

*IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH*

CRIMINAL APPEAL No.136 of 2012

Between:

Karada Eswara Rao
and another.

... Appellants

And

The State of A.P, repled.,
by the Public Prosecutor, Hyderabad.

... Respondent

JUDGMENT PRONOUNCED ON 27.8.2018

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
HON'BLE SRI JUSTICE P.KESHAVA RAO

1. Whether Reporters of Local newspapers : No
may be allowed to see the Judgment?
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : Yes
3. Whether Their Lordships wish to
see the fair copy of the Judgment? : Yes

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE P.KESHAVA RAO

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

HON'BLE SRI JUSTICE P.KESHA RAO

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> Head Note:

! Counsel for the appellant: Mr. G.Vijaya Saradhi

^ Counsel for the Respondent: Public Prosecutor for the State of A.P.

? Cases Referred:

1. 2011 (11) SCC 754
2. (2008) 15 SCC 449
3. (2011) 3 SCC 109

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
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.....Respondent

Counsel for the appellants: Mr. G.Vijaya Saradhi

Counsel for the respondent: Public Prosecutor for the State of AP

The Court made the following:

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

The accused in Sessions Case No.103 of 2010 on the file of the Special Judge for Trial of Cases under SCs. and STs. (POA) Act-cum-Additional District and Sessions Judge, Vizianagaram, filed this Criminal Appeal feeling aggrieved by judgment, dated 02.02.2012, whereby they were convicted for the offences punishable under Sections-302 and 201 read with Section-34 I.P.C. and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.1,000/- each and in default of payment of fine, to suffer simple imprisonment for a period of six months for the offence punishable under Section-302 IPC and also sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1,000/- each and in default of payment of fine, to suffer rigorous imprisonment for six months for the offence punishable under Section-201 read with Section-34 IPC.

The case of the prosecution, as reflected from the charge sheet, is briefly stated hereunder:

About eight years prior to the date of incident, the deceased contested for the post of Sarpanch in Gram Panchayat elections for Meesalapeta on behalf of Congress (I) party, for which accused No.1 supported him; since then, accused No.1 used to move closely with the deceased, visit his house and developed illicit intimacy with the wife of the deceased (P.W-2). About 3 years back, one day at about 1 pm., L.W-13-Mahanti

Rama Rao, who is the son-in-law of the deceased, surprisingly visited his in-laws' house, where he noticed accused No.1 having intercourse with P.W-2. Subsequently, the deceased came to know about the intimacy of P.W-2 with accused No.1, but kept quiet due to fear of loss of his prestige in the society. Thereafter, during the month of May, 2008, the deceased and accused No.1 contributed Rs.1,50,000/- and Rs.50,000/-, respectively and purchased a tractor bearing registration No.AP 35 U 9512 by getting finance from a Bank for meeting the remaining cost of the tractor. Though the tractor was registered in the name of the deceased, the accounts were being maintained by accused No.1, who failed to maintain the records properly and distribute the profits received through the said tractor according to the ratio of their investment. Accused No.1 used to threaten the deceased as and when he asked about the same. Thus differences cropped up between them over sharing of the profits; the deceased expressed about the misuse of the profits received through the said tractor by accused No.1 to his wife-P.W-2 as well as P.W-4 and others, who were his kith and kin; and finally, he decided to settle the issue with accused No.1 as early as possible. Accused No.1 bore grudge against the deceased and engineered a plan with the help of accused No.2 to kill the deceased.

On 01.8.2009 at 1 pm., the deceased left home by telling his wife-P.W-2 that he is going to his partner-accused No.1 to settle the dispute regarding the profits out of the tractor. On the same day, at about 5.30 pm., the deceased and accused No.1 went to the pesticide shop of P.W-5, where they altercated regarding the tractor profits and later, both left that place. On the same night, the deceased contacted his son-LW-3 and informed him that he is going to Gajapathinagaram to bring oil. On coming to know about the same, accused No.1 told accused No.2 to bring the deceased by deceitful means to the dhaba for taking liquor. As per their pre-plan, accused No.2 provided liquor to the deceased at the dhaba of P.W-9 and later, both proceeded to their village in the auto of accused No.2 bearing No.AP-35U-3318. On the way, accused No.2 stopped his auto at the shop of P.W-7 and informed accused No.1 over a coin box phone about their going to Marupalli and asked him to wait after passing Marupalli. At about 9 pm., after accused No.2 and the deceased passed Marupalli in the auto, on noticing accused No.1 on the road side, accused No.2 stopped his auto and asked him as to why he was waiting there, for which, accused No.1 replied that there is no air in the tyre of his bike and requested to allow him into the auto. When the deceased objected to the same, accused No.1 abused the deceased by saying "Lanja koduku na wife tho had intimacy" and he mis-used the tractor

profits to his self and lost his prestige in the society. An altercation took place between the deceased and accused No.1. Later, accused No.2 started his auto from there; accused No.1 followed the said auto on his bike; accused No.2 stopped his auto near Culvert No.518/2 at Kotharoad junction on NH-43 Road, as per their pre-plan to kill the deceased. Accused No.1 approached them and made the deceased get down from the auto and quarrelled with him. Accused No.1 beat the deceased with a stick on his neck twice, due to which he fell in the bushes and became unconscious. Thereafter, accused No.1 forcibly throttled the neck of the deceased till he lost his breath and accused No.1 with the assistance of accused No.2 carried the dead body of the deceased up to the rail track and threw it on the track at K.M.No.440/4-5 with a view to screen the offence committed by them and show it as a rail accident.

After the incident, in fear, both accused Nos.1 and 2 left their chappals and the stick used by them in the commission of offence in the bushes at the Mango thope near the Railway track and went away on their vehicles. P.Ws.8 and 10, who witnessed the altercation between the deceased and accused Nos.1 and 2, identified the latter.

At first, a case was registered by P.W-15-Sub-Inspector of Police, in Crime No.111 of 2009 for the offence under Section-174 Cr.P.C. on the file of R.P. Police Station, Vizianagaram, on

the message given by P.W-1 on 02.8.2009 at 11 am, visited the scene of offence and observed the same in the presence of P.W-4 and L.W-23-K.Pentaiah, seized the blood stained and control stones under the cover of observation report, conducted inquest over the dead body of the deceased in the presence of L.W.21-Deesari Venkata Ratnam and L.W-22-Reddi Appalanaidu and forwarded the dead body of the deceased to P.W-13-Civil Assistant Surgeon, under the escort of L.W-27-D.Ramulu for post-mortem examination. Based on the inquest report, on 03.8.2009 at 3 pm, L.W-28 altered the provision of law in the F.I.R. to Sections-302 and 201 read with Section-34 IPC. L.W-29-P.Ramachandra Rao, Inspector of Railway Police, Visakhapatnam Lines, verified the investigation done by L.W-28 and transferred the case to L.W-30-G.Maheswara Rao, HC-742, Gajapathinagaram Police Station, for further investigation on the point of jurisdiction.

On receipt of the express FIR, P.W-17 took up investigation, visited the scene of offence, examined L.Ws.13 to 15 and recorded their statements under Section-161(3) Cr.P.C. Further investigation was taken up by P.W-18, who on receipt of credible information on 15.8.2009 at 12 noon, arrested accused No.1 in the presence of L.W-23 and P.W-14 and during his interrogation, accused No.1 confessed the commission of offence along with accused No.2. Based on the

confession of accused No.1, P.W-17 observed the original scene of offence in the presence of L.W-23 and P.W-14 and seized 3 pairs of chappals belonging to accused Nos.1 and 2 and the deceased, and a stick from the bushes at the scene of offence and also seized the wearing apparels of accused No.1 from him under the cover of observation report. On the same day at about 5.15 pm., P.W-18 arrested accused No.2, who, on interrogation confessed the commission of offence. On receipt of the post-mortem examination and RFSL reports and after completion of the investigation, the charge sheet was filed.

Based on the charge sheet and the material collected and placed before it by the Investigation Officer, the Court below has framed the following charges:

“Firstly, that on 1st August, 2009 at about 5.30 pm, A-1 and A-2 of you, in furtherance of your common intention abducted the deceased-Kalisetty Satya Rao by deceitful means to the Dhaba of Harikishan Gambhir situated at Bodasingupeta of Bondapalli Mandal near Gajapathinagaram by offering liquor in order to murder him on the grouse that the deceased was having illicit intimacy with the wife of A-1 among you by name-Kaliseti Rajeswari @ Lakshmi and also due to differences that arose in between the deceased and A-1 of you with regard to the profits derived from tractor purchased by you jointly and that you thereby committed an offence punishable under Section-364 read with Section-34 IPC and within my cognizance.

Secondly, that on the night of 1st August, 2009 at about 9 pm, near Culvert No.518/2 at Kotha road

junction on NH-43 road, near Marupalli Village, A-1 and A-2 of you, in furtherance of your common intention, committed murder of Kalisetty Satya Rao by forcibly throttling the neck of deceased by A-1 among you till he lost his breath and that thereby committed an offence punishable under Section-302 read with Section-34 IPC and within my cognizance.

Thirdly, that on the night of 1st August, 2009 at about 9 pm, knowing or having reason to believe that you have committed an offence of murder near Culvert No.518/2 at Kotha road junction on NH-43 road, near Marupali Village and in order to disappear the evidence or knowingly gave false information, A-1 and A-2 of you carried the dead body of deceased up to rail track and threw the dead body on the up-line track at KM.No.440/4-5 from the place of murder with the intention of screening the said offence from legal punishment and that, you thereby committed an offence punishable under Section-201 read with Section-34 IPC and within my cognizance.”

As the plea of the appellants was one of denial, they were subjected to trial, during which, the prosecution examined P.Ws.1 to 18, got Exs.P-1 to P-22 marked and produced M.Os.1 to 13. On behalf of the appellants, no evidence was let in.

On appreciation of the oral and documentary evidence, the Court below has disposed of the case in the manner as noted above.

We have heard Mr. G.Vijaya Saradhi, learned counsel for the appellants, and the learned Public Prosecutor for the State of Andhra Pradesh and perused the record.

This is a case purely based on circumstantial evidence, where motive assumes a decisive role. The case of the prosecution as set up in the charge sheet as regards motive is that appellant No.1 had developed illicit intimacy with P.W-2- wife of the deceased; that the deceased purchased a tractor bearing registration No.AP 35 U 9512 on partnership basis; that the deceased invested an amount of Rs.1.5 lakhs, while appellant No.1 has contributed a sum of Rs.50,000/- towards his share; that though the tractor was registered in the name of the deceased, the accounts were being maintained by appellant No.1; that the latter has failed to maintain the accounts properly and distribute the profits received through hiring of the tractor according to their investment; and in connection therewith also, differences cropped up between them.

Quite contrary to what the prosecution alleged in the charge sheet, the Court below has framed charge to the effect that the deceased was having illicit intimacy with the wife of appellant No.1. No prosecution witness has spoken about the illicit intimacy either as alleged in the charge sheet or as mentioned in the charge framed by the Court below. Therefore, the prosecution miserably failed to prove the said part of motive.

Apropos the alleged motive in connection with sharing of profits through hiring of tractor, P.W-2-the wife of the deceased stated that the deceased purchased a tractor by

investing Rs.3 lakhs and appellant No.1 has contributed Rs.50,000/- and that appellant No.1 was not distributing profits in proportion to the investment made by the deceased, in connection with which, disputes arose between them. P.W-3 also reiterated the said stand. In his cross-examination, P.W-3 admitted that he does not have any documents to show that the deceased and appellant No.1 purchased the tractor jointly. Thus, except the *ipse-dixit* of the witnesses, the prosecution failed to produce any evidence to substantiate the allegation that the tractor was purchased jointly by the deceased as well as appellant No.1 and that disputes arose with regard to distribution of profits in connection therewith. Thus, in our opinion, the prosecution failed to drive home the motive for appellant No.1 to do away with the life of the deceased.

As regards the oral evidence adduced by the prosecution, P.Ws.2, 5 and 10 were examined as last seen witnesses *qua* appellant No.1 and the deceased, and P.Ws.7, 9 and 10 were examined to speak about their last seeing appellant No.2 and the deceased together.

We shall, therefore, refer to the testimonies of the above witnesses. P.W-2-the wife of the deceased stated that on 01.8.2009 at about 2 pm, appellant No.1 and the deceased went out from their house to settle the accounts. P.W-15, one of the Investigation Officers, in his cross-examination admitted that

P.W-2 did not state before him that on 01.8.2009, the deceased and appellant No.1 started from their house together and went outside; that on 02.8.2009, in the morning, when she tried to contact the deceased over cell phone, she received a message that it was switched off; and that she found an injury on the deceased. Thus, the version given out by P.W-2 in her evidence is an improvement after what she stated before the Police. This creates a serious cloud on the veracity of her testimony given before the Court. Therefore, P.W-2 cannot be treated as a last seen witness.

P.W-5, the owner of the shop by name 'Sai Krishna Rice Depot and General Stores', deposed that he knows the deceased and appellant No.1; that on 01.8.2009 at about 2 or 2.30 pm, the deceased visited his shop; that the deceased called appellant No.1, who came to his shop at about 5 pm, had a talk with the deceased for about 10 to 15 minutes and left the shop. He pleaded ignorance about the nature of the talk both had. He, however, added that they had a talk regarding tractor. In his cross-examination, the witness stated that whoever visits his shop has to stand outside the shop as, there is no facility to sit inside. He denied the suggestion that on 01.8.2009, appellant No.1 did not come to his shop. When the shop of P.W-5 did not have the facility of sitting by visitors, it is not possible to believe that the deceased must have stayed at the shop of P.W-5 from

2.30 pm to 5 pm. At any rate, as per the evidence of P.W-10, an altercation allegedly took place between the deceased and appellant No.1 at about 9 pm.

The law is well settled that in order to accept the last seen theory, the time gap between the witness seeing the accused in the company of the deceased and the occurrence must be so short as to rule out any possibility of a third party intervening and committing the crime. (See *Sk. Yusuf vs. State of West Bengal*¹, *Mohd. Azad alias Samin v. State of West Bengal*² and *State thr. Central Bureau of Investigation v. Mahender Singh Dahiya*³)

Even if we accept the version of P.W-5 as true, the time gap between his last seeing the deceased and appellant No.1 together and the occurrence is too long and therefore, P.W-5 cannot be treated as a last seen witness.

Coming to the evidence of P.W-10, who claims to be an auto driver, he deposed that on 01.8.2009, at about 8.30 or 9 pm., while he was coming from Manapuram towards Gajapathinagaram and reached near Kotha road junction, he found the appellants and the deceased altercating. However, he deposed that he does not remember the registration number of the auto which he was plying on 01.8.2009; that he also could

¹ 2011(11) SCC 754

² (2008) 15 SCC 449

³ (2011) 3 SCC 109

not remember the name of the owner of the auto which he was plying on hire on that night; and that he did not observe the registration numbers of the auto and the motor cycle seen by him at the scene of offence. He further deposed that one month after the said occurrence, he was examined by the Police and that he did not inform anybody except the Police about the alleged altercation. In the further cross-examination by the defence, P.W-10 stated that one Ramanamma is his sister and is younger to him by three years; that about 10 years back, she got married; that he studied up to 5th class; that his sister took him on adoption; that Dattu (adoption) ceremony was not performed when he was taken in adoption; that the alleged adoption was not reduced into writing; that his name was recorded in Panchayat Record as 'Bondapalli Chinnarao'; that he nowhere claimed that his name is Nagara Srinivasa Rao; and that he has also not stated to the Police that he was called as 'Nagara Srinivasa Rao' though his name is Bondapalli Chinnarao. He further stated that he has applied to RTO to issue Driving Licence in-person and obtained the same, wherein his name is described as Bondapalli Chinnarao, S/o Poleesu and that in his Voter I.D. card also, the said name was mentioned.

The Police examined the witness as Nagara Srinivasa Rao and the prosecution also examined him in the same name. However, the witness categorically admitted in his further

cross-examination that his name is Bondapalli Chinnarao and that there was nothing to show that he had the name of Nagara Srinivasa Rao. Thus, when there is a dispute about the identity of the person himself and in the absence of any proof that a person by name Nagara Srinivasa Rao was in existence at all, the evidence of P.W-10 examined in such name cannot have any probative value. More over, his evidence shows that he had acquaintance only with appellant No.1 and that he had nothing to do with the deceased. Even if we take his name on its face value, it is very difficult to believe that a person who was passing-by the road by driving an auto in darkness at about 9 pm would be able to recognise the appellants and the deceased altercating with each other. When the witness himself conceded that he did not observe the registration numbers of the auto and the motor cycle parked near the place of altercation because of darkness, by the same reason it is not possible to believe that he would have identified the appellants and the deceased while allegedly altercating with each other. Further more, he does not even remember the registration number and the name of the owner of the auto which he was plying on the date of occurrence. All these reasons impel us to hold that P.W-10 is wholly an untrustworthy witness who was obviously pressed into service by the prosecution to bolster the last seen theory. The facts that he was examined by the Police one month after

the occurrence and that he has not informed any one about the alleged altercation also makes his testimony highly doubtful.

Coming to the evidence of P.W-7, who is running a Kirana shop, he deposed that on 01.8.2009 at about 8 pm., appellant No.2 came to his shop, telephoned to somebody from the coin box phone; and that "one passenger" was with him at that time. Further, P.W-7 has not claimed that he knows the deceased or that the "one passenger" he has seen in the auto was the deceased. No Test Identification Parade was held so as to enable P.W-7 to identify the deceased as the passenger seen by him along with appellant No.2. Therefore, it is highly unsafe to accept the testimony of P.W-7 as a last seen witness.

P.W-9 claimed that he was running a Dhaba and that he knows appellant No.2 and the deceased as they were his customers. He further deposed that on 01.8.2009, between 6 and 7 pm., both appellant No.2 and the deceased came to his Dhaba, took food there and thereafter left the place. He further admitted that he was examined by the Police 15 days after the alleged occurrence. Ex.P-8-Post-mortem report shows that no undigested food was found in the stomach of the deceased. Had the deceased taken food in the Dhaba of P.W-9 between 6 and 7 pm., the death having allegedly taken place around 9 pm., the stomach of the deceased would have contained some partly digested food. More over, the very fact that P.W-9 was

examined by the Police 15 days after the alleged incident shows that he was subsequently planted.

If we discard the evidence of P.Ws.2, 5, 7, 9 and 10, no other evidence would be available except the alleged recovery of MO-4-stick. No doubt MO-4-stick was allegedly seized from the possession of appellant No.1, but as rightly argued by the learned counsel for the defence, the appellants have not been charged for causing the death of the deceased with a stick. On the contrary, in charge No.2, it is specifically alleged that the appellants have caused the death of the deceased by forcibly throttling his neck. Therefore, recovery of stick from appellant No.1 has no bearing on deciding on the guilt or otherwise of the appellants.

In the light of the above discussion, we are of the opinion that the prosecution failed to prove the guilt of the appellants beyond all reasonable doubts.

In the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellants by the Court below are set aside. The fine amount, if any, paid by them shall be refunded to them. The bail bonds of the appellants shall stand cancelled. The appellants shall immediately surrender

before the Superintendent, Central Prison, Visakhapatnam, to enable them to complete the formalities for their release.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE P.KESHA VA RAO

27th August, 2018

Note:

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