MALLAPPA
v.
STATE OF KARNATAKA

(Criminal Appeal No. 1993 of 2010)

MAY 07, 2021

[N. V. RAMANA, CJI, SURYA KANT AND ANIRUDDHA BOSE,* JJ.]

Penal Code, 1860 – s.302 – Murder – Deceased was allegedly assaulted with a club – Prosecution case primarily based on evidence of PW5 (deceased's wife) – Trial court acquitted accused-appellant as well as the co-accused – Acquittal of appellant reversed by High Court – Conviction of appellant challenged – Held: On facts, evidence of PW5 cannot be accepted in full – There were contradictions in PW5's deposition as regards her having seen appellant at the spot of occurrence – PW5 was not a witness to actual act of assault – As a witness, she did not inspire confidence – No cogent evidence demonstrating that the club seized was used to assault the deceased – Proof of commission of offence by circumstantial evidence of discovery of club- the weapon of assault, not acceptable – Even if prosecution case that accused persons were seen by PWs is accepted, that would be too thin a piece of evidence to convict appellant u/s.302 IPC applying the principle of 'res gestae' *– The first court of facts (trial court) on appreciation of evidence had acquitted the appellant – No major lacuna in its reasoning which would have warranted interference by the Appeal Court (High Court) for reversing such finding into that of guilt – Acquittal of appellant by trial court accordingly sustained.*

Evidence – Possible visibility of accused – Relevance of – Murder case – Three PWs deposed to have seen the accused persons at the same location while running away from the place of occurrence – Held: Evidence on whether that location was visible from the spots PWs were at the material point of time, cannot be discarded as being irrelevant.

Evidence – Res Gestae *– Murder case – Three PWs deposed to have seen accused-appellant and the co-accused at the same location while running away from the place of occurrence – Held: On facts, even if the two accused persons were so seen by the*

* Author

PWs, that would be too thin a piece of evidence to convict appellant u/s.302 IPC applying the principle of 'res gestae' *– Doctrines / Principles – Principle of* 'res gestae' *– IPC – s.302.*

Evidence – Circumstantial Evidence – Discovery of weapon of assault – Murder – Death allegedly caused due to assault with a club – Seizure of club – Effect and relevance of – Held: Club is a common implement which can be found at random in rural households – On facts, there was absence of cogent evidence demonstrating that the club seized was used to assault the deceased – Thus, prosecution story, seeking to establish commission of offence by circumstantial evidence of discovery of club - the weapon of assault, not acceptable.

Allowing the appeal, the Court Held:

1. **The evidence of PW-5, the deceased's wife, cannot be accepted in full. There are contradictions in PW-5's deposition as regards her having seen the Appellant at the spot of occurrence. She stated in her cross-examination that by the time she saw the accused persons, they were in front of the house of Devendrappa. That was the evidence of PW-3 and also PW-6. PW-5's contradictory statements as regards when and where she saw the appellant and as to whether she saw him committing the act of assault was of significance. In her examination in chief, she deposed that when she opened her eyes on hearing the sound "dhup", she saw the appellant with a club assaulting on the head of her husband, whereas son of the appellant was standing beside him. But she stated in her cross-examination that by the time she woke up, injury had been caused. She claimed to have had seen the accused in front of Devendrappa's house. This part of her deposition in her cross-examination was otherwise compatible with rest of her statements made in cross-examination. In this perspective, only one conclusion was possible that she was not a witness to actual act of assault. She is the widow of the deceased victim and deserves to be considered with an element of compassion. But as a witness, she did not inspire confidence. [Para 9]**

2. **The Trial Court had found, dealing with evidence of PW-5 that from her house, the houses of Hussainamma and Devendrappa were invisible. This was a finding of fact about possible visibility of the appellant, who, as per prosecution**

version was running away along with his son. The High Court was not right in dismissing the said finding of fact based on evidence being "not of importance" and "irrelevant". The account of PW-5 having been eyewitness of the incident cannot be believed because of her contradictory statements. Involvement of the appellant, as per prosecution version, appears from him being seen while running away from the place of occurrence by the aforesaid three witnesses at the same location, apart from discovery of the club. Evidence on whether that location was visible from the spots the PW Nos. 3 and 6 were at the material point of time could not be discarded as being irrelevant. [Para 10, 11]

3. **The seizure witness (PW-2) stated that the club was not broken. PW-1 had also deposed on spot panchanama made by the police on the morning of 20th April, 1999 from the place of occurrence. He also did not speak of seizure of the broken piece of club. These two prosecution witnesses did not support the statement made by PW-8, the inquest officer in his examination that the latter had seized a small piece of wooden club. The autopsy surgeon (PW-7) was not shown that club. It did not transpire so from his deposition. Club is a common implement which can be found at random in rural households of this country and in absence of any cogent evidence demonstrating that the club seized was used to assault the deceased, the prosecution story seeking to establish commission of the offence by circumstantial evidence of discovery of the weapon of assault failed. [Para 12]**

4. **Even if the prosecution version that the PW-3, PW-5 and PW-6 could and did see the appellant running in front of Devendrappa's house from the respective positions they were in at the time of occurrence of the incident was accepted, the evidence the court would have been left with, would have been two accused persons being seen running away. That would have been too thin piece of evidence to convict someone under Section 302 IPC, applying the principle of res gestae. The first Court of facts on appreciation of evidence had acquitted the appellant. There is no major lacuna in its reasoning which would have warranted interference by the Appeal Court for reversing such finding into that of guilt. The judgment of acquittal of Appellant by the Trial Court is accordingly sustained. [Para 13, 14]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1993 of 2010.

From the Judgment and Order dated 11.06.2008 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 1232 of 2001.

S.N. Bhat, Adv. for the Appellant.

V.N. Raghupathy, Adv. for the Respondent.

The Judgment of the Court was delivered by

ANIRUDDHA BOSE, J.

1. The appellant (Mallappa) was charged with having committed fratricide, murder of his brother Earappa, little beyond the midnight hours of 19th-20th April 1999. His son, Veeresh was the co-accused. The Trial Court acquitted both of them from the charges under Section 302 read with Section 34 of the Indian Penal Code (the Code, in short). In appeal against the judgment of acquittal by the State of Karnataka, the High Court of Karnataka set aside the decision of the Trial Court in relation to Mallappaand convicted him of the offence punishable under Section 302 of the Code. Sentence of life imprisonment was awarded against him. The present appeal is by Mallappa against the judgment of conviction and order of sentence passed on 11th June 2008.The prosecution case,which was accepted by the High Court, was that the appellant (described as A1 and his son Veerappa as A2 in the trial) had assaulted the deceased Earappa with a club while the latter was sleeping in the “angala” (frontyard) of his house in Sidrampur village, Taluk Sindhanur within the State of Karnataka.

2. There was previous dispute between the appellant and the deceased victim over certain immovable properties and sharing of canal water, which were projected as the motive of the crime by the prosecution. It appears from the evidence of the prosecution witnesses that the deceased victim was sleeping in the frontyardof his house at a little distance from his wife, Bassamma (P.W. 5) with two of his daughters when the assault took place. On hearing the screams of his wife and daughter, Shivarayappa (P.W.3), another brother of the deceased woke up and saw the two accused persons running away. As per evidence of P.W.3, he was sleeping at that point of time outside his

house in the 'angala' about 10' away from the location where the deceased was sleeping. We shall describe this location as the place of occurrence (PO). On reaching the PO where the deceased was sleeping, he found the latter bleeding from his nose and ear. Then, he rushed to the house of P.W.1, his sister's husband, whose name is also Earappa. From the P.W.1's house, he went and fetched the local doctor, Mallikarjuna (P.W.4) to the PO. On examining the deceased, he declared him dead. Thereafter, P.W.1, P.W.3 and oneBassappa arranged for a jeep and went to theSindhnur police station for reporting the incident. From the deposition of Sanna Hassan Sab (P.W.8), who recorded the complaint as P.S.I at that police station on the basis of which the F.I.R. was registered, it transpires that they had reached the police station at about 4 A.M. on 20th April, 1999.

3. Evidence of the autopsy surgeon, Dr. Venketesh Y. (PW-7) is that death of Earappa was caused due to intra-cranial haemorrhage and shock. He found an external injury, being a lacerated wound on right occipital protuberance 3 x ½". His opinion, as it appears from his examination-in-chief was that such injury could be caused by an iron rod or lathi. In cross-examination, however, he stated that if a person fell downwards on a hard surface, such injury was possible.

4. The prosecution case was built up primarily on the evidence of PW-5, who was presented as an eye-witness and the depositionsPW-3 and Bhogappa (PW-6), both of whom gave evidence as post occurrence witnesses.They claimed to have had seen the appellant running away, and the location they saw the appellant was in front of the house of one Jeeral Devendrappa. P.W.5 had stated in her examination-in-chief that she had seen A1 assaulting on the head of her deceased husband with a club. In her cross-examination, however she gave a different version, of seeing the accused person near the house of Devendrappa. We shall deal with her evidence in greater detail in the succeeding paragraph. The other factor by which the prosecution sought to establish their case against the appellant was recovery of the weapon of assault- the club from the house of the accused. PW-8, who conducted the inquest, in his deposition stated that he had seized a small piece of wooden club from the spot of occurrence along with certain other materials-barkha, pillow (spelled pillo in the deposition as recorded), jamkhana, bloodstained mud and sample mud. This was reflected in the Mahazar. The club has been made Material Object (M.O.) 6 whereas the small wooden piece was marked M.O.10.

5. Basamma(PW-5), in her examination-in-chief had stated that after midnight of 19th-20th April, 1999, she had heard a sound which she described as 'DHUP'.This appears to be a phonetic description of what may be called a thudding sound. She also stated in her examination-in-chief that Honnappa and Nagaraja, their sons, were sleeping with her husband. On hearing such sound, she shouted and on opening her eyes she saw the appellant Mallappa with a club assaulting on the head of her husband with Veerappa (A-2) was standing behind him. In her cross-examination, she stated that Honnappawas not sleeping with them on that day, as he was in Sindhnur. Her daughters Earamma and Gangamma were sleeping with them. As regards witnessing the accused persons, her varied version in her cross-examination was that by the time she had woken up and saw her husband, injuries had been caused. She saw the accused running near the house of Devendrappa. Prosecution sought to establish the club as the weapon of assault by matching the wooden piece seized atthe house of the appellant with a broken piece the police claimed to have had seized from the spot of crime.

6. PW-2-Srinivas, who was adduced as witness to the seizure of items around the time of inquest in his examination-in-chief stated:-

"…..From the spot, the police collected blood-stained mud, Barkha, Pillo and one Jamkhana, and seized the same. One Virupanna signed the spot mahazaralongwith me. Ex. P.2 is the spot mahazar. It bears my signature. M.O.1 is Barkha, M.O.2 is Pillo& M.O.3 is the Jamkhana. M.O.4 is blood-stained mud. M.O.5 is sample mud which also collected at the spot.

2. Next from the house of A.1 the police by going near the ovan in the kitchen seized a club consisting of blood-stained. Ex. P.3 is club seizure mahazar. It bears my signature. M.O.6 is the club that was seized from the house of A.1. At that time in the house A.2 son of A.1 was present. The other women folk were also present. Ex.P.3 is club seizure mahazar. It bears my signature. M.O.6 is the club that was seized from the house of A.1. At that time in the house A.2 son of A.1 was present. The other women folk were also present."

(quoted verbatim)

Further, in course of his cross-examination, he had also stated:-

"When I went there P.S.I. told me at the spot panchanama is made, where deceased died and thereby I signed it and I do not know for what purpose that mahazar was made. At the spot three mahazars were conducted. I cannot say for what purpose all the three panchanamas were conducted at that place. At the spot itself I signed all the panchanamas. Police had already written those panchanamas. I do not know what is written in all those panchanamas."

(quoted verbatim)

In his cross-examination he had also specifically stated that the club was not broken.

7. The Trial Court found that PW-3 and PW-5 had improved the prosecution case, which was not stated before the police. The Trial Judge found the evidences of PW-3 and PW-5to be exaggerated and deviated from the prosecution story. He was not convinced by the prosecution story of assault and murder of the deceased victim Earappa and acquitted both the accused persons. Other factors behind the Trial Court's judgment wasthat Devendrappa's house was not visible from the place of occurrence. Moreover, the weapon of assault was not produced before the autopsy surgeon and the same was also not sent to any expert to obtain opinion as to whether M.O.-6 and M.O.-10 matched to form the same club.

8. In appeal by the State, it was held by the High Court:-

"9.The evidence of PW3 and PW6 disclose that the houses of Hussainamma and Jeeral Devendrappa are side by side and the said houses are not visible from their house. Whether the house of Jeeral Devendrappa is visible by the house of PW3 and PW6 is not of importance and relevance. The said evidence cannot be interpreted to the effect that the house of Jeeral Devendrapa is not visible from the house of PW5. Therefore, there is no reason to reject the testimony of PW5 which is to the effect that she was able to see the accused persons going away near the house of Jeeral Devendrappa.

10.The prosecution has established the motive for the commission of the offence. The evidence of PW5 is fully credible. It may be that the evidence of PW5 shows that 2 blows were dealt. There is only one lacerated head injury. It could be possible that both the blows must have been dealt at the same site in which event there could be only one injury.

11.PW5 states that it was A1 who dealt blow and ran away from the scene. She states that A2 also ran away. PW2 does not attribute any overt acts to A2. The act of A2 running away cannot be interpreted to attribute sharing of common intention on the part of A2. The evidence of PW5 at the best establish the guilt of A1.

12.In that view of the matter, the order of acquittal recorded by the trial Court against A1 is set aside. The order of acquittal granted to A2 by the trial Court is confirmed."

(quoted verbatim)

9. In our opinion, however, the evidence of PW-5 cannot be accepted in full. There are contradictions in PW-5's deposition as regards the P.W.5 having seen Mallappa at the spot of occurrence. She stated in her cross-examination, which we have referred to earlier, that by the time she saw the accused persons, they were in front of the house of Devendrappa. That is the evidence of PW-3 as also PW-6. We can ignore the contradictions in her evidence concerning presence of Honappa at the PO on the night of occurrence of the incident as the same not having any material impact on the case. But her contradictory statements as regards when and where she saw the appellant and as to whether she saw him committing the act of assault is of significance. In her examination in chief, she deposed that when she opened her eyes on hearing the sound "dhup", she saw A1(i.e. the appellant) with a club assaulting on the head of her husband, whereas A2(Veerappa) was standing beside him. But as we have already observed earlier, she stated in her cross -examination that by the time she woke up, injury had been caused. She claimed to have had seen the accused in front of Devendrappa's house. This part of her deposition in her cross-examination is otherwise compatible with rest of her statements made in cross-examination. In this perspective, only one conclusion is possible and that is she was not a witness to actual act of assault. She is the widow of the deceased victim and deserves to be considered with an element of compassion. But as a witness, she does not inspire confidence.

10. The Trial Court had found, dealing with evidence of P.W.5 that from her house, the houses of Hussainamma and Devendrappa are invisible. On that basis, it held, referring to the evidences of PW-3 and PW-5:-

"As observed supra, PW5 admits, that from her house, the house of Hussainamma and Devendrappa are invisible, thereby their statements in respect to watching the accused running away from that portion, is not true."

(quoted verbatim)

11. This was a finding of fact about possible visibility of the appellant, who, as per prosecution version was running away alongwith his accused son. The High Court, however, gave finding on this count in paragraph 9 of its judgment, which has been quoted earlier. We do not think that the High Court in the judgment under appeal was right in dismissing the said finding of fact based on evidence being "not of importance" and "irrelevant". We cannot believe the account of P.W.5 having been eyewitness of the incident because of her contradictory statements. Involvement of the appellant, as per prosecution version, appears from him being seen while running away from the place of occurrence by the aforesaid three witnesses at the same location, apart from discovery of the club. Evidence on whether that location is visible from the spots the PW Nos.3 and 6 were at the material point of time cannot be discarded as being irrelevant.

12. We have already reproduced the part of the deposition of Srinivas (PW-2), the seizure witness in which he has stated that the club was not broken. PW-1 has also deposed on spot panchanama made by the police on the morning of 20th April, 1999 from the place of occurrence. He also does not speak of seizure of the broken piece of the club. These two prosecution witnesses do not support the statement made by PW-8, the inquest officer in his examination that the latter had seized a small piece of wooden club. The autopsy surgeon Dr. Venkatesh Y(PW-7) was not shown that club. It does not transpire so from his deposition. Club is a common implement which can be found at random in rural households of this country and in absence of any cogent evidence demonstrating that the club seized was used to assault the deceased, the prosecution story seeking to establish commission of the offence by circumstantial evidence of discovery of the weapon of assault fails.

13. Even if the prosecution version that the PW-3, PW-5 and PW-6 could and did see the appellant running in front of Devendrappa's house from the respective positions they were in at the time of occurrence of the incident was accepted, the evidence we would have been

left with would have been two accused persons being seen running away. That would have been too thin piece of evidence to convict someone under Section 302 of the Code, applying the principle of res gestae. The first Court of facts on appreciation of evidence had acquitted the appellant. We do not find any major lacuna in its reasoning which would have warranted interference by the Appeal Court for reversing such finding into that of guilt.

14. For these reasons, we set aside the judgment dated 11th June, 2008 of the High Court of Karnataka delivered in Criminal Appeal No.1232 of 2001 convicting the appellant and the consequential order of sentence. We sustain the judgment of acquittal of Mallappa (A1) by the Trial Court. As we find from the records that the sentence of the appellant was suspended by an order of this Court passed on 29th January, 2016 and prayer for bail of the appellant was granted, we direct discharge of the bail bonds.

15. The appeal is allowed in the above terms. Pending application(s), if any, shall stand disposed of.

Headnotes prepared by: Bibhuti Bhushan Bose

Result of the case: Appeal allowed.