

# SUPREME COURT OF INDIA

Kotikalapudi Subba Rao

Vs.

State of A.P.

Crl.A.No. 819 of 2008

(Dr. Arijit Pasayat and Lokeshwar Singh Panta JJ.)

06.05.2008

## JUDGMENT

**Dr. Arijit Pasayat, J.**

1. Leave granted.

2. Challenge in this appeal is to the judgment of the Division Bench of the Andhra Pradesh High Court disposing of two criminal appeals i.e. Criminal Appeal Nos.1114 and 1118 of 2004. By the impugned judgment Criminal Appeal No.1114 of 2004 filed by Ganpathi Satya Prakash (A3) was allowed. But Criminal Appeal No.1118 of 2004 filed by Kotikalapudi Suresh (A2) was allowed while the appeal filed by the present A1 was dismissed. It is to be noted that the present appellant and Kotikalapudi Suresh (A2) were found guilty under Section 302 of the *Indian Penal Code, 1860* (in short 'IPC') while Ganpathi Satya Prakash (A3) was found guilty for offence punishable under Section 302 read with Section 34 IPC. The present appellant was also found guilty for offence punishable under Section 307 IPC. Appellant was sentenced to undergo RI for life and to pay a fine of Rs.500/- for the first offence and RI for five years and fine of Rs.2000/- with default stipulation for the second offence.

3. Background facts in a nutshell are as follows:

“Kancherlapalli Ravi Kiran (hereinafter referred to as the 'deceased') was doing finance business. A1 borrowed an amount of Rs.30,000/- from the deceased and executed a promissory note scribed by Pasupuleti Chennakesavulu (P. W.8) . On 5.5.2001 the deceased asked A1 to repay the said amount due to him. On denial of A1 to repay the same, the deceased allegedly slapped A1 and thereupon, A1 threatened the deceased that he would see his end. On the next day i.e. on 6.5.2001 at about 6.30 P.M. the deceased alongwith P.W. 1 came to old Bus Stand in Papatla on Suzuki Motorcycle. Then A 1 stopped the motorcycle and called deceased and P.W.1. The deceased got down from the motorcycle and went to A1 and thereupon quarrel ensued. P.W.1 rushed towards A1 and noticed A1 and A2 armed with knives and

another person was also with them. P.W. 1 identified the other person as A3. According to P.W. 1, A1 and A2 attempted to attack the deceased with knives and therefore he went in rescue of him and thereupon A1 poked him with a knife on the right side of abdomen, and A3 kicked him on his stomach and so he fell down. Later, A1 poked the deceased with knife on the left side of chest and ribs and A2 poked the deceased on the top of right side hip. In the meanwhile, P.W.2-Kokkerala Naga Satish reached the scene and raised cries. His cries drew the attention of the passers by and thereby the scene stormed with strong gathering. The accused took to his heels towards Bheemavaripalem Road, P.W.2 informed the incident to his father over phone. P.W.7-Kancherlapalli Kishore Kumar, a relative of P.W.2, reached the scene and shifted the deceased and P.W.1 to Government Hospital, Bapatla for treatment. The Doctor examined the deceased and declared him dead. P.W.16-Dr.Y.Vaijyanthi, CAS, Government Hospital, Bapatla examined P.W.1 medically and found a clean cut stab injury of size 3 1/4 cm s long, 1 cm wide and 7 depth, 2.5 cms below and 8 cms right of umbilicus on abdomen. After giving first aid to P.W. 1, the doctor referred him to Government Hospital, Guntur, for further treatment. She issued Ex.P.12 certificate opining that the injuries received by P.W. 1 are grievous in nature. Ex. P.19 is the wound certified issued by her. A requisition was sent to JFCM, Bapatla to record the dying declaration of P.W. 1. P.W. 12 - M.Babu Rao, JFCM, Bapatla received the requisition from the Government Hospital on 6.5.2001 at about 8.50 P.M. to record the dying declaration of P.W.1. He proceeded to Government Hospital, Bapatla, and commenced recording of the dying declaration of P. W .1 at 9 P.M. and concluded the same at 9.20 P.M. Ex.P.13 is the dying declaration recorded by him. P.W.14 M.Dayanandam, ASI of Bapatla Town Police Station received death intimation as well as intimation of the admission of P.W.1 in the hospital. Ex. P.15 and P-16 are the intimations received by him. He rushed to Government Hospital, Bapatla, recorded the statement of P.W.1 and registered a case in Cr. No.50/2001 under Sections 307 and 302 r/w 34 IPC and issued Ex.P-17 FIR. P.W.15 received the copy of FIR and took up investigation. He examined P.W.1 and recorded his statement under Section 161 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C'). He observed the scene on 3.5.2001 at about 3 A.M. and prepared Ex.P.6 scene of offence panchanama. He examined PWs.2, 6 and 7 and one Kancherlapalli Naresh at the Government Hospital, Bapatla and recorded their statements. He conducted inquest on the dead body of the deceased on 7.5.2001 at 8 A.M. The opinion arrived by the panchas, on hearing the statements of the witnesses examined during the inquest, came to be incorporated at Col. No. 15 of the Inquest Report. Ex.P.7 is the inquest report. P.W. 17 G. Penchalanaidu, Inspector of Police, Bapatla, took up investigation and effected arrest of A1 and A2 and recovered Mos. 1 and 2 in pursuance of their disclosure statements. Ex.P.8 and P.9 are the admissible portions in their confessional statements. He effected the arrest of A3 on 19.5.2001 at 10.30 A.M. at the footbridge of Railway Station, Bapatla and sent him for remand. On requisition, P.W. 13 conducted test identification parade on 16.6.2001. In the test identification parade P.Ws. 1 to 3 identified A1 to A3 as the assailants of the deceased. After completing investigation, a charge sheet came to be submitted before the II Additional Munsif Magistrate, Bapatla. The learned Magistrate committed the case to

the Sessions Division, Guntur as the offence u/s.302 and. 307 IPC are exclusively triable by the Court of Sessions. The learned Sessions Judge made over the same to II Additional Sessions Judge, Guntur for trial in accordance with law. The learned II Additional Sessions Judge, Guntur, on hearing the prosecution and the accused, framed the following charges:

1) Charge No.1: Against A1 for the offence u/s.307 IPC;

2) Charge No.2: Against A1 and A2 for the offence u / s.302 IPC;

3)Charge No.3: Against A3 for the offence u/s.302 r/w 34 IPC. He read over and explained the charges to the accused, for which the accused pleaded not guilty and claimed to be tried. To bring home the guilt of the accused for the offences with which they stood charged, the prosecution examined P.Ws.1 to 17, marked Exs. P.1 to P.20 and exhibited Mos. 1 to 8. The learned Additional Sessions Judge, on appreciation of the evidence brought on record and on hearing the prosecution and the accused, found the accused guilty for the offences with which they stood charged and convicted them accordingly and sentenced them.”

4. 17 witnesses were examined to further the prosecution version. The accused persons pleaded innocence and false implication. PW1 was the injured complainant. PW2 was also an eye witness who removed the deceased to the hospital along with others. It was also stated that PW3 is an eye witness. PWs. 3, 4 and 5 were eye witnesses to the occurrence. The Trial Court placed reliance on the evidence of PWs. 1, 2 and 3 because PWs. 4 and 5 resiled from their statement during investigation. The Trial Court found the evidence of injured eye witness and two other witnesses to be credible and cogent and, therefore, recorded conviction and sentence as aforementioned.

5. Two criminal appeals were filed before the High Court by the accused persons.

6. The basic stand was that the evidence of the witnesses do not inspire confidence, more particularly, when PWs 4 and 5 do not support the prosecution. The High Court found that the case was established against the accused persons on the basis of evidence so far as the present appellant A1 is concerned, but found the evidence so far as the other accused persons are concerned. Accordingly, as noted above, the appeal filed by the appellant was dismissed.

7. In support of the appeal learned counsel for the appellant submitted that the Trial Court and the High Court should not have relied upon the evidence of PWs 1, 2 and 3. It is also submitted that even if the prosecution version is accepted in its entirety, a case under Section 302 IPC is not made out because the occurrence took place in course of a sudden quarrel and Exception 4 to Section 300 is applicable. The learned counsel for the State supported the judgment of the Trial Court and the High Court.

8. So far as the evidence of PWs. 1, 2 and 3 are concerned, learned counsel for the appellant was not able to point out any discrepancy or deficiency in their evidence to warrant rejection

of their evidence. The Trial Court and the High Court have rightly relied upon their testimony.

9. The residual question is whether Section 302 IPC has application.

10. For bringing in operation of Exception 4 to Section 300 IPC, 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.

11. 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 men's sober reasons 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's 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'.

12. The aforesaid aspects have been highlighted in *Sridhar Bhuyan v. State of Orissa*<sup>1</sup>, *Prakash Chand v. State of H.P.*<sup>2</sup>, *Sachchey Lal Tiwari v. State of Uttar Pradesh*<sup>3</sup>, *Sandhya Jadhav v. State of Maharashtra*<sup>4</sup> and *Lachman Singh v. State of Haryana*<sup>5</sup>.

13. When the factual position is considered in the background of the legal principles set out above, the inevitable conclusion is that the appropriate conviction would be in terms of Section 304 Part I IPC and not Section 302 IPC. The conviction under Section 307 IPC does not suffer from any infirmity. The same is upheld. Custodial sentence of 10 years in respect of the offence punishable under Section 304 Part I IPC would suffice. Both the sentences shall run concurrently.

14. The appeal is allowed to the aforesaid extent.

<sup>1</sup>(*JT 2004 (6) SC 299*)

<sup>2</sup>(*JT 2004 (6) SC 302*)

<sup>3</sup>(*JT 2004 (8) SC 534*)

<sup>4</sup>[*2006(4) SCC 653*]

<sup>5</sup>[*2006 (10) SCC 524*]