Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2047 OF 2008

Vutukuru Lakshmaiah ... Appellant

Versus

State of Andhra Pradesh ... Respondent

WITH

CRIMINAL APPEAL NO. 2052 OF 2008

CRIMINAL APPEAL NO. 205O OF 2008

J U D G M E N T

Dipak Misra, J.

The present appeals are directed against the judgment and order dated 22.03.2007 passed by the High Court of Andhra Pradesh in Criminal Appeal No. 517 of 2005, whereby it has confirmed the judgment of conviction and order of

sentence passed by the learned Additional Sessions Judge, Nellore in Sessions Case No. 365 of 1998 whereunder he had found the appellants guilty of the offence under Sections 302 and 148 of the Indian Penal Code (IPC) and sentenced each of them to suffer rigorous imprisonment for life on the first score and imposed separate sentence under Section 148 IPC with the default clause stipulating that all the sentences shall be concurrent. Be it stated, the High Court has acquitted three of the convicted persons.

2. Filtering the unnecessary details, the prosecution case is that the deceased, Patrangi Ramanaiah, was a supporter of the Telugu Desam Party, while accused Vutukuru Lakshmaiah, A-1, was the Councilor for Ward No. 16 of Nellore Municipality and belonged to the Congress Party. One Patrangi Velongini Raja of Telugu Desam Party was allegedly murdered by accused, A-1, and his brother and in the said prosecution the deceased and PW-1 were witnesses.

3. On 14.05.1996 about 9.30 p.m., Pamula Ramanaiah, PW-1, and the deceased were travelling on their scooter towards Akuthota Harijanawada, and when they reached a

sweet meat shop, Meriga Yedukondalu, A-4, and Utukuru Seenaiah, A-6 (since deceased) attacked them as a result of which, PW1, who was driving the scooter lost control of the scooter and both of them fell down. As the prosecution story proceeds, Vutukuru Lakshmaiah, A-1, Rayapu Srinivasulu, A-2, Rayapu Sivaiah, A-3, Meriga Ramaiah, A-5, and Meriga Penchlaiah, A-7, stabbed the deceased multiple times with knives, while A-4 and A-6 beat him with iron rods. A-2 then tried to stab PW-1 but missed. Thereafter A-3 stabbed PW-1 with a knife on his left arm, but he managed to escape and hid in the PWD office situated nearby.

4. As the prosecution case further unfurls, Pantrangi Venkateswarlu, PW-2, and Ragutu Sreenivasulu, PW-3, who were returning from their work witnessed the incident and after the assailants left the scene of crime, they took the deceased to the Government Head Quarters Hospital, Nellore. Being informed about the incident, the police immediately reached the scene of incident where they found injured PW-1 who had returned to the scene of occurrence and took him to the hospital, where Md. Kareemula, Head Constable, PW-20,

recorded the statement of PW-1, Ex. P-1, and it was handed over to G. Srinivasa Rao, Sub-Inspector of Police, PW-21. Based on the statement, Crime No. 57 of 1996 U/s. 147, 148, 324, 307 r/w 149 IPC was registered and the investigation commenced. The deceased was subsequently shifted to Apollo Hospital, Madras for better treatment. Meanwhile the II Additional Judicial First Class Magistrate, Nellore, PW-18, recorded the dying declaration of the deceased at the General Head Quarter Hospital, which has been brought on record as Ex. P-13. On 15.05.1996, PW-21, visited the scene of offence, prepared the panchanama, Ex. P-7, the rough sketch, Ex. P-18, and recorded statements of PWs 1, 2, 3, 5, 6, 8, 12, 17. After the receipt of intimation of death of the deceased on 18.05.1996, there was alteration of the offence to Section 302 IPC and the investigation was taken over by K. Veera Reddy, PW-22, the Inspector of police, who visited the Apollo hospital, Madras and held inquest over the dead body of the deceased in presence of G. Pulla Reddy, PW-18, and sent a requisition to Dr. C. Manohar, PW-19, Assistant Professor, Forensic Medicine at Kilbank Medical College, Chennai for postmortem

examination who carried out the autopsy over the dead body of the deceased on 18.05.1996 and opined vide Ex.16, the postmortem report, that the cause of death was due to multiple stab injuries. PW-22, the Investigating Officer, arrested A-2 to A-7 and A9 on 28.05.1996 and at the instance of the arrested persons, except A-9, the investigating agency recovered four knives and two iron rods. After completion of the investigation, the chargesheet was placed before the competent court and eventually the matter was tried by learned Additional Sessions Judge. The accused persons took the plea of false implication and the A-1, additionally took the plea of alibi.

5. The principal witnesses are, Pamula Ramanaiah, PW-1, Pantrangi Venkateswarlu, PW-2, Ragutu Sreenivasulu, PW-3, II Additional Judicial First Class Magistrate, Nellore, PW-18, and Dr. C. Manohar, PW-19. The defence in support of its plea, examined 7 witnesses i.e. DW-1 to DW-7. The learned trial Judge, after appreciating the entire evidence, both oral and documentary, on record, especially the evidence of PW-1 to PW-3, and the dying declaration, Ex.P-13, convicted A-1 to

A-5 and A-7 to A-9 for the offences punishable under Sections 148 and 302 IPC for causing death of deceased Patrangi Ramanaiah, convicted A-2 to A-4 for the offence punishable under Section 324 IPC and A5 for the offences punishable under Sections 324 read with 149 IPC for causing injuries to PW-1.

6. Being aggrieved by the judgment of the trial Court, all the accused persons preferred Criminal Appeal no. 517 of 2005 wherein the High Court, after re-appreciating the evidence in entirety, affirmed the conviction and sentence passed by the trial court in respect of the present appellants and partly allowed the appeal thereby acquitting A4, A8 and A9 giving them the benefit of doubt.

7. We have heard Mr. Nagendra Rai, learned senior counsel for the appellants and Ms. June Chaudhary, learned senior counsel for the State.

8. Criticizing the judgment of conviction, it is submitted by Mr. Nagendra Rai, learned senior counsel for the appellants that the evidence adduced by the prosecution witnesses should have been discarded inasmuch as their testimony is

replete with contradictions and as the occurrence had taken place during the night about 9.30 p.m. and there was no electric supply and hence, it could not have been possible on the part of the witnesses to see the accused-appellants by lighting the earthen mud lamp with a match stick. Learned counsel would contend that they are chance witnesses and their evidence really do not inspire confidence and, in fact, when cautiously scrutinized, they deserve to be totally discarded. It is urged by him that the dying declaration, Ex. P-13, does not inspire confidence inasmuch as the allegations are omnibus in character and no specific overt acts have been attributed to any of these appellants. It is contended by him that when the High Court has found that A-4, A-8 and A-9 have been falsely implicated, it would have been appropriate on the part of the High Court to hold that the present appellants also had been falsely implicated in the case. It is canvassed by him that the appellant no. 1 was attending the Water Committee meeting on the date of occurrence and the same had been established by bringing acceptable evidence on record by citing witnesses and also by filing documents Ex.

D-3 to D-8 which are documents maintained by Nellore Municipality. It is his further submission that learned trial Judge as well as the High Court has not given any justifiable reason to disregard the evidence of DW-1 to DW-7. It is also urged by him that the appellants could not have been convicted in aid of Section 149 IPC as the charge framed against them was simplicitor Section 302 IPC; and even if Section 149 IPC can be resorted to, in the absence of specific charge, the Court is required to see the circumstances, what is the nature of offence committed. Alternatively, it is submitted by him that even if the assault on the deceased is accepted, regard being had to the absence of intention and the nature of injury suffered by the deceased and death having taken place after three days, they may be liable for conviction under Section 304 Part II IPC and not under Section 302 IPC. To buttress the said submission, he has drawn inspiration from decisions in ***State of Orissa v. Dibakar Naik***[1], ***Sunder Lal***

[1] (2002) 5 SCC 323

v. State of Rajasthan[2] and ***Marimuthu v. State of Tamil Nadu***[3].

9. Ms. June Chaudhary, learned senior counsel appearing for State, resisting the aforesaid arguments, contended that there is no reason to discard the dying declaration as there is no infirmity in the same. It is further urged by her that the testimony of all the witnesses are credible and the contention that PW-2 and PW-3 are chance witnesses does not deserve any acceptance. Learned senior counsel for the State would further submit that though the charge has not been framed under Section 149 of the IPC, there is no bar, regard being had to the evidence on record, to convict the accused-appellants with the aid of the said provision. It is canvassed by her that it is not a case for conversion of the offence, for it is squarely a case under Section 302 IPC and not under Section 304 Part I or Part II of the IPC.

10. First, we shall advert to the issue of non-framing of charge under Section 149 IPC. While dealing with the said

[2] (2007) 10 SCC 371
[3] (2008) 3 SCC 205

issue, in ***Willie (William) Slaney v. State of M.P.***[4] Vivian Bose, J., observed that every reasonable presumption must be made in favour of the accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. The learned Judge proceeded to state that all said and done, the Court is required to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and whether he was given a full and fair chance to defend himself. Thereafter, Bose, J. proceeded to observe thus:-

> "In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be material to consider whether objection to

[4] AIR 1956 SC 116

the nature of the charge, or a total want of one, was taken at an early stage.

If it was not, and particularly where the accused is defended by counsel (*Atta Mohammad* v. *King-Emperor*[5]) it may in a given case be proper to conclude that the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars, provided it is always borne in mind that "no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused" (*Abdul Rahman* v. *King-Emperor*[6]).

But these are matters of fact which will be special to each different case and no conclusion on these questions of fact in any one case can ever be regarded as a precedent or a guide for a conclusion of fact in another, because the facts can never be alike in any two cases "however" alike they may seem. There is no such thing as a judicial precedent on facts though counsel, and even Judges, are sometimes prone to argue and to act as if there were."

Chandrasekhara Aiyar, J., in his concurring opinion stated thus:-

"A case of complete absence of a charge is covered by Section 535, whereas an error or omission in a charge is dealt with by Section 537. The consequences seem to be slightly different. Where there is no charge, it is for the court to determine whether there is any failure of justice. But in the latter, where there is mere error or omission in the charge, the court is also bound to have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

[5] AIR 1930 PC 57
[6] AIR 1927 PC 44

After so stating, the learned Judge opined that generally in cases of omission to frame a charge is not *per se* fatal. Eventually, he ruled thus:-

> "Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; *and the charge is a rolled-up one involving the direct liability and the constructive liability* without specifying who are directly liable and who are sought to be made constructively liable.
>
> In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant."

11. After 1973 Code came into existence, two-Judge Bench in ***Annareddy Sambasiva Reddy v. State of A.P.***[7], relying on the principles enunciated in ***Willie (William) Slaney*** (supra), has opined that the legal position stated by the larger Bench would hold good after enactment of Code of Criminal Procedure, 1973 as well in the light of Sections 215, 216, 218,

[7] (2009) 12 SCC 546

221 and 464 contained therein. Proceeding further, the Court has ruled:-

> "Is non-mentioning of Section 149 in Charge 4 and Charge 5 a fundamental defect of an incurable illegality that may warrant setting aside the conviction and sentence of the appellants? We do not think so. Non-framing of a charge under Section 149 IPC, on the face of the charges framed against the appellants would not vitiate their conviction; more so when the accused have failed to show any prejudice in this regard. The present case is a case where there is mere omission to mention Section 149 in Charges 4 and 5 which at the highest may be considered as an irregularity and since the appellants have failed to show any prejudice, their conviction and sentence is not at all affected. Tenor of cross-examination of PW 1 and PW 3 by the defence also rules out any prejudice to them."

12. Keeping in view the aforesaid exposition of law, we are required to see whether in the present case, the tests are satisfied. On a perusal of the evidence on record, we find the facts and circumstances clearly bring out that there was an unlawful assembly. Each of the accused person was very well aware that they are tried for being a part of the assembly which was armed with weapons and hence, it was unlawful. On a close scrutiny of the evidence on record, it is difficult to hold that any prejudice has been caused to the accused

appellants. Thus, the said submission pales into insignificance.

13. The next contention of the learned senior counsel for the appellants is that the prosecution witnesses are chance witnesses, for there is no occasion on their part to be at the scene of crime. Dealing with the concept of chance witness, a two-Judge Bench in ***Rana Pratap and others v. State of Haryana***[8], has observed that:-

> "We do not understand the expression "chance witnesses". Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed on a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses", even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence."

[8] (1983) 3 SCC 327

14. In ***Jarnail Singh v. State of Punjab***[9], a two-Judge Bench opined that the evidence of a chance witness requires a very cautious and close scrutiny and as such a witness must adequately explain his presence at the place of occurrence and if his presence at the place of incident remains doubtful, then his version should be discarded.

15. In the case at hand, the prosecution has been able to establish the presence of the witnesses at the place of occurrence. The plea that there was no electricity and, therefore, it would not have been possible on the part of the witnesses to see the accused-appellants by lighting the earthen mud lamp does not deserve commendation, for the witnesses have categorically deposed that they were able to see the accused persons and the participation of the accused-appellants. Thus, despite the keen scrutiny of their evidence, we are unable to put them in the category of so-called 'chance witnesses' as has been nomenclatured by the learned senior counsel for the appellants.

[9] (2009) 9 SCC 719

16. The next limb of submission of the learned senior counsel for the appellants relates to acceptability and reliability of the dying declaration recorded vide Ex. P-13. The criticism is advanced on the foundation that it is absolutely vague. It is urged by him that the dying declaration being absolutely infirm, it cannot be placed reliance upon and once the dying declaration is discarded, a serious dent is created in the prosecution story. To appreciate the said submission, we have carefully scrutinized the contents of the dying declaration contained in Ex. P-13, which has been recorded by the Additional Judicial Magistrate, First Class, PW-18. In his testimony, he has categorically stated every aspect in detail and nothing has been elicited in the cross-examination. At the time of recording of the dying declaration, as the material would show, the declarant was absolutely in a conscious state and there is an endorsement in that regard by the treating doctor. The submission that the dying declaration is eminently vague is neither correct nor is it based on any material on record. On the scanning of the dying declaration, we find that he has named Vutukuru Laxmaiah, A-1, Rayapu

Sreenivasalu, A-2, Rayapu Subbaiah, A-3, Meriga Ramanaiah, A-5, Amburi Raja, A-8, Rayapu Ravi, A-9, and Rapayu Siddaiah. Thus, in the absence of any kind of infirmity or inherent contradiction or inconsistency or any facet that would create a serious doubt on the dying declaration, we are not inclined to discard it. It is well settled in law that conviction undisputedly can be based on dying declaration, if it is found totally reliable. In ***Mehiboobsab Abbasabi Nadaf v. State of Karnataka***[10], while discarding multiple dying declaration, the Court held thus:-

> "Conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied."

In ***Kashi Vishwanath v. State of Karnataka***[11], a two-Judge Bench did not place reliance on the dying

[10] (2007) 13 SCC 112
[11] (2013) 7 SCC 162

declaration as there were three dying declarations and they showed certain glaring contradictions.

17. At this juncture, it is worthy to note that the High Court has acquitted A-4, A-8 and A-9 on the foundation that they have been falsely implicated. Learned senior counsel for the appellants has contended that when the appellate court had acquitted the said accused persons, there was no warrant to sustain the conviction of other accused persons. On a perusal of the judgment of appellate court, we find that the judgment of acquittal has been reversed on the score that the names of A-8 and A-9 do not find mention in the evidence of PWs 1 to 3. On similar basis, A-4 has been acquitted. Suffice to mention here because the High Court has acquitted A-4, A-8 and A-9, that would not be a ground to discard the otherwise reliable dying declaration, for the evidence in entirety vividly show the involvement of the accused-appellants.

18. The next plank of submission of the learned counsel for the appellant, Vutukuru Lakshmaiah, appellant in Criminal Appeal No. 2047 of 2008, pertains to non-acceptance of plea of alibi. As is manifest, both the Courts have elaborately dealt

with it. As the judgment of the High Court would reveal, a finding has been returned that there is no evidence to the effect what is the distance between municipal office where the Committee meeting was held and the place where the offence had been committed; nothing has been brought on record to show that it was impossible for one to reach the place of offence; that the authenticity of the minutes book prepared under the signatures obtained have not been maintained in discharge of public function because the Water Committee constituted is not a statutory Committee. That apart, the law clearly stipulates how a plea of alibi is to be established. In this context, we may profitably reproduce a few passages from ***Binay Kumar Singh V. State of Bihar***[12]:-

> "22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (*a*) given under the provision is worth reproducing in this context:
>
> > "The question is whether *A* committed a crime at Calcutta on a certain date; the fact that on that date, *A* was at Lahore is relevant."

[12] (1997) 1 SCC 283

23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.

[Emphasis supplied]

The said principle has been reiterated in ***Gurpreet Singh v. State of Haryana***[13]***, S.K. Sattar v. State of Maharashtra***[14] and ***Jitender Kumar v. State of Haryana***[15].

19. In the instant case, the prosecution has been able to clearly establish the presence of the accused-appellant A-1, appellant in Criminal appeal No. 2047 of 2008, at the scene of occurrence. The initial onus put on the prosecution having been discharged, the burden shifts to the accused to establish the plea of alibi with certainty. As is evident from the analysis made by the High Court that the plea of alibi of the accused-appellant, A-1, could not be accepted as his presence has been proven. We find the said opinion of the High Court is based on the material brought on record and hence, there is no reason to differ with the same.

20. The last plank of submission of the learned senior counsel for the appellants is that the appellants had no intention to commit the murder of the deceased. It is also submitted by him that when death has occurred three days

[13] (2002) 8 SCC 18
[14] (2010) 8 SCC 430
[15] (2012) 6 SCC 204

after the incident, it is demonstrable that there was no intention on the part of the accused-appellants to kill him. To appreciate the said submission, we have perused the injury report. We find that there are five stab injuries at different parts of the body i.e. near right axilla, below the right axilla, over right hypochoncriam at mid clavicular line, over the border of right scapula and over mid spinal region at the level of 4th and 5th lumbar vertebra. The evidence on record shows that the deceased was assaulted as he was a witness in Velongini Raja's murder case wherein the accused-appellant, A-1, was an accused. There are cases where this Court has converted offence from 302 IPC to 304 Part I IPC, regard being had to the genesis of occurrence or the nature of injuries. It is because one of the relevant factors to gather the intention is the nature of injury inflicted on the deceased. In the instant case, considering the nature of injuries and the previous animosity, we are of the considered opinion that it is not a fit case where the offence under Section 302 IPC should be converted to Section 304 Part I IPC.

21. Consequently, we do not perceive any merit in these appeals and accordingly, the same stand dismissed.

.....J.
[Dipak Misra]

.....J.
[N.V. Ramana]

New Delhi
April 24, 2015