrara Rao – Panchayat Secretary, Challagirigala as mediators and interrogated accused No.1 at the Police Station on 08.12.2006 at 9.30 a.m. P.W.18 arrested accused No.1 and seized black beads gold chain and gold *talibotlu* under the cover of a mahazar in which the confession of accused No.1 was also recorded, and which was duly attested by P.W.15 and L.W.17. In pursuance of the confession of accused No.1, on the same day, i.e., on 8.12.2006 at 11.00 a.m., P.W.18 and the mediators were led to the bushes situated near Tiffen Hostel of P.W.6 and accused No.1 produced M.O.7 - bloodstained crowbar used in the commission of the offence from the bushes. P.W.18 seized the crowbar under the cover of a separate Mahajar duly attested by P.W.15 and L.W.17. On 8.12.2006, P.W.18 also arrested accused Nos.2 and 3 and sent all the accused for remand. The material objects seized during the investigation were sent to the Regional Forensic Science Laboratory (RFSL), Guntur, through

the Sub-Divisional Police Officer, Kandukuru, and received the report. L.W.18, who conducted the autopsy on the deadbody of the deceased, issued Ex.P.9 - post-mortem certificate opining that the deceased appeared to have died of haemorrhage due to head injury. After completing the investigation, P.W.18 filed the charge sheet.

3. Based on the charge sheet and the evidence available on record, the Court below has framed the following charges.

“1. That A1 of you, at 11.00 P.M. on 27.11.2006 at Kanigiri in the house of the deceased beat with crowbar on the head of the deceased and body indiscriminately and also throttled the deceased to prevent his survival and thus did commit murder intentionally causing the death of MITHUKALA KOTESWARA RAO @ KOTESU and thereby committed an offence punishable under Sec. 302 of Indian Penal Code and within my cognizance.

2. That A2 and A3 of you on the same day, time and place and during the course of same transaction as mentioned in Charge No.1 supra facilitated A1, (A2 caught hold of the legs of the deceased and A3 followed A1 and entered into the house of the deceased and watching outside the house) and A2 and A3 of you facilitated A1 to commit murder of the deceased MITHUKALA KOTESWARA RAO @ KOTESU and thereby committed an offence punishable under Section 302 R/w 34 of Indian Penal Code and within my cognizance.”

4. As the plea of the accused was one of denial, they stood trial during which the prosecution examined P.Ws.1 to 18, got Exs.P.1 to P.15 marked and produced M.Os.1 to 7. On behalf of the accused, no oral evidence was adduced, but Exs.D.1 to D.8 contradictions were marked. On appreciation of the oral

and documentary evidence, the lower Court has convicted and sentenced accused Nos.1 and 2 as stated supra, while acquitting accused No.3 for the offence under Section 302 IPC read with Section 34 IPC.

5. Smt. A. Gayatri Reddy, learned counsel for the appellants/accused Nos.1 and 2, submitted that the evidence on record is not sufficient to hold accused Nos.1 and 2 guilty of the charge made against them. Though P.Ws.1 and 3 initially deposed against accused Nos.1 and 2, further cross-examination of P.W.3 revealed that she was taken to Visakhapatnam by her senior paternal uncle by name, Mitukula Balakotayya, she was brought back to Kanigiri on the second day of the death of her father and that therefore she was not an eyewitness to the incident and her evidence has no probative value. The learned counsel further submitted that if P.W.3's evidence is eschewed from consideration, the remaining evidence is not sufficient to find accused Nos.1 and 2 guilty of the offence with which they are charged. She further submitted that Ex.P.11, based on which Ex.P.12 - First Information Report (FIR), was registered, being self-inculpatory, the conviction of accused Nos.1 and 2 cannot be sustained based on such statement. The learned counsel alternatively submitted

that the prosecution failed to prove the common intention and in the absence of a charge under Section 120-B IPC, accused No.2 cannot be convicted as she did not participate in the commission of the offence as, even as per the evidence on record she stayed outside the house in the verandah along with her two children, including P.W.3. She has also submitted that M.O.1 - bloodstained stone and M.O.7 – crowbar were seized from the scene of offence and the prosecution failed to explain whether both the objects or one of them were used in the commission of the offence and that therefore the conviction of accused Nos.1 and 2 cannot be sustained.

6. The learned Public Prosecutor for the State of Andhra Pradesh while opposing the submissions of the learned counsel for accused Nos.1 and 2, argued that the initial deposition of P.W.3, a child witness, is sufficient to hold accused Nos.1 and 2 guilty of the offence with which they are charged. That both P.Ws.1 and 3, who were recalled for further cross-examination nearly 1½ years after the evidence was closed, were evidently won over by the accused and they have retracted their earlier stand with a view to save accused No.2, who is no other than the daughter-in-law of P.W.1 and mother of P.W.3, and that therefore their later testimony was rightly disbelieved by the

lower Court as a pure afterthought. The learned Public Prosecutor further argued that the prosecution was able to prove through its witnesses that accused Nos.1 and 2 shared common intention to do away with the life of the deceased in order to continue the illicit relationship between them unhindered and that therefore the lower Court has rightly held accused Nos.1 and 2 guilty of the offence under Section 302 IPC read with Section 34 IPC, though accused No.2 did not cause any injury to the deceased.

7. We have carefully considered the submissions of the learned counsel for the parties.

8. The motive alleged by the prosecution is illicit relationship between accused Nos.1 and 2. P.W.1, mother of the deceased and mother-in-law of accused No.2, herself stated in categorical terms that one year prior to the incident accused Nos.1 and 2 developed illicit relationship between them. The witness was not cross-examined by accused No.2. On behalf of accused No.1 it was suggested that there was no illicit intimacy between accused Nos.1 and 2, that some thieves have killed the deceased and that a false case was foisted against accused No.1 which was denied by the witness. P.W.2, mother of accused No.2, also spoke about the illicit intimacy between accused

Nos.1 and 2 and that in spite of her advise to refrain from continuing the relationship, her daughter did not heed to the same. In her cross-examination P.W.2 stated that she has seen accused Nos.1 and 2 in a compromising position. Not even a suggestion was put to this witness on behalf of accused No.1 that there was no illicit intimacy or that she has not seen accused Nos.1 and 2 in a compromising position. The suggestion given to P.W.1 that some thieves have killed the deceased was not put to P.W.2. It was suggested to her that as accused No.1 has purchased the house in front of the house of the deceased the family of the deceased has developed ill-feelings due to which a false case was foisted. P.W.4, sister of accused No.2, also spoke on the illicit intimacy between accused Nos.1 and 2. No suggestion was put even to this witness denying the illicit relationship between accused Nos.1 and 2. Barring a half-hearted suggestion put to P.W.1 that there was no extra marital relationship between accused Nos.1 and 2, nothing could be elicited from P.Ws.1 to 4 to discredit their testimony regarding illicit intimacy between accused Nos.1 and 2 which lead to the murder.

9. We shall now consider whether the prosecution was able to bring on record sufficient evidence to connect accused

Nos.1 and 2 to the crime. Based on Ex.P.11, statement of accused No.2, recorded by P.W.17 – Sub-Inspector of Police in the presence of the Duty Medical Officer, Government Hospital, Kanigiri, Ex.P.12 – FIR was registered. In Ex.P.11 accused No.2 has unfolded the whole story relating to her illicit intimacy with accused No.1 and her cooperating with accused No.1 in killing her husband. As rightly observed by the lower Court, the contents of Ex.P.11 to the extent they are self-inculpatory are not admissible in evidence. Therefore, de hors the said statement, we need to examine the evidence on record to cull out the culpability or otherwise of accused Nos.1 and 2.

10. Neither the scene of offence, nor the nature of the death being homicidal is disputed by the accused. The presence of accused No.2 by the side of the deceased prior to the occurrence is also not disputed. The incident has taken place some time past midnight inside the house of the deceased and accused No.2. As could be seen from the evidence of P.W.5, who employed the deceased in his hallow brick unit at Kanigiri, accused No.2 made an attempt to offer an explanation as to how the assailant has gained access into the house. According to his version, he found accused Nos.1 and 3 near a liquor shop on the day preceding the occurrence at Kanigiri and that on the

same night at about 2.00 a.m. accused No.2 came to his house along with his two children weeping and explained that thieves knocked the door of the house, that she opened the door and came out of the house and that thereupon the thieves beat the deceased with a crowbar and took away the gold chain with *Mangalasutram* from the neck of accused No.2. This part of his evidence is not controverted as he was not cross-examined on behalf of accused No.2. The defence has not taken forward this theory to the extent of some thieves entering the house and killing the deceased. This version looks so artificial that when accused No.2 opened the door, there was no necessity for the thieves to harm the deceased as they could have snatched away the gold *Mangalasutram* from the person of accused No.2, who allegedly came out of the house and opened the door without even entering the house. It is not the case of the defence that any other valuables from the house were found missing. Accused No.2 has come out with a false version as regards the assailants who would not have gained entry into the house without her connivance.

11. The next question to be considered is whether accused No.1 was the assailant? P.W.3, who is no other than the daughter of accused No.2 and the deceased, was seven years

old at the time of her giving evidence. On being satisfied that she has given rational answers, her deposition was recorded. She has stated in her evidence that during the fateful night, herself, her younger sister and her mother – accused No.2 slept on one cot and her father slept on another cot, that she heard her father groaning and that when she asked her mother the reason therefor, she replied that the deceased consumed liquor. That later herself, her mother and her sister came out of the house and all of them sat in the verandah and accused No.1 went inside the house, came out after sometime, talked with her mother and went away from the place. That accused No.2 instructed her to say that the thieves snatched away the chain. The defence marked the part of Section 161 CrPC statement of P.W.3 as Ex.D.3 which reads “..By that time one person was found standing in the shadow near our house.” If we carefully scrutinize the evidence of P.W.3, we find her version very natural. It is clear from her evidence that accused No.2, to facilitate accused No.1 to enter the house and accomplish the task of killing her husband, along with her two children opened the doors of the house and stayed in the verandah, along with her children. On behalf of accused No.2, P.W.3 was cross-examined. No suggestion was put to her that accused No.1 has

not entered the house and killed the deceased or that it is the thieves who killed the deceased and snatched away the chain of accused No.2.

12. No doubt the defence appeared to have made a desperate attempt to turn the tables by making P.Ws.1 and 3 take a 'U' turn. Both of them were further examined after nearly 1½ years and came out with a varied version that P.W.3 was in Visakhapatnam when the occurrence has taken place. As rightly observed by the lower Court, no credibility could be attached to the retracted statements of P.Ws.1 and 3, who, as noted earlier, are no other than the mother-in-law and daughter respectively of accused No.2, and that their earlier testimony does not get effaced by their later statements which are obviously the result of clear manipulation by accused Nos.1 and 2.

13. In **Pubi Satyanarayana @ Satteyya v. State of Andhra Pradesh**¹, this Court has come down heavily on the practice of deferring cross-examination of the prosecution witnesses to facilitate the defence to win over them and make them turn hostile and held that no credence could be given to the retracted versions. In **Dudekula Rasool v. State of Andhra**

¹ 1994(2) ALT 172 (DB)

Pradesh², a Division Bench of this Court, speaking through one of us (Justice C.V. Nagarjuna Reddy), affirmed the said view.

14. In **Gundegoni Jangaiah v. State of A.P.**³ referred by the Public Prosecutor, the witness has supported the prosecution version in chief examination. As the defence has not cross-examined him, the Sessions Court recorded the cross-examination as Nil. The witness was recalled after a long gap of time, who deposed contrary to what he had deposed in chief examination. This Court held that in such cases the Courts must accept the earlier version and reject the later version. Similar view was taken in **Krishna v. State of Karnataka**⁴. Indeed, in the case on hand, unlike in the aforementioned two cases, both P.Ws.1 and 3 were cross-examined from which the defence could not elicit anything to discredit their evidence. It is only much thereafter that they were further cross-examined during which the witnesses have come out with a new theory which was never put forth earlier. If P.W.3 was not in the house at Kanigiri on the night of occurrence, there was no reason for the defence to not put the relevant suggestions at the earliest point of time. Their further cross-examination was

² MANU/AP/0126/2018 (CrL.A.No.615 of 2011, dt.14.2.2018)

³ 2005 (2) ALT (CrL.) 362 (DB)(AP)

⁴ 2010 CrL.LJ 1515

made as a desperate attempt to introduce a new theory which cannot be taken even with a pinch of salt. The lower Court has therefore rightly rejected this part of the deposition of P.Ws.1 and 3.

13. M.O.1 – stone and M.O.7 – crowbar were sent to the FSL for examination. Ex.P.15 is the FSL Report which reveals that on both the items blood was found and that the same was of human origin. P.W.16 – Doctor was examined to identify the handwriting and signature of Dr. V. S. Kota Reddy, the then Civil Assistant Surgeon, Community Health Centre, Kanigiri, on Ex.P.9 – post mortem certificate. The said Doctor was examined as the Doctor who conducted the autopsy left his service. Ex.P.9 shows the following injuries.

“1) An irregular reddish obliquely placed lacerated injury over the left side of the forehead starting from middle of the forehead passing through the supraorbital margin of the left eye to the outer canthus of the eye measuring about 7 cm x 1 cm x bone deep.

2) An irregular reddish lacerated injury over the upper part of pinna of right ear measuring about 2 x 0.5 cms.

3) An irregular reddish lacerated injury measuring about 1 x 1 cm. in the left groin region.

4) An irregular reddish laceration of about 1 x 1 x 1 cms. over the back of the right shoulder region.

5) A penetrating injury of about 2 x 1 x 2 cms in the upper part of medial side of left thigh.”

It was opined in the post-mortem report that the death was due to haemorrhage due to head injury. This part of the evidence thus proves that the nature of the death is homicidal.

15. Another crucial piece of the evidence connecting accused No.1 with the offence is recovery of M.Os.4 to 6 - black beads gold chain, two gold thalibotlu, and gold coin with Lakshmi emblem under Ex.P.7 - mediators' report, and M.O.7 - crowbar under Ex.P.8 mediators' report, from the possession of accused No.1. P.W.15, one of the mediators, along with L.W.17 - Pydipati Hema Surya Nageswara Rao, to Ex.P.7 - report has spoken on the seizure of M.O.4 - two rows of black beads gold chain; M.O.5 - gold *thalibottu* studded with read stone with flower design and M.O.6 - gold kasu with Lakshmi emblem. He has also spoken on the seizure of iron crowbar - M.O.7 which was seized under Ex.P.8 - mediators' report, from accused No.1. P.W.18 - the investigation officer has spoken on the seizure of M.Os.5, 6 and 8. Except putting some suggestions to him, nothing material could be elicited to disbelieve his evidence. The involvement of accused No.1 in the commission of the offence is thus proved beyond all reasonable doubt by the prosecution.

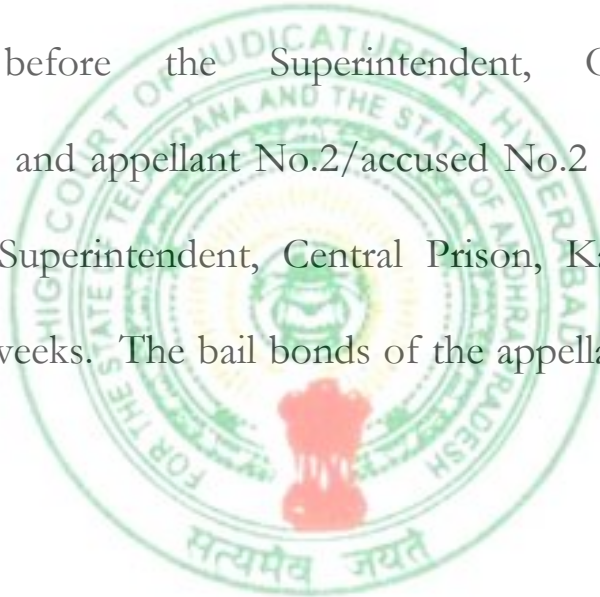
16. As regards the submission of the learned counsel for accused Nos.1 and 2 that accused No.2 has not participated in the commission of the offence and that as the prosecution failed to prove the allegation that she caught hold of the legs of

the deceased while accused No.1 attacked him, she is entitled for acquittal, we find no merit in the submission. In our opinion, accused No.2 is the main culprit but for whose help accused No.1 would not have committed the offence in the manner he has done. It is accused No.2 who provided access to accused No.1 into the house facilitating the commission of the offence. But for the common intention shared by them, accused No.2 would not have allowed accused No.1 to go inside the house by opening the door. Therefore, Section 34 IPC is squarely attracted and there was no necessity for the prosecution to allege criminal conspiracy.

17. With regard to the submission of the counsel for accused Nos.1 and 2 that the prosecution failed to prove as to which object among M.Os.1 and 7 was used for causing the death, since no one was present at the actual scene when the offence was taking place, it is not possible to prove as to whether one of the two objects was used or both were used by accused No.1 in the commission of the offence. The defence could not elicit from P.W.16 that the injuries found on the body of the deceased were not possible with either of the two objects. Thus, when there was a possibility of accused No.1 using either or both of M.Os.1 and 7, the failure of the prosecution to

specify as to which of the objects was used in the commission of the offence does not affect its case.

18. In the light of the above discussion, we do not find any reason to interfere with the judgment of the lower Court. The criminal appeal is accordingly dismissed. The conviction and sentences recorded against the appellants by the Court below under the impugned judgment are confirmed. As the appellants are on bail, appellant No.1/accused No.1 shall surrender before the Superintendent, Open Prison, Ananthapur, and appellant No.2/accused No.2 shall surrender before the Superintendent, Central Prison, Kadapa District, within two weeks. The bail bonds of the appellants shall stand cancelled.



C.V. NAGARJUNA REDDY, J

GUDISEVA SHYAM PRASAD, J

11-6-2018

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Note: LR copies to be marked.

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