

HIGH COURT FOR THE STATE OF TELANGANA

HON'BLE THE CHIEF JUSTICE SRI RAGHVENDRA SINGH CHAUHAN

AND

HON'BLE Dr. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No.487 of 2012

Date: 23.07.2019

Between:

1. Nagendhar Mandal @ Nagi

2. Chulhai Choudhri @ Dharmender

..Appellants/Accused 1 and 2

AND

The State of A.P.

Rep. by its Public Prosecutor,

High Court Buildings, Hyderabad.

..Respondent/Complainant

Counsel for the Appellants : Smt C. Vasundhara Reddy

Counsel for the Respondent : Smt. J. Sridevi,
Additional Public Prosecutor

The Court made the following:

JUDGMENT: (Per Hon'ble Dr. Justice Shameem Akther)

This Criminal Appeal, under Section 374(2) of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C'), is filed by the appellants-accused 1 and 2, aggrieved by the judgment, dated 17.02.2012, passed in Sessions Case No.102 of 2010 by the learned III Additional District and Sessions Judge (Fast Track Court) at Nizamabad, whereby and whereunder, the appellants-Accused Nos.1 and 2 (hereinafter referred to as A.1 and A.2) were found guilty of the offence punishable under Section 302 r/w 34 of I.P.C and were convicted under Section 235(2) Cr.P.C and sentenced to suffer Imprisonment for Life and also to pay a fine of Rs.200/-, in default, to suffer Simple Imprisonment for a period of 15 days.

2. In brief, the case of the prosecution is that Thatikonda Ashok (hereinafter referred to as 'deceased') used to work as beedi packer in Desai Beedi Karkhana, situated at Mubaraknagar. The deceased used to reside near Nalla Hanuman Temple, Kotagalli, Nizamabad. About six months prior to the incident, the deceased developed illicit intimacy with PW.6 (Banavath Laxmi), with whom A.1 and A.2 were already in illicit relationship. About ten days prior to the incident, while PW.6 and the deceased were in the market yard, A.1 and A.2 warned the deceased not to continue his relationship with PW.6, otherwise they would kill him. On 08-12-2009, at about 9.30pm, A.1 and A.2 noticed the deceased and PW.6, near Devi Theatre and followed them. At about 10.00pm, while the deceased was in illegal intimacy with

PW.6, A.1 and A.2 went there and A.1 beat the deceased on his head with a stone and at the same time A.2 also beat the deceased on his head with a stone. Thereafter, A.1 and A.2 dragged the deceased for some distance and A.1 picked up another stone and cut the throat of the deceased, while A.2 caught hold the legs of the deceased, due to which the deceased sustained bleeding injuries to the head and neck and died on the spot.

3. On 09.12.2009, at about 11.00am, PW.1-the *de facto* complainant lodged a report in IV Town Police Station, Nizamabad. On receiving the report, PW.11-Sub-Inspector of Police, registered the same as a case in Crime No.289 of 2009 under Section 302 I.P.C and issued F.I.R(Ex.P.11). PW.12-Investigating Officer, took up the investigation and rushed to the scene of offence and conducted scene of offence panchanama in the presence of mediators PW.7(P.Sanjeev) and LW.10 (P.Rajesh) and seized MO.1-blood stained earth, MO.2-controlled earth, MO.3-blue pant and MO.4-two stones, under the scene of offence panchanama (Ex.P.3). Further, PW.12 got photographed the dead body of the deceased by PW.4, drew rough sketch of scene of offence (Ex.P.4) and obtained signatures of PW.7 and LW.10 on Ex.P.4, recorded the statements of son of the deceased (PW.2), wife of the deceased (LW.2-T.Laxmi), daughter of the deceased (LW.4-R.Neelima), PW.3 and PW.4. Thereafter, held inquest over the dead body of the deceased in the presence of panch witnesses (PW.7 and LW.10-P.Rajesh) under inquest panchanama (Ex.P.5)

and sent the dead body of the deceased for post-mortem examination. On 10.12.2009, Dr.M.Bhooma Reddy (PW.9), the Civil Assistant Surgeon, Government Hospital, Nizamabad, held autopsy over the dead body of the deceased and issued post-mortem examination report (Ex.P.10), wherein it was opined that the cause of death was due to head injury with intracranial bleeding. At the time of post-mortem examination in Government Mortuary Room, Nizamabad, the police seized MO.5 (full shirt), MO.6(coffee colour underwear) and MO.7 (banian) in the presence of PW.7 and LW.10-Rajesh under Ex.P.6-seizure panchanama of clothes of deceased.

4. On 14.12.2009, at 7:00PM, PW.12 along with PW.11 and staff apprehended A.1 and A.2 at Labour Adda, Nehru Park, Nizamabad and in the presence of PW.10 (G.Raghu) and PW.8 (G.Nagabhushanam) interrogated A.1 and A.2, who confessed the commission of offence and recorded their statements under Exs.P.7 and P.8 respectively. Thereafter, A.1 and A.2 led the police and panch witnesses (PW.8 and PW.10) to the scene of offence, where A.1 showed the sharp edged cement stone (MO.8) used for cutting the neck of the deceased, which contained dry blood and the same was seized under Ex.P.9-seizure panchanama and obtained signatures of panch witnesses (PW.8 and PW.10). PW.12 forwarded the material objects to Regional Forensic Science Laboratory, for analysis and report and received FSL report (Ex.P.12). PW.12, after receiving all the relevant documents and on completion of investigation, filed the charge

sheet against A.1 and A.2 of the offence punishable under Section 302 r/w 34 IPC before the Additional Judicial Magistrate of First Class, Nizamabad.

5. The learned Magistrate took cognizance of the case and committed the same to the Court of Sessions. The Court of Sessions took the case on file under Section 302 r/w 34 of I.P.C and made it over to the trial Court for disposal in accordance with law. When A.1 and A.2 appeared before the trial Court, charge under Section 302 r/w 34 IPC was framed against them, read over and explained to them in Hindi, for which they pleaded not guilty and claimed to be tried.

6. During the course of trial, the prosecution to prove its case, examined PW.1 to PW.12 and got marked Exs.P.1 to P.12 and material objects MO.1 to MO.8. Ex.D.1 is marked in the evidence of PW.6 (Banavath Laxmi).

7. After closure of prosecution evidence, when A.1 and A.2 were examined under Section 313 of Cr.P.C explaining the incriminating material appearing against them, they denied the same and did not adduce any evidence on their behalf.

8. The trial Court on analysis of both oral and documentary evidence and the submissions made before it, held that the prosecution proved the guilt of A.1 and A.2 beyond all reasonable doubt of the offence punishable Section 302 r/w 34 IPC and accordingly convicted and sentenced them as indicated above. Hence the Criminal Appeal by A.1 and A.2.

9. Heard Smt C.Vasundhara Reddy, learned counsel for the appellants-A.1 and A.2, Smt.J.Sridevi, learned Additional Public Prosecutor for the respondent-State and perused the record.

10. The learned counsel for the appellants-A.1 and A.2 would contend that the conviction and sentence recorded by the trial Court against A.1 and A.2 is erroneous, contrary to law, weight of evidence and probabilities of the case. PW.6 is a doubtful witness. She did not inform the incident to anyone for two days. There are inconsistencies in the statement of PW.6 recorded under Section 161 Cr.P.C and the evidence given before the Court. The evidence of PW.6 is also inconsistent with the medical evidence on record. Further, there is inconsistency in the evidence of PWs.8 and 10 with regard to the seizure of alleged blood stained sharp edged cement stone (MO.8). PW.6 in her evidence stated that on the next day she went to Police Station and informed the incident but as per the evidence of PW.12-Investigating Officer, he found the cell phone number of PW.6 in the pocket of the deceased and with that he contacted PW.6. PW.6 has put up a fabricated story of her going to police station voluntarily and narrating the incident. PW.6 is unreliable witness. Except the evidence of PW.6, there is no other evidence on record to connect the A.1 and A.2 with the alleged offence. The trial Court erroneously considered the evidence of PW.6 and recorded conviction and sentence against A.1 and A.2 of the offence under Section 302 r/w 34 IPC. Furthermore, no credibility can be given to the evidence of PW.5-circumstantial witness, who deposed before the trial Court that he

saw A.1 and A.2 threatening the deceased. PW.5 did not state the same to anybody nor lodged any complaint in that regard. Learned counsel relied upon the following decisions to substantiate the aforesaid contentions and ultimately prayed to allow the appeal by setting aside the conviction and sentence recorded against A.1 and A.2 of the offence under Section 302 r/w 34 IPC:

- i) *Shahid Khan v. State of Rajasthan*¹
- ii) *Peddireddy Subbareddi and others v. State of Andhra Pradesh*²
- iii) *Dinesh and another v. State of Haryana*³
- iv) *Vadivelu Thevar v. State of Madras*⁴

11. On the other hand, Smt. J. Sridevi, learned Additional Public Prosecutor for the State, would contend that PW.6 is a trustworthy witness. She has given the details of the incident. She also testified with regard to her contacts. There is no animosity or grudge for PW.6 to falsely implicate A.1 and A.2. As far as PWs.8 and 10-witnesses for confession of A.1 and A.2 and recovery of MO.8-blood stained sharp edged cement stone is concerned, there is no material contradiction. Further, PW.12-Investigating Officer has testified the recovery of MO.8-stone pursuant to the confession made by A.1 and A.2. There are no material omissions and contradictions in the evidence of prosecution witnesses. The trial Court had elaborately dealt with all the contentions raised by

¹ (2016) 4 Supreme Court Cases 96

² AIR 1991 Supreme Court 1356

³ (2018) 2 Supreme Court Cases (Cri) 423

⁴ AIR 1957 Supreme Court 614 (1)

A.1 and A.2 and rightly rejected them and ultimately prayed to sustain the impugned judgment by dismissing the appeal.

12. In view of the submissions made by both sides, there is no contest with regard to the death of the deceased on the night of 08.12.2009. There is also no dispute with regard to finding of the dead body of the deceased in thorny bushes, situated near Devi Theatre at Nizamabad. Further, there is also no dispute with regard to conducting of autopsy over the dead body of the deceased by PW.9-Dr.M.Bhooma Reddy and preparation of Ex.P.10-post-mortem examination report. There is evidence of PW.12-Investigating Officer with regard to finding of the dead body of the deceased and preparing scene of offence panchanama under Ex.P.3 and sketch map under Ex.P.4 and seizure of material objects MO.1-blood stained earth, MO.2-controlled earth, MO.3-blue pant, MO.4-two stones from the scene of offence, in the presence of PW.7 and LW.10-Rajesh and also conducting of inquest panchanama over the dead body of the deceased under Ex.P.5. All these would clinchingly establish that the subject death was caused on the night of 08.12.2009 in an open area situated near Devi Theatre, Nizamabad and the death is homicidal.

13. Now the question that falls for determination is:

“Whether the appellants/ A.1 and A.2 had caused the death of deceased (T. Ashok)?”

14. The main eye witness in this case is PW.6 (B. Laxmi). The evidence of PW.6 reveals that she is a native of Damannapet thanda of Karimnagar District. She was married to one Dharisingh

about 20 years prior to her deposition. She was blessed with a female child, but unfortunately the said child died after two years of birth. Thereafter, she left her native place and went to Nizamabad to make a living. There she started working as a coolie and came in contact with Khaleel of Nizamabad, through him she begot one son and a daughter. The said Khaleel left her company four years prior to her deposition before the trial Court. Then she developed intimacy with A.1. Thereafter, A.1 introduced A.2 and she also developed intimacy with A.2. After six months, she developed intimacy with the deceased (Ashok) and used to talk with him at the market yard. Eight months prior to her deposition, A.1 and A.2 followed her and the deceased. She stated that she consumed toddy and followed the deceased from the market yard to Devi Theatre at about 9:00 or 10:00pm. A.1 and A.2 came and caught hold of the deceased and pulled him aside and PW.6, then due to fear, she had hidden in the bushes (Ex.P.3-scene of offence panchanama and Ex.P.4-sketch map, reveals the presence of bushes). PW.6 specifically stated that A.2 caught hold of the deceased and A.1 had cut the throat of the deceased with a cement stone. PW.12-Investigating Officer testified with regard to the recovery of the cement stone (MO.8), pursuant to confession made by A.1 and A.2. PW.8 stated that A.1 led to the scene of offence i.e, Devi Theatre and had shown the blood stained cement stone as MO.4. Contrary to this, PW.10 had stated that A.2 led to the scene of offence i.e, nearby Devi Theatre and had shown MO.4-stone. The trial Court while dealing with the recovery of cement stone had observed that from the three stones seized, by

mistake MO.4 was marked through the evidence of PW.8. However, the trial Court concluded that there is clear evidence of PW.12 with regard to recovery of MO.8-blood stained sharp edged cement stone, pursuant to the confession made by A.1 and A.2. Ex.P9-seizure panchanama also substantiates the evidence of PW.12. The evidence of PW.6 further reveals that A.1 and A.2 killed the deceased. After the incident, she went to her house and did not come outside due to fear. She also specifically deposed that A.1 and A.2 killed the deceased as she developed intimacy with the deceased. She further testified that on the next day she went to Police Station and narrated the whole incident and the police examined her. She further stated that the Judicial Magistrate of First Class, Armoor, had also recorded her statement. As per the evidence of PW.12-Investigating Officer, he found the telephone number of PW.6 in the pocket of the deceased and using that telephone number, he called PW.6 and informed about the death of deceased. In the cross-examination, PW.6 clearly and cogently gave the reasons of her not intimating the incident to anybody except the police, though she passed through the house of DSP on the night of incident. She also specifically stated that she was afraid that she would also be implicated in this case. PW.6 is a deserted woman. Her apprehension of being implicated in this case is a genuine one. In the cross-examination of PW.6, Ex.D.1 was marked i.e, she stated to the police that herself and the deceased (Ashok) together went towards Devi Theatre. In the course of her evidence before the trial Court, she stated that she followed the deceased to the Devi

Theatre. It is pertinent to state that PW.6 was examined about eight months after the alleged incident. She is an illiterate woman. When she was examined after eight months, it is quite possible to state a different order of her going to the scene of offence along with the deceased. It is not a material contradiction. On this ground, the case of the prosecution cannot be thrown out. There is specific evidence of PW.6 that A.1 and A.2 followed her and the deceased and they caught hold of the deceased and pulled him aside from PW.6 and then due to fear, she had hidden in the bushes. Further, she specifically stated that A.2 caught hold of the legs of the deceased and A.1 had cut the throat of the deceased with a sharp edged cement stone. In the course of investigation, the sharp edged cement stone(MO.8) was recovered pursuant to the confession and identification made by A.1 and A.2. Ex.P.10-post-mortem examination report mentions the following injuries:

- “1) Penetrating injury over left side of forehead of size 2 x ½ cm through bone.*
- 2) A large laceration wound on upper part of neck of size 10 x 6 cm exposing muscles and hyoid bone.”*

PW.6 had spoken about the injury No.2 i.e, a large laceration wound on upper part of neck of size 10 x 6 cm exposing muscles and hyoid bone. The injury No.2 is possible with a sharp edged cement stone like MO.8.

15. It is not the case of A.1 and A.2 that PW.6 had seen the dead body of the deceased on the next day of the incident. As per the entire prosecution case, she went to police station on

10.12.2009. Had the PW.6 was not an eye witness to the incident, she would not have deposed about the injury No.2 caused by A.1, while the deceased being caught hold by A.2. PW.6 has specifically stated that to save herself, she had hidden in the bushes. In cases of illegal intimacy between two persons, there is every possibility of elimination of those two persons. If PW.6 had not hidden in the bushes, there was every possibility of danger to her life at the hands of A.1 and A.2. When PW.6 had hidden in the bushes, it is not possible for her to see both the injuries inflicted on the deceased by A.1 and A.2. In the given circumstances, it was possible for her to witness only the second injury. The specific evidence of PW.6 is that when the deceased and herself were in compromising position, the deceased was dragged by A.1 and A.2. As per the scene of offence panchanama and oral evidence on record, MO.3-pant was found at the scene of offence near the dead body of the deceased. So the finding of MO.3-pant at the scene of offence fortifies the evidence of PW.6 and it can be safely concluded that she was an eye witness to the incident in question. Further, PW.6 had deposed with regard to her illegal intimacy with one Khaleel and thereafter with A.1 and A.2 and also the deceased. She has revealed her conduct and character during her evidence before the trial Court. This was not challenged by A.1 and A.2. No woman would impeach her conduct to falsely implicate the accused. Whether PW.6 had reached the police station voluntarily or she was called to police station by PW.12 is immaterial. What she testified before the Court with regard to the subject death is paramount consideration.

Therefore, it cannot be said that PW.6 is unreliable and doubtful witness. Her evidence is consistent and cogent without any material omissions or contradictions.

16. In *Shahid Khan's* case (1 supra) cited by learned counsel for appellants-A.1 and A.2, the Hon'ble Apex Court observed as follows:

“Para 20: The statements of PW.25 Mirza Majid Beg and PW.24 Mohamed Shakir were recorded after 3 days of the occurrence. No explanation is forthcoming as to why they are not examined for 3 days. It is also not known as to how the police came to know that these witnesses saw the occurrence. The delay in recording the statements casts a serious doubt about their being eye-witnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. The circumstances in this case lend such significance to this delay. PW.25 Mirza Majid Beg and PW.24 Mohamed Shakir, in view of their unexplained silence and delayed statement to the police, does not appear to us to be wholly reliable witnesses. There is no corroboration of their evidence from any other independent source either. We find it rather unsafe to rely upon their evidence only to uphold the conviction and sentence of the appellants. The High Court has failed to advert to the contentions raised by the appellants and re-appreciate the evidence thereby resulting in miscarriage of justice. In our opinion, the case against the appellants has not been proved beyond reasonable doubt.”

In the case on hand, PW.6, who is an eye witness to the incident, went to police station on the next day at about 10:30am. Due to fear PW.6 did not inform the incident to anyone on that night, she apprehended that police may involve her in the case. Her silence

in not informing the incident to the police for two days has been explained in detail by PW.6 in her chief-examination as well as cross-examination. Her evidence corroborates with the evidence of PW.5-circumstantial witness. Therefore, the decision in *Shahid Khan's* case (1 supra) is not applicable to the case on hand.

17. In *Peddireddy Subbareddi's* case (2 supra) cited by learned counsel for appellants-A.1 and A.2, the Hon'ble Apex Court observed as follows:

"Para 4: No doubt, plurality of witnesses is not necessary to establish a fact in issue and a conviction can be based on the testimony of a sole witness provided that evidence is wholly believable (Vide Vadivelu Thevar v. State of Madras [AIR 1957 Supreme Court 614 (1)]. In the present case as we have come to the conclusion that the evidence of P.W.1 is clouded with strong suspicion and as the first information report was lodged by a delay of 15 hours, the false implication of appellants in the present case cannot be completely ruled out. On going through the judgments of both the Courts below we are unable to share with the finding rendered by the two Courts holding the appellants are guilty of the charges with which they stand convicted.

In the instant case, the offence took place at about 10.00pm on 08.12.2009. PW.6 informed the incident to police on the second day of the incident. She gave elaborate reasons. She has no animosity, grudge or any reason to falsely implicate A.1 and A.2 in this case. The evidence of PW.6 is trustworthy and wholly reliable and hence her evidence cannot be discarded. Therefore, the facts and circumstances of the decision rendered above and the case on hand are distinguishable.

18. In *Dinesh's* case (3 supra), the Hon'ble Apex Court observed that ocular version of manner in which accused allegedly assaulted the deceased, was not matching with the medical evidence of injuries. The son of the deceased therein, who was an eyewitness, stated that all the three accused had assaulted the deceased. There is evidence of another eye witness that three accused therein caused injuries, in which case, three injuries, all by sharp edged weapons should have been sustained by the deceased, whereas there were only two injuries on the deceased. In the instant case, PW.6 had specifically stated about the injury No.2 and the said injury is possible with MO.8-sharp edged cement stone. Since PW.6 was hiding and protecting herself from the hands of A.1 and A.2, it was not possible for her to see the infliction of both the injuries. Non-mention of one of the injuries found in the post-mortem examination report (Ex.P.10) by PW.6 is not fatal to the prosecution case.

19. There is also evidence of PW.5, who had clearly and categorically stated that A.1 and A.2 threatened the deceased to desist from having illegal contacts with PW.6. PW.5 is a stranger to A.1 and A.2. Since A.1 and A.2 threatened the deceased but did not inflict any injuries in the presence of PW.5, there was no necessity for either the deceased or PW.5 to lodge any complaint against A.1 and A.2 with regard to that incident. PW.5 has no grudge or reason to depose falsely against A.1 and A.2. Sexual jealousy is the motive for A.1 and A.2 to eliminate the deceased. The injuries 1 and 2 found over the dead body of the deceased

were caused by A.1 and A.2 with an intention to eliminate the deceased and they were successful in doing so.

20. Thus there is unimpeachable evidence on record to believe that A.1 and A.2 had caused the subject death. The trial Court had elaborately dealt with the same and answered all the contentions raised. There is nothing to take a different view. All the contentions raised on behalf of appellants-A.1 and A.2 do not merit consideration. This appeal is devoid of merit and is liable to be dismissed.

21. In the result, this Criminal Appeal is dismissed, confirming the conviction and sentence recorded against the appellants-A.1 and A.2 of the offence punishable under Section 302 r/w 34 IPC vide impugned judgment dated 17.02.2012, passed in Sessions Case No.102 of 2010 by the learned III Additional District and Sessions Judge (Fast Track Court) at Nizamabad.

Miscellaneous petitions, if any, pending in this appeal, shall stand closed.

RAGHVENDRA SINGH CHAUHAN, HCJ

Dr. SHAMEEM AKTHER, J

Date: 23.07.2019
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