

THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
THE HON'BLE SRI JUSTICE P. KESHA VA RAO

CRIMINAL APPEAL Nos.58 and 831 of 2011

COMMON JUDGMENT: (Per the Hon'ble Sri Justice P. Keshava Rao)

Heard the learned counsel for the appellants in Criminal Appeal No.58 of 2011, learned Senior counsel appearing for the appellant/de facto complainant (PW.1) (hereinafter referred to as PW.1) in Criminal Appeal No.831 of 2011 and the learned counsel for the respondents 1 and 2 and the learned Public Prosecutor appearing for the State in both the appeals.

2) As far as CrI.A.No.58 of 2011 is concerned, it is filed by accused Nos.1 to 3, who were tried for the offences under Sections 147, 148, 302 and 324 IPC in S.C.No.112 of 2008 on the file of the Court of VI Additional District and Sessions Judge (FIC), Markapur, and convicted and sentenced to undergo life imprisonment for the offence under Section 302 and Sec. 302 read with Section 34 IPC, A1 and A2 are also ordered to pay fine of Rs.25,000/- and Rs.10,000/- respectively. In default, A1 and A2 shall undergo simple imprisonment for a period of one year each. A3, who is also found guilty of the offence under Section 324 IPC, is ordered to undergo rigorous imprisonment for a period of one year and to pay fine of Rs.2000/-. In default, he shall undergo simple imprisonment for two months under Section 235(2) Cr.P.C.

3) As far as the CrI.A.No.831 of 2011 is concerned, it is filed by the appellant/defacto complainant (PW.1) against the acquittal of accused Nos.4 and 5, who are not found guilty of offence under Sections 147, 148, 302 read with 34 and 324 read with 149 IPC, in S.C.No.112 of 2008 on the

file of the Court of VI Additional District and Sessions Judge (FTC), Markapur.

4) Since both the above said appeals are directed against the judgment in SC.No.112 of 2008, this Court is of the opinion that a common judgment can be rendered.

5) The prosecution story as narrated during the course of trial in brief is as under:

The de facto complainant/PW.1 (Appellant in Crl.A.No.831 of 2011) is the wife of the deceased. The deceased borrowed some amount as hand loan from A1, but did not repay the same. In that context, disputes arose between them. In the year 2004, there was a quarrel between the groups of the deceased on one hand and the accused on the other with regard to the land dispute. In the said quarrel, the deceased and his brothers beat A1 and inflicted injuries. In that connection a case was registered vide Crime No.48 of 2004 under Section 324 read with 34 IPC and later on numbered as C.C.No.44 of 2005 on the file of the JFCM, Giddalur. Since that time onwards the accused group was waiting for an opportunity to settle scores with the deceased.

6) On 09.10.2006, at about 7.00 p.m. while the deceased was carrying the plastic pipes from an auto to his house, A1 to A5 and one Appani Venkata Ratnamma with a common object of killing the deceased, formed into an unlawful assembly and attacked the deceased with lethal weapons like sticks and knives. During the said attack, initially A4, A5 and the said Appani Venkata Ratnamma sprinkled chilli powder on the face of the deceased. A1 hacked him with a country knife on his chest, back,

head and on the face indiscriminately causing bleeding injuries. A2 beat the deceased with a stout stick on his head and on the chest causing injuries. A4 and Appani Venkata Ratnamma beaten the deceased indiscriminately and as a result, the deceased fell down. Thereupon, A3 and A5 kicked the deceased on his chest, stomach and testicles indiscriminately and thereby the deceased succumbed to injuries instantly. On seeing the same, when PW.1 i.e., the wife of the deceased went to rescue her husband, she was beaten by A3 with a stick on her shoulder and pushed her aside. The said incident was witnessed by PWs.2, 3 and 5. LW.2 and PW.6 after coming to know about the commission of offence rushed to the scene of offence. On 10.10.2006 at 0600 hours PW.1 lodged a report with the Station House Officer, B.V. Peta Police Station. PW.10, S.I. of Police, registered a case vide Crime No.59 of 2006 for the offences under Sections 147, 148, 323, 302 read with 149 IPC and PW.11, Inspector of Police, visited the scene of offence in the presence of LW.7 and PW.4 seized the blood stained wooden piece, control earth, blood stained earth and clothes of the deceased in their presence under a cover of observation report duly attested by them. He also conducted inquest over the dead body and prepared an inquest report. He examined PWs.1 to 3, 5, 6 and LW.2 and recorded their statements. In the course of investigation, on 19.10.2006, at 5.00 p.m., he arrested A1 to A3 at Konapalli road in the presence of PW.7 and LW.11. During interrogation, in pursuance of confession made by A1 to A3, he recovered the crime weapon used by A1 and sent the accused for judicial remand. On 27.10.2006 and 05.01.2007, he arrested A4 and A5 respectively and sent them for judicial remand. However, Appani Venkata Ratnamma obtained an anticipatory bail. PW.9, who held the postmortem

examination over the body of the deceased, issued a certificate to the effect that the deceased died of prior neurogenic shock and hemorrhage as a result of injury. He also treated PW.1 and issued wound certificate. After completion of investigation, LW.15 filed a charge sheet against the accused. However, since Appani Venkata Ratnamma is a juvenile, aged about 16 years, a separate charge sheet has been filed against her before the Juvenile Court at Tirupati. The case was taken on file as PRC.25 of 2007. The copies of the documents were furnished to the accused and the PRC was committed to the Court of Sessions. Thereupon, the Principal District and Sessions Judge, Ongole, assigned the case number and made over to the VI Additional District and Sessions Judge (FTC), Markapur, for trial.

7) The accused were examined under Section 228 Cr.P.C. and charges were framed and the same were explained to the accused, who, in turn, pleaded not guilty and the said charges are as under:

FIRSTLY:

That A-1 to A-5 of you along with Appani Venkata Ratnamma on or about 9th day of October, 2006 at about 19 hours at Sngarapalli village were members of unlawful assembly, in prosecution of common object of such assembly, viz., in killing the deceased Bandla Chinnaiah S/o Thirupathaiah of Sngarapalli village and to cause injury to his wife Bandla Jayamma committed the offence of rioting, and thereby committed an offence punishable U/Sec.148 of IPC and thereby committed an offence punishable U/Sec.147 of IPC and within my cognizance.

And I hereby directed that you be tried by this Court for the above said charge.

SECONDLY:

That A-1 to A-5 of you along with Appani Venkata Ratnamma on or about the same day at the same time and at the same place mentioned in charge No.1 were members of unlawful assembly, did, and in prosecution of the common object, viz., in killing the deceased, commit the offence of rioting and at that time were armed with deadly weapons which used as weapon of offence were likely to cause death to wit country knife, stout stick and other sticks and thereby committed an offence punishable U/Sec.148 of IPC and within my cognizance.

And I hereby directed that you be tried by this Court for the above said charge.

THIRDLY:

That A-1 and A-2 of you in prosecution of your common object to kill the deceased along with A-3 to A-5 of you and Appani Venkata Ratnamma on or about the same day at the same time and at the same place mentioned in charge No.1 did commit the murder of the deceased by intentionally causing his death by hacking with country knife on chest, back, head and on the face indiscriminately by A-1 of you and by beating with stout stick and head and chest by A-2 of you and A-1 and A-2 of you thereby committed an offence punishable U/Sec.302 IPC and within my cognizance.

And I hereby directed that you be tried by this Court for the above said charge.

FOURTHLY:

That A-2 to A-5 of you along with A-1 and A-2 and Appani Venkata Ratnamma on or about the same day at the same time and at the same place mentioned in Charge No.1 were members of unlawful assembly and in prosecution of the common object of such assembly, viz., to kill the deceased and at that time A-4 and A-5 of you and Appani Venkata Ratnamma spilled chilli powder on the face of the deceased and A-4 of you and Appani Venkata Ratnamma bitten the deceased on his person indiscriminately and A-3 and A-5 of you kicked the deceased on his chest, stomach and testicles indiscriminately whereas A-1 and A-2 of you intentionally caused the death of the deceased by hacking with country knife and by beating with stout stick which offence you knew to be likely to be committed in prosecution of the common object of the said assembly and A-3 to A-5 of you thereby U/Sec.149 IPC guilty of causing the said offence punishable U/Sec.302 IPC and within my cognizance.

And I hereby directed that you be tried by this Court for the above said charge.

FIFTHLY:

That A-3 of you on or about the same day at the same time and at the same place mentioned in Charge No.1 voluntarily caused hurt to LW.1 Bandla Jayamma W/o Chinnaiah when she came to rescue of her husband on her shoulder by means of stick which instrument if used as weapon of offence is likely to cause death and A-3 of you committed an offence punishable U/Sec.324 IPC and within my cognizance.

And I hereby directed that you be tried by this Court for the above said charge.

SIXTHLY:

That A-1, A-2, A-4 and A-5 of you along with A-3 of you and Appani Venkata Ratnamma on or about the same day at the same time and at the same place mentioned in Charge No.1 were members of unlawful assembly, and in prosecution of common object of which viz., to kill the deceased and to cause injuries A-3 of you voluntarily caused hurt to LW.1 on her shoulder by means of stick which offence you knew to be likely to be committed in prosecution of the common object of the said assembly and you thereby U/Sec.149 IPC guilty of causing the said offence punishable under Section 324 IPC and within my cognizance.

And I hereby directed that you be tried by this Court for the above said charge."

8) To substantiate the guilt of the accused, the prosecution has examined PWs.1 to 11 and Exs.P1 to P15 and M.Os. 1 to 7 are marked. After closure of the prosecution evidence, the accused were examined under Section 313 Cr.P.C. They pleaded not guilty denying the incriminatory evidence given against them. On behalf of the accused, DWs.1 to 3 are examined, but no documents are marked.

9) The learned VI Additional District and Sessions Judge (FIC), Markapur, after analyzing the oral and documentary evidence, convicted the appellants in Criminal Appeal No.58 of 2011 i.e., A1 to A3 for the offences under Sections 302, 302 read with 34 and 302 read with 34 and 324 IPC respectively and acquitted A4 and A5 for the offences under Sections 147, 148, 302 read with 34 and 324 read with 149 IPC vide judgment dated 23.12.2010 in SC.No.112 of 2008. Questioning the said conviction, A1 to A3 filed Criminal Appeal No.58 of 2011 and against acquittal of A4 and A5, Criminal Appeal No.831 of 2011 was filed by PW.1.

10) Learned counsel appearing for the appellant in Criminal Appeal No.58 of 2011 would submit that the Court below failed to appreciate that PW.1 did not mention the eyewitnesses to the occurrence of the offence either in the FIR or in her Section 161 Cr.P.C. statement, but the Court below committed an error in treating some other witnesses as eyewitnesses. The Court below has not given any importance for the delay of 11 hours caused in lodging the FIR and the same has not been explained properly by the prosecution. In this context, the learned counsel also brought to the notice of the Court that the Auto driver, who brought the pipes to the house of the deceased and who is a direct eyewitness, was not examined and the Court below failed to appreciate

that the prosecution failed to offer any explanation for not producing the said Auto driver. In fact, the Auto driver was on the spot at the time of occurrence of the offence and he is a relevant and material witness for the prosecution to prove the commission of offence. The Court below also failed to appreciate that at the time of occurrence of the offence, PW.1 was not at the scene of offence. The said fact can be inferred from a perusal of FIR since PW.1 has not narrated any specific overt act on any particular accused. Only to concoct a story and to implant some interested witnesses in the form of PWs.2 and 5, who are her blood relations, and others, the FIR was lodged with a delay of about 11 hours.

11) The basic theory of the prosecution is that sprinkling of the chilli powder by A4 and Appani Venkata Ratnamma, as deposed by PWs.1, 2 and 5, is contradictory to the evidence of PW.9 – Doctor. The Court below also failed to appreciate that the reasons given for acquitting A4 and A5 of all the charges will equally apply to A1 to A3 and they ought to have been acquitted. Since PWs.1, 2 and 5 are the interested witnesses being the wife and relatives, their evidence cannot be relied upon for giving conviction and at the same time, the appellant would have been acquitted as the prosecution did not produce independent witnesses, who were present at the time of commission of offence, from the same street. In fact, the learned counsel emphasized on the aspect that at the time of commission of offence there was no sufficient light to identify any person more particularly, the persons who committed the offence. To substantiate his contention, he relied on sunrise and sunset calendar and thereby argued that on 09.10.2006 the sunrise was at 6.04 a.m. and the sunset was at 5.57 p.m. Therefore, there was no occasion to identify any

person since it was dark. Thus, the reasons given by the Court below convicting A1 to A3 are not germane to the facts and circumstances of the case and the evidence adduced by the prosecution.

12) On the aspect of motive, the learned counsel should submit that the land dispute between the deceased and the accused was resolved and PW.5 pleaded ignorance about the money due by the deceased to A1. In that context, he also specifically emphasized that since there is a delay in lodging FIR, PW.1 got drafted Ex.P9 through some unknown persons and implicated the accused. In fact, PW.2 being the brother-in-law of the deceased his evidence cannot be relied upon. At the scene of offence when PW.2 was present, it was not drafted by him nor by the Sarpanch, who was present at the relevant time. Since the complaint was lodged on 10.10.2006 at 0600 hours, there is any amount of suspicion on Ex.P9. The other important aspect is that when the specific case of the prosecution is that A4 and Appani Venkata Ratnamma sprinkled chilli powder on the face of the deceased, but PW.9 deposed that he did not find anything on the body of the deceased. The learned counsel also argued that there is a dispute with regard to the scene of offence and no specific overt acts are attributed to each accused. So, the presence of PW.2 was also doubtful since the name of PW.2 does not contain in Ex.P9. Therefore, he would submit that in murder cases the theory of complaint is not the encyclopedia of all the facts is not applicable. Except the evidence of PW.1, no other evidence is available on record to convict A1 to A3.

13) To substantiate the above said contentions, the learned counsel relied on the judgment of the Apex Court in Vadivelu Thevar v. The State

of Madras¹ and the judgment of this Court in Yerasu Venkataramana Peddy and others v. State of A.P.². Basing on the judgment of the Apex Court in Vadivelu Thevar (1 supra), the learned counsel contended that since PWs.1, 2 and 5 being the interested witnesses their evidence is wholly unreliable. In fact, merely because number of witnesses are examined, it cannot be said that the prosecution has proved the guilt of the accused. In fact, it is the quality, but not the quantity of the evidence that is required to prove the guilt of the accused. The relevant portion is as under:

"In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down that "no particular number of witnesses shall in any case be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after the consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's Law of Evidence -9th Edition, at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Section 134 quoted above. The section enshrines the well recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

- (1) Wholly reliable.

¹ AIR 1957 SC 614

² 2005 (2) ALT (Crl.) 252 (D.B.) (A.P.)

- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.”

Basing on the judgment of this Court in Verasu Venkataramana Reddy (2 supra) the learned counsel would submit that there was an ample time for the prosecution to manufacture a case against the accused. Therefore, the version in the FIR must have been a result of consultation among the interested persons after coming to know the nature of injuries. In the case on hand, as there is a lapse of 11 hours from the date of incident to the lodging of a complaint, there is every possibility for PW.1 to implicate the accused.

14) The learned Public Prosecutor appearing for the State, have supported the judgment of the Court below; firstly on the ground that PW-1, has witnessed the commission of offence, the presence of PW-1 cannot be doubted or ruled out since after witnessing the incident when she attempted to interfere with the accused in attacking the deceased, PW-1 was beaten up by A-3 with a stick on her shoulder and pushed her aside resulting in PW-1 sustaining injuries. In fact, PW-9-Medical Officer who was examined on behalf of the prosecution, examined PW-1 and issued the wound certificate Ex.P-8. This fact clinchingly proves that PW-1 was present at the scene of offence and she tried to stop the accused from attacking the deceased. Therefore, the contention of the learned counsel for the appellants that the presence of PW-1 at the scene of offence is doubtful and her evidence is wholly unreliable cannot be sustained. He further submitted that the testimony of PW-1 cannot be disputed unless there is contrary evidence. PWs.2 and 5 who are the other eyewitnesses also corroborate with the evidence of PW-1 in attacking the deceased by the accused is not shaken in any aspect.

15) The learned Public Prosecutor also submitted that in the F.I.R. the names of all the accused are mentioned. In the complaint PW-1 has categorically stated that after sprinkling chilli powder into the eyes of the deceased, all the accused together beat her husband indiscriminately with sticks, knives and mercilessly killed him. Therefore, she requested to take action against the accused. On this aspect, he submits that the complaint is not the encyclopedia of all the facts. Law also does not require any specific overt acts in the complaint. In fact, complaint is only a piece of paper to set the law into motion. That apart, when the husband of PW-1 was killed, she will be in a state of mental shock and lot of strain. In those circumstances, it cannot be said that since no specific overt acts are attributed to each accused, it cannot be said that PW-1 has not witnessed the incident or her evidence cannot be believed. As far as the delay in lodging the F.I.R. is concerned, PW-1 has categorically stated that due to fear of the accused, no one came forward to help her and thereby she was constrained to lodge a complaint with the police on the next day early hours. Therefore, PW-1 has categorically explained the reason for lodging the complaint on 10.09.2006 at 6.00 A.M.. If the contention of the learned counsel for the appellants that PW-1 was influenced to implicate the accused, she would have mentioned specific overt acts. This is also one of the circumstances which goes to show that there are no circumstances which really doubt the veracity of the statement given by PW-1. Thus, the contention of the appellants that F.I.R. was filed belatedly only to implicate the accused, is not correct and self contradictory. He also brought to the notice of the Court that the evidence of PWs.1, 2 and 5, has not shaken in any manner on the aspects of lodging of a complaint, the participation of all the accused in the

commission of the offence, the injuries sustained by the deceased and etc. In fact, the evidence of PW-9 also supports the theory of prosecution since the injuries 1 to 6 are on the face and neck of the deceased and the same has been corroborated by PW-1. The learned Public Prosecutor also argued on the conduct of injured witness i.e. PW-1, in normal course when her husband was being attacked with a knife and other weapons, it is not abnormal to come to the rescue of the deceased. He also contended that merely because PW-1 being the wife and PWs.2 and 5 being the relatives, their evidence cannot be doubted and it does not in any manner affect the credibility of their evidence. However, it is open to the Courts to analyze their evidence minutely with caution and come to a conclusion whether the same is credible and cogent. To support the said contention that the evidence of PW-1 cannot be doubted in any aspect, he relied on the following judgments:

1. MAIN PAL AND ANTOHER v. STATE OF HARYANA AND OTHERS³. -

The relevant portion is as under:

“Though PWs.1 and 2 were related to the deceased, that does not in any manner affect the credibility of their evidence. When a person is shown to be the relative of an accused, it is open to the courts to critically analyse his evidence with caution and then come to a conclusion whether the same is credible and cogent. Though the conduct of PW-2 may appear to some to be somewhat unusual, as rightly noted by the High Court, every person cannot act or react in a particular or very same way and it would depend upon the mental set-up of the person concerned and the extent and nature of fear generated and consequently on the spot his reaction in a particular way has to be viewed on the totality of all such circumstances. The hypothetical discrepancy regarding the height from which the gun was shot is one aspect which needs to be noted, only to be rejected. If the eyewitnesses' version, even though of the relatives, is found to be truthful and credible after deep scrutiny the opinionative evidence of the doctor cannot wipe out the effect of eyewitnesses' evidence. The opinion of the doctor cannot have any binding force and cannot be said to be the last word on what he deposes or meant for implicit acceptance. On the other hand, his evidence is liable to be sifted, analysed and tested, in the same manner as that of any other witness, keeping in view only the fact that he has some experience and training in the nature of the functions discharged by him.”

³ 2004(10) SCC 692

2. ABDUL SAYEED v. STATE OF MADHYA PRADESH⁴. The relevant portion is as under:

“The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. “Convincing evidence is required to discredit an injured witness.” [Vide *Ramlagan Singh v. State of Bihar* [(1973) 3 SCC 881 : 1973 SCC (Cri) 563 : AIR 1972 SC 2593] , *Malkhan Singh v. State of U.P.* [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12] , *Machhi Singh v. State of Punjab* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , *Appabhai v. State of Gujarat* [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696] , *Bonkya v. State of Maharashtra* [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113] , *Bhag Singh* [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163] , *Mohar v. State of U.P.* [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606b-c), *Dinesh Kumar v. State of Rajasthan* [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472] , *Vishnu v. State of Rajasthan* [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , *Annareddy Sambasiva Reddy v. State of A.P.* [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and *Balraje v. State of Maharashtra* [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] .]

The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”

Basing on the same, the learned Public Prosecutor would contend that there are no merits in the appeal and the same is liable to be dismissed.

16) As far as Crl.A.No.831 of 2011 filed against the acquittal of A-4 and A-5 is concerned, the learned Senior Counsel appearing for the appellant/de facto complainant/PW-1 would contend that A-4 is the daughter of A-1 and A-5 is the son of A-2. Their presence is spoken from the beginning i.e. from the date of lodging the complaint and registration of F.I.R. (Ex.P-9). Their names are mentioned not only in the complaint but also in Ex.P-9. Though no specific overt acts are attributed, omnibus allegations are made against them. In fact, the specific allegation made

⁴ 2000(10) SCC 259

against A-4 and A-5 is that they sprinkled chilli powder on the face of the deceased and A-5 kicked him on his chest, stomach and testicles indiscriminately. Even in the inquest report, there are injuries on the body, more particularly that the testicles were swollen. Even in the post mortem report Ex.P-7, the external injury mentioned is diffused swelling of the scrotum. The learned Senior Counsel also submitted that the Court below cannot believe the evidence of PW-1 only for A-1 to A-3 and not for A-4 and A-5. If the evidence of PW-1 has to be believed, it has to be believed in toto but not in part. He also would contend that there is ample evidence of PWs.1 and 2 corroborating and supporting Exs:P-9 and P-7 which show the participation of A-4 and A-5 in the incident and the nature of injuries sustained by the deceased. Though A-5 has taken a plea of alibi being an engineering graduate, he has not discharged the burden of proof that he was not present at the scene of offence. The confessional statement of A-1 dated 09.09.2008 on behalf of the other accused also with regard to killing the deceased was totally ignored. The motive was also established by the evidence of PWs.1 and 6. To support the above said contentions, he relied on Main Pal and another case (3rd supra).

17) Per contra, the learned counsel appearing for the respondents 1 and 2 i.e. A-4 and A-5 would contend that the incident took place at 7 P.M. Therefore, as to who sprinkled the chilli powder on the face of the accused cannot be noticed, for which he placed reliance on the sunrise and sunset time calendar which shows that on the relevant date, the sunset was at 5.50 P.M. Therefore, there was no possibility to identify as to who really sprinkled chilli powder on the face of the deceased. He also

submitted that the injuries sustained by the deceased may not be possible with M.O.2. In fact, the evidence of prosecution is totally contrary to the evidence of PW-9. Though Appani Venkata Ratnamma (A-6), since the case was separated she being juvenile, was acquitted, no appeal was filed against the same. He also would contend that in the absence of any unlawful assembly, there cannot be any offence under Sections 147 and 148 IPC. Therefore, the conviction under Section 302 r/w 149 IPC does not arise. Therefore, he submits that no case is made out against A-4 and A-5 and the appeal is liable to be dismissed.

18) The learned Public Prosecutor supported the version of the learned counsel for the appellant.

19) On the basis of the arguments advanced from both sides and after perusal of the material on record, what emerges is as to whether A-1 to A-3 are liable to be acquitted and simultaneously whether A-4 and A-5 are liable to be convicted.

20) To prove the guilt of A-1 to A-5, the prosecution mainly relied on the evidence of PWs.1, 2 and 5 said to be the eyewitnesses for the occurrence of the offence. In fact, PW-1 is the wife of the deceased and PW-2 is the brother-in-law of the deceased. PW-5 is a distant relative to the deceased. From the evidence of PW-1 and also in the light of Ex.P-8 it can be safely inferred that she was present at the scene of occurrence and she is an eyewitness. The injury sustained on her arm also substantiates her presence at the scene of occurrence. Though the accused have raised a doubt about her presence at the scene of occurrence, but in the cross-examination of PW-1 nothing is elicited to

doubt her presence. In fact, in Ex.P-9 she has categorically stated about the way in which her husband was attacked by the accused and when she attempted to intervene, she was beaten up by A-3. A perusal of Ex.P-9 clearly indicates that she has specifically mentioned how the deceased was attacked with knives and sticks. PW-2 who is examined as another eyewitness to the scene of occurrence categorically stated that A-1 hacked the deceased with 'kathi' on head and face. A-2 beat the deceased with stout stick on the face. A-3 and A-5 kicked the deceased on his chest and testicles indiscriminately. PW-5 also deposed corroborating the evidence of PWs.1 and 2. In fact, PWs. 2 and 5 have categorically stated that A-4, A-5 and Appani Venkata Ratnamma have sprinkled chilli powder on the face of the deceased and after he fell down, A-4 and the said Appani Venkata Ratnamma has beaten the deceased on his body which corroborates with the evidence of PW-1. However, as PWs.2 and 5 are said to be the relatives, their evidence has to be carefully scrutinized as to whether they were present at the scene of occurrence. Though the houses of PWs.2 and 5 are not situated in the street where the scene of occurrence took place, the house of PW-2 is at a distance of 200 yards. As per his evidence, he was in bazaar at the time of occurrence and he is at a distance of 40 feet from the place where the cots were placed. He has specifically stated in his evidence that he was in the bazaar routinely and no specific reason for his presence in the vicinity of scene of offence at the time of occurrence. Similarly, PW-5 is a distant relative of both the deceased and the accused. His evidence is duly corroborated on all material aspects with the evidence given by PW-1. In fact, in his evidence he has stated that at the time of occurrence, there was light darkness and in spite of it the persons are

visible. Added to this, the light was also projecting on to the street from the houses on both sides. To substantiate his presence at the scene of occurrence, he has stated that on the date of occurrence, he had been to the fields located towards the North of the house of the deceased belonging to Reddy garu and locally known as Pachalamarri fields and there was no public way to Pachalamarri fields from the scene of offence. He did not intervene in the occurrence. He also deposed in the cross-examination that his relationship with the accused is not cordial. However, the suggestion given by the accused that the differences between him and the accused are still subsisting is categorically denied stating that he is not on talking terms with A-1. Though PW-3 was examined by prosecution as one of the eyewitnesses, he has not supported the prosecution case and he was declared hostile. However, the suggestions given to him in the cross-examination by the learned Public Prosecutor show that he is not a trustworthy witness. Therefore, the evidence of PWs.1, 2 and 5, categorically establishes the case against A-1 to A-3. However, the contention raised by the accused that PWs.2 and 5 being interested witnesses their evidence cannot be accepted on the basis of a careful scrutiny of their evidence as stated supra. The trustworthiness of PWs.2 and 5 also can be decided on the basis of the evidence given. The evidence of PW-6 establishes the motive part of the murder of the deceased. Further, the prosecution also relied on the evidence of PW-7 who acted as mediator for the arrest of A-1 to A-3 and seizure of M.O.2 knife used by A-1 in the commission of the offence. The evidence of PW-7 who is a panch witness for the inquest of the deceased examined apart from the evidence of

PW-9 who conducted post mortem examination of the deceased as well as who treated the injured PW-1 establishes the use of M.Os.1 and 2.

21) In fact, PW-7 in his evidence has deposed that on 19.10.2006, PW-11-investigating officer arrested A-1 to A-3 in his presence near Kankanalapalli cross road at about 4.15 P.M. and on their interrogation they confessed their guilt in murdering the deceased. A-1 further confessed that the knife M.O.2 used by him in the commission of the offence was hidden in the eaves of kostam at Sngarapalli and led them to Sngarapalli. A-1 produced M.O.2 before the police in his presence under the cover of Ex.P-5 mediatomama. In fact, the Medical Officer who is examined as PW-9 deposed that on 10.10.2006 he conducted post mortem examination over the body of the deceased and found the injuries as mentioned in Ex.P-7 and basing on the same, he opined that the deceased died of primary neurogenic shock and hemorrhage as a result of the head injury and certified that the above injuries can be caused by M.Os.1 and 2 and sufficient to cause the death in the ordinary course of nature. He also deposed that he has examined PW-1 also on the same day and issued the wound certificate i.e. Ex.P-8 which establishes reddish black contusion of 8 x 2 cms. on right upper arm on posterior aspect which is simple in nature caused by blunt object about 24 to 26 hours prior to his examination. PW-11 who is the investigating officer also deposed that he arrested A-1 to A-3 in the presence of PW-7 and seized M.O.2 knife in pursuance of the confession made by A-1 from his kostam under cover of Exs:P-4 and P-5. It is relevant to mention that though cross examination has been made to PWs.1, 2 and 5 at length, nothing is elicited by the accused to doubt their trustworthiness. In fact,

they have no enmity or ill-feelings towards any of the accused. At the same time, the evidence adduced on behalf of the accused in the form of DWs.1 to 3, more particularly DW-2 cannot be relied upon for the simple reason, DW-1 being signatory to Exs:P-4 and P-5, he deposed on behalf of the accused. However, in the cross examination it is elicited that he is not in the habit of signing on documents containing false recitals. That being so, he being a signatory to Exs:P-4 and P-5, his version that he has signed on Exs:P-4 and P-5 at police station is only the result of collusion between him and the accused. As far as the delay in lodging the complaint and registration of the F.I.R. is concerned, PW-1 has categorically stated that due to fear of the accused no one came forward even to help her and therefore, she was constrained to lodge a complaint with the police only on the next day at 6 A.M. Thus, PW-1 has satisfactorily explained as to why she could not lodge the complaint immediately.

22) Therefore, the prosecution has proved beyond reasonable doubt about the commission of offence by A-1 to A-3. Therefore, this Court is of the opinion that there is no irregularity or illegality in the judgment given by the Court below in convicting A-1 to A-3 for the offences under Sections 302, 302 r/w 34 IPC and 324 IPC.

23) For the purpose of invoking the provisions of Sections 147 and 148 IPC, the prosecution has to prove that 5 or more persons were assembled and that such assembly was unlawful when it was convened or subsequently became unlawful for proving any one of the 5 objects specified in Section 141 IPC. To appreciate the same, the provisions of Section 141 IPC is as under:

“141. Unlawful assembly:- An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is—

First – to overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second – to resist the execution of any law, or of any legal process; or

Third – To commit any mischief or criminal trespass, or other offence; or

Fourth – By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth – By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation – An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.”

Further, Section 148 IPC contemplates that whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to 3 years, or with fine, or with both. Therefore, the prosecution to invoke Section 148 IPC has to prove that in addition to the unlawful assembly, the accused was armed with deadly weapons or with anything which is likely to cause death when used as a weapon of offence.

24) In fact, the prosecution mainly relied on the evidence of PWs.1, 2 and 5 being the eye witnesses to the scene of occurrence. PW.1 is the wife of the deceased, PW.2 is the brother-in-law of the deceased (sister's husband). As far as PW.5 is concerned, he is a distant relative and is said to have more closure to the accused than the deceased. Though PW.3 was examined as eye witness, the prosecution has declared him as hostile, since he has not supported its case. So from the evidence of eye

witness, it can be safely inferred that they were at the scene of occurrence. Similarly, from the evidence of PW.1 and also Ex.P8 it inspires confidence that PW.1 was at the scene of occurrence and in fact, when she attempted to interfere when the accused were attacking the deceased, she sustained injury on her arm.

25) A close scrutiny of the evidence of PW.1 would indicate the presence of A1 to A3 at the scene of occurrence. Though the accused have denied the presence of PW.1, as stated supra, in the light of Ex.P8 and her evidence it cannot be doubted that she was not there at the scene of occurrence. In fact, PW.1 lodged a complaint on 10.10.2006 at 6.00 a.m. before the Station House Officer, B.V. Peta Police Station vide Ex.P9 in which she categorically narrated that her husband was attacked when he was carrying the pipes. She also stated that when she attempted to intervene and stop the accused from attacking the deceased, A3 has beaten her and in the process she sustained injury. In fact, her evidence is in tune with Ex.P9, report lodged by her. A close perusal of Ex.P9 also would reveal that she has mentioned all the overt acts against the accused, but the same was elicited in her chief-examination giving details against the weapons used by the accused such as, knife and stick. As per PW.1, the role attributed to A4 and A5 is that A4 along with one Appani Venkata Ratnamma (juvenile) sprinkled chilli powder on the face of the deceased before the attack and she has categorically deposed in the cross-examination that when she attempted to interfere, some of the chilli powder was also fell on her sari. However, the prosecution has not seized the sari wore by PW.1 nor she handed over the same to the investigating officer and in the process it was not seized

by the investigating officer. Even from the inquest report i.e., Ex.P6 nor in the postmortem report i.e., Ex.P7, there are no traces of chilli powder. Even in the evidence given by the mediators for the scene of offence observations or inquest, the theory of chilli powder is not there. PW.9, medical officer, who conducted autopsy over the deceased, did not find any traces of chilli powder over the body of the deceased. The overt act attributed to A5 is that he kicked the deceased along with other accused when he fell down. If Ex.P7 i.e., postmortem certificate is considered and even in the evidence of PW.9, it is not co-related to the evidence of PW.1 since PW.1 has categorically deposed that chilli powder was sprinkled on the face of the deceased and some of the powder was also fell on her sari. However, the prosecution miserably failed to establish these two vital aspects on the theory of sprinkling of chilli powder. So this gives rise to a strong suspicion about participation of A4 and A5 during the course of commission of offence. At the time of commission of offence it is brought on record that A4 was a student and A5, who is an engineering graduate, was working in Bombay. In the light of the vital link with regard to sprinkling of chilli powder is missing and as contended by the counsel for the accused that there is every likelihood of implicating A4 and A5 by PW.1 in view of previous enmity with the other accused cannot be ruled out. At the same time, the defense set up by the accused appears to be probable. Even if the evidence of PW.s2 and 5 is looked into on this aspect, their evidence is consistent and convincing in respect of the offence committed by A1 to A3 which corroborated with the evidence of PW.1 in all material aspects. However, as argued by the counsel for the accused that the presence of A4 and A5 at the scene of occurrence appears to be doubtful.

26) In these circumstances, the evidence brought on record by the prosecution is not inspiring confidence with regard to presence and participation of A4 and A5 at the scene of occurrence and is doubtful. Hence, it is a fit case to give benefit of doubt to A4 and A5. As such, in the absence of A4 and A5 it is to be concluded that there is no unlawful assembly as per the provisions of Section 141 IPC and therefore, the question of invoking either Section 147 or Section 148 IPC will not arise. Thus, the prosecution did not establish and bring home the guilt of A1 to A5 for the offence under Sections 147 and 148 IPC. Hence, A1 to A5 had not found guilty for the offence under Sections 147 and 148 IPC.

27) In the result, both the criminal appeals i.e. Crl.A.No.58 of 2011 filed by the appellants/A-1 to A-3 against their conviction and Crl.A.No.831 of 2011 filed by the appellant/de facto complainant (PW-1) against the acquittal of A-4 and A-5, are dismissed. However, the period of detention/imprisonment undergone by the appellants/A1 to A3 before trial and after trial, shall be set off against the term of imprisonment. The appellants/A1 to A3, who are on bail, are directed to surrender before the trial Court within two weeks from today. Upon such surrender, the trial Court shall commit them to the concerned jail for undergoing the remaining period of imprisonment.

Miscellaneous petitions, if any, shall stand closed.

SURESH KUMAR KAIT, J

P. KESHAVA RAO, J

Date: 01.05.2018.
ES/CCM

Note: C.C. to trial Court.