

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

THE HON'BLE SMT JUSTICE T. RAJANI

CRIMINAL APPEAL No.293 of 2012

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

The judgment that is assailed, in this appeal, is rendered by the XI Additional District and Sessions Judge, Krishna, Gudivada in SC.No.211 of 2009 on 21.03.2012 whereby A1 was found guilty for the offence punishable under section 302 IPC.

2. To understand the facts of the case, the charge sheet can be referred to:

A1 is the brother-in-law of A2. A2 is the son of A4. A3 is son-in-law of A4. A1, A2 and A4 are residents of Gudivada while A3 is a resident of Vijayawada. They conspired to do away with the deceased, as he has become obstacle to their pork business. In pursuance of their pre-plan, A4 induced the deceased on 08.12.2007, to do pork business in her stall at market centre. Believing the inducement of A4, the deceased, on 09.12.2007, at about 4 AM, along with his wife went to the market centre with dressed pork and shared it with A2 for selling. At about 9.30 AM, the deceased felt that the pork on hand is not sufficient for that day and he took a pig from the slaughter house situated adjacent to the market, for dressing. A1 to A3, who were waiting to do away with the deceased, followed him to the slaughter house. A1, armed with porker knife, hacked the deceased on the back and left chest, with an intention to kill the deceased. While the deceased was trying to run away to save his life, A2 and A3 closed the gate of the slaughter house, to prevent him from

escaping and pushed the deceased from the gate. When the deceased tried to scale over the wall to escape from there, A1 further hacked on his left forearm, on which the deceased fell down on the ground. The deceased forcibly came to the road, by pushing A2 and A3 and fell down on the road, unconscious. Later, he was shifted to Government Area Hospital, Gudivada in 108 Ambulance, but he succumbed to the injuries while undergoing treatment at Government General Hospital, Guntur on 22.12.2007 at 11 PM.

The statement of P.W.2 was recorded on 09.12.2007 and based on the said statement, a case was registered in Cr.No.251 of 2007 for the offence under Section 307 of the Indian Penal code. The scene of offence panchanama was conducted, witnesses were examined and their statements were recorded and the blood stained clothes of the deceased were seized from L.W.8. During investigation, A2 intentionally gave false information to the police that A1 only participated in the offence, with intent to screen himself, A3 and A4 from legal punishment and the statement of A2, to that effect was recorded. On 09.12.2007, the SI of Police, P.W.10, arrested A1 at his residence and in pursuance of the confession made by him, the weapon was seized. On 23.12.2007, after receipt of death intimation of the deceased, the section of law was altered to Sections 302, 114 read with 34 IPC. A2 and A4 were arrested on 09.01.2008 at their residence and A3 was arrested on 10.01.2008 at the house of A4. The Magistrate recorded the dying declaration of the deceased on 17.12.2007. The investigating officer got conducted the post mortem examination on the dead body of the deceased.

After concluding the investigation, charge sheet was filed against A1 for the offence under Section 302 IPC; A2 for the offence under Sections 201 and 203 IPC and A1 to A4 for the offence under Sections 120-B and 302 read with 34 IPC.

The Additional Judicial Magistrate of First Class, Gudivada took cognizance of the case and after complying with the required legal formalities, committed the case to the Sessions Division by virtue of orders in PRC.No.14 of 2009. The Sessions Judge, in turn, made over the case to the XI Additional District and Sessions Judge, Krishna, Gudivada for trial and disposal in accordance with law. The Court below, on appearance of the accused, framed charges against them for the same offences and after recording the plea of not guilty by the accused, conducted the trial of the case, during which the court examined P.Ws.1 to 14 and marked Exs.P1 to P25 and M.Os.1 to 4 on behalf of the prosecution. Ex.D1 was marked during the cross-examination of P.W.2. 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 and considering the material on record, passed the impugned judgment, convicting A1 for the offence under Section 302 IPC and acquitting A2 to A4 of the offences under Section 302 IPC and A2 of the offence under Section 203 IPC, against which the present appeal is preferred on the following grounds:

The Court below ought to have seen that there was no motive for the accused to kill the deceased; the Court below failed to see that P.W.2 gave Ex.P1 report based on hearsay evidence and the Court below failed to see that P.Ws.2 to 6 did not support the case and were declared hostile by the prosecution; the Court below also suspected Ex.P17, statement of the deceased, which was recorded by P.W.10; the Court below failed to see that Ex.P22, dying declaration, is tutored one and rightly observed that there were exaggerations in the dying declaration, but wrongly convicted the accused based on such exaggerations; the Court failed to see that the identity of A1 is mistaken and that P.W.1 is not an eye witness to the occurrence; the Court below failed to see that the deceased died after 14 days of the incident due to septicaemia. Based on the above grounds, the impugned judgment is sought to be set aside.

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

5. The counsel for the appellant contends that the dying declaration on which the Court below relied upon cannot be considered, as the Court below itself did not believe it totally for which reason, it acquitted A2 to A4. The counsel contends that the dying declaration rules out the presence of P.W.1 and hence, her evidence, given, projecting herself as an eye witness, cannot be held to be credible. The counsel further contends that even if the Court below believes the dying declaration, the offence for which the accused can be made liable would only be under Section 304 IPC, as the incident is an outcome of a quarrel. The counsel also contends that there arises

a doubt regarding the statement of the deceased as there is no evidence to show that the deceased became unconscious and that he regained consciousness only on the date of recording the statement and hence, she contends that the implication of A1 is an after thought by the deceased.

6. Learned Public Prosecutor, on the other hand, contends that there is no embargo on believing the dying declaration partly. He, further, contends that the even if P.W.1 is not considered as an eye witness, the dying declaration would go to prove the guilt of the accused beyond all reasonable doubt. He further contends that there was absolutely no quarrel, which preceded the incident and hence, the verdict of the Court below cannot be disturbed.

7. Based on the above arguments and the material on record, we take up the following points for consideration:

1. Whether the dying declaration of a person can be partly relied upon and whether the dying declaration of the deceased by itself or when read along with the evidence of the witnesses would inspire confidence and would render basis for the guilt of the accused
2. Whether the judgment of the Court below is sustainable.
3. To what result.

POINT Nos.1 and 2:

8. A decision of the Supreme Court in PREM KUMAR GULATI v. STATE OF HARYANA¹ declined to subscribe to the view that if a part

¹ (2014) 1 SCC (CR) 486

of the dying declaration has not been proved to be correct it must necessarily result in the rejection of the whole of the dying declaration. The Supreme Court, in fact, relied on its earlier decision in *GODHU v. STATE OF RAJASTHAN* [(1975) 3 SCC 241] rendered by a three judge bench and extracted the observations made therein as under:

“16. We are also unable to subscribe to the view that if a part of the dying declaration has not been proved to be correct, it must necessarily result in the rejection of the whole of the dying declaration. The rejection of a part of the dying declaration would put the court on the guard and induce it to apply a rule of caution. There may be cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event the court would well be justified in rejecting the whole of the dying declaration. There may, however, be other cases wherein the two parts of a dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part. In the last mentioned cases the court would not normally act upon a part of the dying declaration, the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by the other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct.”

Hence, the contention of the counsel for the appellant that since the Court below did not believe part of the dying declaration while acquitting A2 to A4, the dying declaration loses value, loses its strength.

9. Ex.P22 is the dying declaration of the deceased. In the said declaration, the deceased disclosed the manner in which the incident

occurred and stated that on 09.12.2007 at 9.40 AM, he was selling pigs in the market centre of Bandar, Gudivada, as Balasani Ramanamma told him to take pig and sell the pig meat. He bent forward to set fire with match, to burn the pig. Then Sala Panduranga Rao, A1, hacked him with pig meat knife, on his back and again he hacked on his left side chest. When he tried to escape, by running through the gate, A2 and her son-in-law, A3, caught him and obstructed him from escaping. When he tried to jump the compound wall to escape, he hacked him on his left hand arm and again he hacked him on right hand wrist. He came out and fell down and became unconscious. Explaining the reason for the said attack, he states that he did not have any disputes with Sala Panduranga Rao or with anybody. They hacked him with a view to prevent him from selling pig meat and with a view to stop him from doing business. They hacked him as he was doing business and maintaining his family happily. For the question as to who were there at the time of the incident, he stated that there were nobody there, who had acquaintance with him, but he stated that the persons, who came to buy pig meat, were present but he does not know their names. It is true that the said statement of the deceased does not spell the presence of P.W.1 at the place of the incident.

10. A reading of the evidence of P.W.1 would offer an answer for the lapse of the deceased in not speaking about the presence of P.W.1. According to her evidence, on the date of the incident, she went to the market along with the deceased at about 4 AM and they cut the pig and half of the meat was given to A2. The deceased went to the place

where the pigs were cut, which is behind their shop and A1 followed the deceased. She went to a hotel to take tiffin, at 9 AM and while she was half way in taking tiffin, she heard the cries of the deceased and went to the gate of the market, near their shop. A1 to A4 were present there with the deceased and A1 hacked the deceased at left side of the chest with a knife used for cutting pigs and he again beat the deceased on back side with the same knife. The deceased tried to jump the wall and was climbing the wall. Then A1 beat the deceased on his left, with the knife and the accused went away. On that, the deceased came out of the gate and fell down. P.Ws.2 and 3 went to the deceased and advised her to bring their people. She then left to her house. In the meanwhile, P.Ws.2 and 3 shifted the deceased to the hospital.

11. Hence, from the above, it can be understood that there was no opportunity for the deceased to observe P.W.1. P.W.1, in fact, left the place where the deceased was present, for taking tiffin and it is only later, when P.W.1 heard the cries of the deceased, that she saw the deceased and A1 to A4 and she witnessed the hacking made by A1. The scenario of the incident becomes vivid, through her evidence. By the time P.W.1 went to the spot, the attack on the deceased commenced and the deceased was making attempts to escape from them and in that state of mind, it cannot be expected that the deceased would be able to witness the presence of other witnesses and hence, he might not have observed P.W.1, due to which reason, her presence is not stated by the deceased in his statement. The evidence also shows that he fell unconscious.

12. Apart from the evidence of P.W.1, the evidence of P.W.2 also comes as a circumstance, to prove the incident. He is also a person, who sells pigs at the market centre and he has been doing the said business since 15 years. A4 and himself have licences to sell the pork in that shop. A2 sells the pork on behalf of A4. A4 is his distant relative, being his aunt. He knows the deceased and his wife. On the date of the incident, at about 9.30 AM, he saw the deceased, who fell on the road, after coming from the market. He had been selling pork in the shop at that time, while P.W.3 had been collecting money from the customers at that shop. The deceased fell on the road at a distance of 50 feet from his shop. He saw the deceased while he had been running before falling and he immediately rushed to that place. He noticed one injury on the left hand and one on the left side of the chest. When he questioned the deceased, he informed that A1 beat him. He also noticed A1 to A4 at that place. He called for 108 Ambulance and shifted the deceased to Government Hospital, Gudivada along with P.W.3. After half an hour or one hour, the deceased was shifted to Vijayawada and P.W.2 went to his house. He was, however, declared hostile since according to the statement made by him to the police, he saw the A1 causing injuries to the deceased on his back and left side of chest and left hand, with a knife. We can understand that due to the said reason, his evidence that the deceased informed that A1 beat him, stands to be an omission in his statement. For the reasons best known to him, he did not want to stand as an eye witness. He is related to A4, might be a factor, which made him resile from the earlier statement, which he made immediately, when there was no time to think about his interests.

The omitted part of the statement, given as evidence before the court, shows that he was inclined to somehow uphold the truth. But, however, even if that part of his evidence is discarded, the presence of A1 to A4 spoken to by P.W.2 is not a omission and hence, the same would support the evidence of P.W.1 and the statement of the deceased.

13. P.W.3 shifted the deceased to hospital along with P.W.2. He also saw the deceased running from inside the market and going to the road and falling down and losing consciousness. P.W.3 was also declared hostile. P.W.4, another hostile witness, nevertheless spoke about the deceased coming out of the market and falling on the road. But he did not go near the deceased and he left on his business. P.W.5, another hostile witness, also spoke on the same lines as that of P.W.4. However, he stated that he went to the house of the deceased and informed his brother, L.W.4. P.W.6, another hostile witness, saw the deceased running and falling on the road. He also saw the deceased bleeding all over his body, though he did not keenly observe the injuries. He did not observe whether the accused were present there or not. P.W.8 is a witness for the confession and recovery of M.O.1 from A1. He stated that on seeing the police, A1 tried to escape, but he was apprehended by the police and he confessed about the offence. He also produced M.O.1, which was seized by the police. In the cross-examination, it was elicited that the knife like M.O.1 is available in the market.

P.W.13 is the Magistrate, who recorded the dying declaration of the deceased. Her cross-examination does not assail the procedure

that was adopted by her in recording the statement. It was elicited that she asked the kith and kin of the patient to leave the patient and she could not say whether the patient was tutored. She also obtained certification of the doctor with regard to the fitness of the deceased for making a statement.

14. The doctor, who was examined as P.W.12, conducted the post mortem examination on the dead body of the deceased. He observed external injuries viz. one injury on the chest, infected incised wound over middle back, stab injury below the left nipple, a sutured wound on the left arm. There were corresponding internal injuries noticed by P.W.12.

15. Having concluded that the statement of the deceased is recorded as per the procedure and that his statement is supported by the evidence of P.Ws.1 and 2 and other hostile witnesses, with regard to his sustaining injuries, the contention of the counsel for the appellant with regard to the delay in recording the statement of the deceased can be now met with.

16. Ex.D1, which is marked during the cross-examination of P.W.2, is to the effect that the deceased became unconscious. Hence, by virtue of marking Ex.D1, the fact that the deceased became unconscious stands proved. The evidence of P.W.13 shows that the deceased was conscious at the time of recording the dying declaration. The contention of the counsel is that the prosecution did not prove as to when exactly the deceased regained consciousness, so as to rule out the possibility of he being tutored to give a statement in the

manner in which it was given by him. But we are unable to accept the said reasoning put forth by the counsel. The deceased attributed fatal overt act only to A1. If the overt acts were equally attributed to all the accused, there would have been some scope to assume that A1, might have been falsely implicated along with other accused, who, in fact, made the attack. With an understanding of a prudent person, it can be said that a person on the verge of death, would not leave the real culprit, though he may falsely implicate some others along with the real culprit. The Supreme Court also in *Amrik Singh, Satnam Singh And Anr. vs State Of Rajasthan* on 17 December, 1993. Equivalent citations: 1984 (1) Crimes 297 SC, 1993 (4) SCALE 673, (1994) 1 SCC 563, 1993 Supp 3 SCR 996, made similar observations that in the normal course of human conduct, no victim would leave out the real culprits and falsely implicate innocent persons. Moreover, absolutely no motives are made out against A1, for either P.Ws.1 and 2 or the deceased, to implicate him falsely. The Court below only extended a benefit of doubt to A2 to A4, considering the evidence of P.W.10, the investigating officer, that no witness stated to him about the participation of A2 to A4 and that would not amount to disbelieving the statement of the deceased. The court did not hold that the dying declaration is unbelievable and unreliable. Hence, we conclude that the dying declaration of the deceased and the evidence, would conclusively prove the guilt of the accused.

The points are accordingly answered.

POINT No.3:

In the result, the criminal appeal is dismissed, upholding the conviction and sentence imposed on the appellant/accused in SC.No.211 of 2009 dated 21.03.2012 by the XI Additional District and Sessions Judge, Krishna, Gudivada. The period of detention/imprisonment undergone by the appellant/accused before trial and after trial shall be set off against the term of imprisonment. The appellant/accused, who is on bail, is directed to surrender before the trial Court, which shall commit him 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 24, 2018

Note: Office to dispatch the copy of the judgment to the Trial Court forthwith.

(B/o) DSK

