SUPREME COURT OF INDIA

Golla Yelugu Govindu

Vs.

State of Andhra Pradesh

Crl.A.No.556 of 2008

(Dr. Arijit Pasayat and P.Sathasivam,JJ.)

26.03.2008

JUDGMENT

Dr. Arijit Pasayat, J

1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Andhra Pradesh High Court dismissing the appeal filed by the appellant questioning correctness of his conviction for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short IPC) and sentence of imprisonment for life and fine as imposed by learned IVth Additional Sessions Judge, (F.T.C.), Anantapur.

2. Background facts in a nutshell are as follows:

> "The marriage between Dhanalakshmi (hereinafter referred to as deceased) and the accused took place 14 years prior to the date of incident. During the wedlock, they were blessed with three children, namely, Golla Yelugu Adilakshmi (PW2), Golla Yelugu Anjaneyulu (PW3) and Gollal Yelugu Venkatesu (LW7). At the time of marriage, the accused was doing cultivation. After marriage the deceased and the accused lived happily for some years. Due to addiction to vices, he started ill-treating his wife, demanding her to get money from her parents. About six months prior to the incidence, the accuse beat and caused fracture to the hand of the deceased and sent her along with her children to her parent's house. He again took them back by promising to look after them well and kept his family at Pamidi. Ten days prior to the occurrence, the accused sold his auto rickshaw and cleared his debts and asked his wife to get money from her parents to purchase another autorickshaw. But the parents of the deceased did not comply with the said demand. On 20.6.2002 at about 2 A.M. while the deceased was in the house, there was exchange of hot words and quarrel between the accused and deceased. This happened in the presence of their children. Suddenly accused hacked the deceased on her back with a sickle and the deceased fell down and the accused once again hacked on the neck and left ear of the

deceased causing severe bleeding injuries. Accused went to the house of LW3 and confessed the offence before him. LW3 went and informed the same to the father of the deceased, PW1. PW1 lodged a complaint before the police and on its basis a case in Cr.No.35/2002 was registered for the offence punishable under Section 302 IPC by PW11, who conducted inquest over the dead body of the deceased in the presence of PWs. 5, 8 and LW16: examined some witnesses and recorded their statements; seized the clothes and blood stained mat covered under MOs. 1 to 4; prepared rough sketch under Ex.P.7, forwarded the material objects to the Forensic Science Laboratory, Hyderabad for analysis through the Judicial First Class Magistrate, Gooty and arrested the accused on 25.6.2002, and at his instance MOs 5-sickle and 6-bag were recovered. PW6, the Medical Officer, who conducted autopsy over the dead body of the deceased opined that the deceased would appear to have died due to hemorrhage and shock due to cut laceration over the throat involving the major blood vessel. After completion of the investigation, charge sheet was filed.

3. In order to establish the accusations the prosecution examined 11 witnesses and marked several exhibits and MOs. The accused did not adduce any oral or documentary evidence. He however pleaded innocence.

4. After analyzing the evidence of eyewitnesses PWs2 and 3, and finding that they are corroborated by the evidence of PWs 1 and 7, the appellant was found guilty.

5. In appeal, the appellant took the plea that PWs. 2 and 3 should not have been pleaded as they are of tender age and were child witnesses. The High Court found that PWs. 2 and 3 were children of the deceased and the accused and there was no reason as to why they would falsely implicate their father. The High Court also discarded the plea that they were under the influence of PW1, their maternal grandfather. As noted above, the appeal was dismissed.

6. In support of the appeal, learned counsel for the appellant submitted that reliance should be placed on the evidence of PWs 2&3 and in any event offence under Section 302 IPC is not made out.

7. Indian Evidence Act, 1872 (in short the Evidence Act) does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease- whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in *Wheeler v. United States*[1] The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Surya Narayana v. State of Karnataka (2001 (1) Supreme 1).

8. In *Dattu Ramrao Sakhare v. State of Maharashtra*[2] it was held as follows:

> "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

9. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

10. It is submitted that Section 302 IPC has no application as the assault was made during the course of sudden quarrel and Exception 4 of Section 300 IPC applies.

11. The residuary plea relates to the applicability of Exception 4 of Section 300 IPC, as it is contended that the incident took place in course of a sudden quarrel.

12. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

13. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds mens sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A sudden fight

implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception

> 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the fight occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression undue advantage as used in the provision means unfair advantage. "

14. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In *Kikar Singh v. State of Rajasthan*[3] it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that giving the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

15. Considering the factual scenario in the background of the position in law as highlighted above, the inevitable conclusion is that the appropriate conviction would be under Section 304 Part I IPC. Custodial sentence of 10 years would meet the ends of justice. Appeal is allowed to that extent.

Judgment Referred.

[1]*(159 U.S. 523)*
[2]*(1997 (5) SCC 0341*
[3]*AIR 1993 SC 2426*