A MALEMPATI PATTABI NARENDRA ETC.

v.

GHATTAMANENI MARUTHI PRASAD AND ORS. ETC.

APRIL 27, 2000

B [K.T. THOMAS AND D.P. MOHAPATRA, JJ.]

Penal Code, 1860 :

Section 302 read with Section 149—Murder—Testimony of witnesses—
C *Conviction and sentence—On appeal, Held, prosecution has failed to establish the guilt of the accused—On re-appreciation of evidence, testimony of prosecution witnesses not found reliable—Conviction and sentence, set aside.*

Sections 302/34, 302/149 and 326—Murder by inflicting grievous injuries—Conviction under S. 326—Validity of—Held, assailants cannot escape
D *from conviction under S. 302 atleast with the help of Section 34 if not with Section 149—High Court committed serious error by convicting the accused only under S. 326.*

Constitution of India, 1950 : Article 136—Concurrent findings regarding appreciation of evidence—Interference with—Held, normally not called
E *for—However, in a case where the conviction is to be altered from one under S. 326 to that under S. 302 and consequent enhancement of sentence it would be necessary to re-apprise the evidence in the interest of justice—Penal Code, 1860—Ss. 302/34 and 326.*

Appellant-accused along with four others was prosecuted for an
F **offence under Section 302 read with Section 149 of the Penal Code. The prosecution case was that 'S' while proceeding towards his daughter's house around 11 P.M. was attacked by accused persons with axe, knife etc. etc. 'S' succumbed to his injuries on the spot. PW-1, son of the deceased lodged a complaint against the accused persons including A-4. However, the Investigating Officer found that A-4 was in jail when the**
G **incident occurred. Consequently, A-4 was arraigned as an accused for hatching criminal conspiracy to murder the deceased. On appreciation of evidence, Trial Court convicted and sentenced the accused persons. However, on appeal, High Court while convicting A-1 and A-3 only for the offence under S. 326 IPC acquitted the remaining accused persons. Hence**
H **the present appeals.**

Disposing of the appeals, the Court A

HELD : 1.1. Prosecution has failed to establish that the accused were the assailants who attacked the deceased. On reappreciation of evidence the testimony of PWs was not found reliable. Thus, on the ground of reasonable doubt the conviction and sentence passed against A-1 and A-3 is set aside. [728-B] B

1.2. PW-1 in his first written complaint stated that he saw A-4 who is the father of A-1 to A-3 participating in the occurrence and a specific role (inflicting axe blows on the deceased) has also been ascribed to that accused. But when PW-1 gave evidence in Court, he adopted a dubious strategy by saying that A-4 was not present at the scene of occurrence but he was a person having striking resemblance to A-4 giving axe blows on the deceased. Further, if PW-1 was present when the occurrence took place, it does not stand to reason why he was completely spared by the assailants. It is difficult to believe that if PW-1 was present, a young man of 33 like him could not have done even a bit to go to the rescue of his father and if he had done so, he would have sustained injuries, atleast some minor injuries. But the fact is that PW-1 did not sustain even a scratch on his person. If PW-1 waited to rush to his dying father till the assailants stopped attacking him even then it is difficult to conceive that atleast the clothes of PW-1 could not have been smeared with some blood, if not copious blood. But nobody has noticed even a drop of blood on his clothes. Thus, there is complete dearth of satisfactory explanation for relying on the testimony of PW-1. [725-C; 726-C-D] C D E

1.3. PW-2 and PW-3 also said in their examination-in-chief that an assailant resembling A-4 had participated in the occurrence by hacking the deceased with an axe on the head. However, when PW-2 was asked how he was present in the village on that day when his grand-mother had passed away on the previous evening, he put forward an excuse that he was informed about the death of his grand-mother only on the next morning. It is difficult to believe that PW-2 was unaware of the serious condition of his grand-mother particularly because his parents who were living with him, had already gone away to see the old lady in her death bed. On the other hand, PW-3 admitted that he was a witness in another case against A-1 to A-4 some years ago and even his father was a witness against A-4 in a case. Thus, it is difficult to place reliance on the testimony of such a witness as PW-3 in the aforesaid background. [726-F; 728-A-B; D] F G H

A **1.4. PW-4 examined as a corroborating witness has stated that he was a watchman in a poultry farm and on the fateful day after his work was over he was returning home around 11 P.M. when he saw accused running with axe, knife etc. He went to the scene of occurrence and saw the deceased lying injured and got the entire narration of the incident from** B **PW-3. During cross-examination, he said that it was his maiden appearance in any court of law, but when he was confronted with Ext. D-17, he admitted that he had deposed against A-4 earlier also. Further he admitted that his watchman's work was limited to day time and thus could not account for his presence at the scene of occurrence at 11 P.M. Thus, reliance cannot be placed on the testimony of a witness like PW-4 also.** C **[727-E-G; 728-A]**

2. The Division Bench of the High Court has committed a serious error in holding that the offence proved as against A-1 and A-3 is only under Section 326 of the Indian Penal Code. The assailants, who had D **participated in the occurrence in which deceased was killed so brutally cannot escape from conviction under Section 302 at least with the help of Section 34, if not with the Section 149 of the Indian Penal Code. The conviction of the assailant or assailants who inflicted grievous injuries which resulted in the death of the victim cannot be limited to S. 326 of the Code. [724-D-E]**

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3. In an appeal under Article 136 of the Constitution, normally the concurrent findings relating to the appreciation of evidence were not reopened. However, in the instant case, the sequel is that conviction passed on A-1 and A-3 will have to be altered to Section 302 IPC and the sentence has F **to be enhanced to atleast imprisonment for life. In view of such a consequence befalling the convicted persons, it is necessary in the interest of justice to make a reappraisal of the evidence. [724-G-H]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 445 and 446 of 1998 Etc. Etc.

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From the Judgment and Order dated 27.1.97 of the Andhra Pradesh High Court in Crl.A. No. 900/96 and Crl.R.C. No. 1082 of 1996.

M.N. Rao, Ms. K. Amareshwari, A.T. Rao, Tushar Rao, P. Thiruohangv, A. Subba Rao, Ram Narayan, S.U.K. Sagar, G. Venkatesh, Ms. T. Anamika, H G. Prabhakar, L.N. Rao and G.R.K. Prasad for the appearing parties.

The Judgment of the Court was delivered by

THOMAS, J. For the murder of a Gram Sarpanch the sessions court which tried the case convicted 6 persons for various offences including criminal conspiracy to commit the said murder. But a Division Bench of the Andhra Pradesh High Court, on appeal filed by the convicted persons, acquitted most of them and even regarding the two who were found guilty the High Court has chosen to convict them only of the offence under Section 326 of the Indian Penal Code. They were sentenced to undergo RI for 7 years. Hence they have appealed before us by special leave. The son of the deceased filed a separate appeal by special leave challenging the judgment of the High Court in so far as it is favourable to the accused. The State of Andhra Pradesh has also filed an appeal for restoring the conviction and sentence passed by the trial court. We heard all the appeals together.

The incident happened on the night of 18.1.1993, on a public road. Prosecution case is that the deceased Sitaram Anjanalelu, the Gram Sarpanch, was proceeding to the house of his daughter Sujatha (who is married to A.K. Rao). The time was around 11.00 P.M. when the deceased reached almost near that house. Then 5 accused (all except A-4 Shashiah) jumped out from ambush, and waylaid the deceased. After surrounding him the accused showered him with blows by using axe, knife and similar lethal weapons. The victim died at the spot after sustaining extensive injuries.

The background for the said occurrence, as pictured by the prosecution, is that the deceased was a Congress leader and 4th accused Shashiah belonged to CPI and as between them there were enough causes for rivalry including an election which was held to the Board of Directors of a Co-operative Society in which a panel set up by the deceased had trounced the candidate set up by the 4th accused. The newly elected Board of Directors initiated proceedings against the 4th accused (who held the office of President of the same society earlier) for misappropriation of the funds of the society. Thereupon 4th accused entered into a conspiracy with other accused for liquidating the deceased Sitaram Anjanalelu. Accused 1, 2 and 3 are the sons of 4th accused and accused Lal Bahadur is his nephew. P.W.1 (Pattabhi Narendra) is the son of the deceased. He lodged a complaint in writing with the police on the same night in which he said that he was walking a few yards behind his father and witnessed the incident in which all the accused (including the 4th accused Shashiah) launched the attack on his father. But the investigating

officer came to understand that A-4 was interned in a jail on the previous day in connection with some other case, and therefore, it was impossible for him to be present at the scene of occurrence. So the investigating officer charge- sheeted the remaining accused mentioned in the complaint for the offence under Section 302 read with Section 149 of the Indian Penal Code. Nonetheless, A-4 was also arraigned as an accused on the allegation that he had hatched a criminal conspiracy with the other accused to finish the deceased off.

Dr. J. Krishnamurthy (PW-10) conducted the autopsy on the dead body of the deceased. He noticed 17 incised injuries out of which 10 were on the head, 3 injuries among them were the most serious injuries and the brain of the deceased was lacerated.

At the outset, we have to point out that the Division Bench of the High Court has committed a serious error in holding that the offence proved as against A-1 and A-3 is only under Section 326 of the Indian Penal Code. The assailants, who had participated in the occurrence in which deceased was killed so brutally, cannot escape from conviction under Section 302 at least with the help of Section 34, if not with Section 149 of the Indian Penal Code. The conviction of the assailant or assailants who inflicted grievous injuries which resulted in the death of the victim cannot be limited to Section 326 of the Indian Penal Code.

On the conspectus of the facts of this case, the only inquiry which the court needs to conduct is whether any one of the accused was among the assailants who inflicted injuries on the deceased. If the finding is in the affirmative then that accused cannot escape conviction under Section 302 with the aid of Section 34, if not with Section 149 of the Indian Penal Code.

As this is an appeal under Article 136 of the Constitution, normally, we would not reopen the concurrent findings relating to the appreciation of evidence. But in this case if we adopt that standard, the sequel is that conviction passed on second and third accused will have to be altered to Section 302 I.P.C. and the sentence has to be enhanced to at least imprisonment for life. In view of such a consequence befalling the convicted persons, we feel it necessary in the interest of justice to make a reappraisal of the evidence in order to reach our conclusion regarding the reliability of the evidence of the prosecution.

If the testimony of PW1 is believable, the corollary is that the testimony of PW2, PW3 and PW4 can also be believed because each of them has identified the other as present at the scene. The consequence is that the accused(except A4) cannot escape conviction under Section 302 read with Section 149 of the Indian Penal Code. PW2 and PW3 are the other two witnesses who said that they were residing in the house of A.K. Rao(son-in-law of the deceased) and on hearing the hue and cry from the nearby road they rushed out and saw the assailants showering blows on the deceased with axe and knife, etc.

Would PW1 have been present at the place when the occurrence took place? We have noticed some hurdles in the way for believing that he witnessed the occurrence. The foremost amongst such hurdles is the unambiguous version given by PW1 in his first written complaint that he saw A4(Shashiah) who is the father of A1 to A3, participating in the occurrence and a specific role (inflicting axe blows on the deceased) has also been ascribed to that accused. But it was later understood that A4 was in fact locked up in a jail during that very night pursuant to a conviction imposed on him by a criminal Court on the previous day. Jail records as well as the court proceedings conceived would have proved that fact and hence the police could not array A4 (Shashiah) as a 'participus criminus'. That might be the reason why police allotted a different role to A-4 (Shashiah) as the chief conspirator over the murder of the deceased. When PW1 gave evidence in Court, he adopted a dubious strategy by saying that A4 was not present at the scene of occurrence but he saw a person having striking resemblance to A4 giving axe blows on the deceased.

Though to be interned in jail is a misfortune, it became a blessing to A4. If he was not then in jail, what would have been the disastrous consequences for him. We have no doubt that PW1 would certainly have stuck to his version regarding A4's role in the same manner as he gave in his written complaint. If the Court had believed PW1, in that situation A4 would have been convicted of the offence under Section 302 I.P.C. Now, we have no manner of doubt that PW2's present version, that he identified an assailant having close resemblance with A4, is nothing but a canard concocted for the purpose of escaping from the charge of a rank perjury.

In this context, it must also be borne in mind that A1, A2 and A3 are the children of A4. If the father could have been falsely implicated in the

A murder of the deceased, why not the children also be arrayed with the same angle. Hence, the possibility of false implication of A1, A2 and A3 cannot be lightly glossed over. So, we must seriously consider whether PW1 witnessed the occurrence at all or he would have reached the place of occurrence only after hearing about his father's mishap.

B Apart from the above insurmountable hurdle, if PW1 was present when the occurrence took place, it does not stand to reason why he was completely spared by the assailants. It is difficult to believe that if PW1 was present, a young man of 33 like him could not have done even a bit to go to the rescue of his father and if he had done so, he would have sustained injuries, at least C some minor injuries. But the fact is that PW1 did not sustain even a scratch on his person. Yet another aspect is that if PW1 waited to rush to his dying father till the assailants stopped attacking him even then it is difficult for us to conceive that at least the clothes of PW1 could not have been smeared with some blood, if not copious blood. But nobody has noticed even a drop of D blood on his clothes.

We are in complete dearth of satisfactory explanation for such broad features staring at the reliability of PW1's version. Attached to the above features is another odd feature. The FIR has been prepared on the strength of a written complaint furnished by PW1. He said that the complaint was E scribed by his nephew who was residing 13 kilometers away from the place. That scribe was not examined as a witness. We do not know how that scribe was brought to this place from such a distance and at what time. There certainly would have been confabulations and deliberations before preparing the written complaint.

F It is pertinent to notice that PW2 and PW3 also said in their examination in chief itself that an assailant resembling A4 had participated in the occurrence by hacking the deceased with an axe on the head. But even they refrained from saying more than that, lest, any assertion that A4 participated in the crime would contaminate their testimony. When we read the further G portion of the testimony of PW2 and PW3, we have come across reasons to be slow in acting on such testimony as well.

PW2 admitted that he was doing contract work in an industrial establishment owned by deceased's brother (Venugopal Rao). The defence counsel H seriously disputed that claim of PW2. It was sought to be made out that PW2

could not have been present on that night even in that village because his grand mother had passed away on the previous evening. When PW1 was asked about that fact, he said that the parents of PW2 had gone to other village as they got the information that his grand mother was very serious and she died at 7.00 p.m. PW2 would clearly have anticipated that he would be confronted with that question during cross-examination. So he put forward an excuse that he was informed of the death of his grandmother only on the next morning. It is difficult for us to believe that PW2 was unaware of the serious condition of his grandmother particularly because his parents who were living with him, had already gone away to see the old lady in her death bed.

PW3 (Pothuraju), an employee under deceased's son-in-law A.K. Rao said that he was residing in one of the rooms of the house of A.K. Rao. His evidence is in tune with PW1 and PW2 and so he also said that a person resembling A4 was one of the main assailants. Why did he also say that? PW3 being a dependant of A.K. Rao appears to be speaking in tune with his master because he admitted that he was a witness in another case against A1 to A4 which was tried in 1980. He also admitted that even his father was a witness against A4 in a case tried in 1968. We have difficulty to place reliance on the testimony of such a witness as PW2 in the aforesaid background.

Although PW4 did not see the occurrence or any part of it, prosecution examined him as a corroborating witness. He said that he was a watchman of the poultry farm of one A. Koteswararao and after his work was over on the date of occurrence, he walked home and on the way, he saw these accused(except A4) running with axe, knife, etc. The time was about 11.00 p.m. then. A little later, PW4 saw the three witnesses (PW1, PW2 and PW3) and PW4 went to the scene of occurrence and saw the deceased lying injured and he got the entire narration of the incident from PW3. Normally, a witness like PW4 would be sufficient to corroborate the testimony of the eye witnesses. When Counsel for some of the accused cross-examined him, he said that it was his maiden appearance in any court of law on that day. But when another Counsel appearing for the remaining accused confronted him with Ext. D-17 (a copy of his deposition which he gave in 1957 in another case), he admitted that he had deposed against A4 even in 1957. As the defence strongly disputed his claim that he was employed by Koteswararao, he had to admit, to a Court question, that there is no record to show that he was so employed. Even that apart, he said that his watchman work was

A limited to the day time. If so how could he account for his presence at the scene of occurrence at 11.00 p.m.? The above are features which dissuade us from placing reliance on his testimony as a witness of truth.

For the aforesaid reasons, we are unable to hold that prosecution has succeeded in establishing that the accused in this case were the assailants who B attacked the deceased. We entertain a reasonable doubt on that score.

In the result, we allow the appeal filed by A1 and A3 and set aside the conviction sentence passed on them. They are acquitted. The remaining appeals are dismissed.

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S.V.K. Appeals dismissed.