REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1038 OF 2008

GAJULA SURYA PRAKASARAO … APPELLANT

VERSUS

STATE OF ANDHRA PRADESH … RESOPNDENT

J U D G M E N T

B. SUDERSHAN REDDY, J.

This appeal by special leave is directed against the Judgment rendered by a Division Bench of the Andhra Pradesh High Court confirming the conviction of the appellant for the offences punishable under Sections 302 and 307 of Indian Penal Code, 1860 (in short "IPC"). The High Court by the impugned judgment confirmed the judgment passed by the Principal Sessions Judge, Eluru convicting the appellant under Sections 302 and 307 of IPC and sentencing him to suffer imprisonment for life and rigorous imprisonment for seven years, respectively,

and further to pay a fine of Rs.1,000/- each and in default, to suffer simple imprisonment for a period of six months each.

2. In the nutshell, the prosecution version which led to the trial of the appellant is as under:

3. On the intervening night of 7th/8th April, 2002 appellant went to the house of the deceased in Venkatayapalem village with an intention to end the life of the deceased and knocked at the door of the deceased which was opened by the wife of the deceased, Cherukuri Srinukumari (PW-3) and the appellant-accused all of a sudden hacked and attempted to kill her by inflicting severe injuries on her body, as a result of which she fell down and then he rushed towards the deceased who was sleeping and hacked him by inflicting severe injuries. The appellant after committing the offence escaped from the place of occurrence by bolting the door from outside. The daughter of the deceased Sri Surekha (PW-4) aged about 9 years raised hue and cry upon which the neighbours opened the door from outside and informed Cherukuri Gangaraju (PW1) who is a close relation of the deceased who thereafter informed Gopalapuram Police Station and lodged first information report at about 4.00 a.m. on 8th

April, 2002. A case was registered as Crime No. 30 of 2002 under Sections 302 and 307 read with Section 34 IPC against unknown persons.

4. The prosecution, in order to establish its case, examined altogether 14 witnesses. The trial court upon appreciation of the evidence found the appellant guilty of the offences punishable under Sections 302 and 307 IPC and sentenced him to suffer imprisonment for life and rigorous imprisonment for a period of seven years, respectively. The trial court mainly relied upon the evidence of PW-3 and PW-4. The High Court vide its judgment dated 20th August, 2007 dismissed the criminal appeal filed by the appellant and accordingly confirmed the judgment of the trial court. The High Court too relied upon the evidence of PW-3 and PW-4. Both courts below found that the appellant attacked the deceased with sharp edged weapon resulting in his death. The courts below also found the appellant-accused attempted to kill PW-3 by inflicting severe injuries on her body.

5. In this appeal, Shri M.N. Rao, learned senior counsel for the appellant, submitted that the evidence of the eye witnesses does not inspire any confidence as PW-3 made a lot of improvements

in her version and implicated the appellant for the first time only while deposing before the Court and never before during the investigation or in the first information report. The injured witness (PW-3) and her minor daughter (PW-4) never mentioned the name of the appellant while narrating the incident to their neighbours, police or the Magistrate though the appellant was very well known to them. It was submitted that Section 161 of Code of Criminal Procedure statement (08.04.2002) of PW-3 was clearly ante-timed. The evidence of prime witness PW-3 is totally unreliable and could not be believed under any circumstances as in her cross-examination she went to the extent of denying having given any statement (Ex. P-21) to the Magistrate (CW-1).

6. In response, Ms. D. Bharathi Reddy, learned counsel for the State submitted that the evidence of eye witnesses is clear and cogent. The relationship of the witnesses with the deceased itself cannot be a ground to discard their evidence. Learned counsel submitted that what is relevant is the evidence of PW-3 and PW-4 in the court and not their statement under Section 161 Cr.P.C.

7. We shall first deal with the contention regarding the nature of evidence of PW-3 and PW-4 to consider as to whether their evidence has been rightly accepted by the courts below. In the process, we will not re-appreciate the evidence to substitute our view for that of the courts below but consider as to whether non-consideration of certain important aspects of the case resulted in miscarriage of justice.

8. It is an admitted fact that the deceased was a farmer and cultivating the lands belonging to one Satyam Ramachandra Laxmi Devi of Rytapuram which land was adjacent to the land of the appellant. The owner of the said land decided to dispose of her land admeasuring 01 acre and 54 cents and the deceased was willing to purchase the land at the rate of Rs.90,000/- per acre which price was much higher than the price offered by the appellant who also wanted to purchase the said land. The appellant is stated to have approached the deceased and demanded to cancel the agreement so that he would purchase the land at a lesser price than which was offered by the deceased. The deceased despite the threats proceeded further and informed the landlady that he was ready with the balance sale consideration and required her

to execute a registered sale deed on 2.4.2002. The appellant was upset and developed a grudge against the deceased and in the process committed the crime on the intervening night of 7th/8th April, 2002. This is the motive suggested by the prosecution for the appellant committing the crime. The prosecution story itself shows that PW-3 and PW-4 very well knew the appellant and also about the dispute with regard to the purchase of the land. Yet this aspect is not stated by either of them and more particularly by PW-3 at any stage prior to her evidence in the court.

9. Be it noted that the first information report was lodged by one Cherukuri Gangaraju (PW-1) who is none other than a close relation of the deceased at about 4.00 a.m. on 8th April, 2002 in which he clearly stated that on the intervening night of 7th/8th April, 2002 at 2.00 A.M. "some unknown persons knocked the door of the house, his wife Srinukumari opened the door, two persons entered into the house of Cherukuri Gangaraju, hacked him with knife on his neck and also hacked Srinukumari on her face and hands". That according to the first information report two unknown persons entered into the house and

committed the crime. In his evidence he merely stated that he was informed by the villagers that the deceased was murdered, based on which he gave written report to the police and the police reached at the scene of occurrence within half an hour and shifted the wife of the deceased to the hospital. It is in his evidence that he gave report to the police at the house of the deceased. He did not draft the first information report and he does not remember as to who drafted the same. In his cross-examination it is stated by him that PW-3 was sent by him to the hospital prior to the arrival of the police.

10. Be that as it may, the crucial evidence is that of PW-3. There is some discrepancy in the evidence as to who sent PW-3 to the hospital. But the fact remains that on 9.4.2002 at about 11.25 a.m. her statement was recorded by the Judicial First Class Magistrate (Ex.P21). The Magistrate having received the information at about 11.00 A.M. reached the hospital and recorded the statement as 'dying declaration'. PW-3 in her statement stated that one person came to her house and suddenly beat on her head at about 10 P.M. in the night. She did not identify the person but stated that he was a young man

wearing stripes shirt. She did not state anything about the attack on the deceased.

11. CW-2 is Dr. G. Bhaskararao who stated in his evidence that PW-3 was sent for treatment of injuries by Gopalapuram Police Station. As her condition was serious, he immediately sent intimation to JFCM (CW-1) who came and recorded her statement. The doctor (CW-2) was present when CW-1 recorded her statement. He certified that the patient was conscious and coherent to give her statement. The Magistrate at the foot of her statement (Ex. P 21) certified that the declaration recorded by him was read over and she admitted it to be correct and complete. It is specifically observed that she has been conscious, coherent and in a fit state of mind to depose all throughout. He appeared as CW-1 and stated that he recorded the statement of PW-3 under Exhibit P-21. It has not been suggested to him that PW-3 was not in a fit and coherent condition at the time of recording her statement.

12. It is plainly evident that PW-3 was conscious and coherent to make her statement and made her statement in Exhibit P-21 in which not only she did not mention the name of the appellant but positively stated that she was attacked by an

unknown person aged about 20 years. Be it noted that the appellant even at the relevant time was of 50 years and was well known to PW-3. She did not explain as to and under what circumstances she made the statement in Exhibit P-21 nor there is any explanation as to how she omitted the name of the appellant and described somebody else to be the assailant. On the other hand, she went to the extent of stating that she did not know whether the Magistrate had recorded her statement in the house or in the hospital.

13. It is well settled and needs no restatement at our hands that when a person who has made a statement, may be in expectation of death, is not dead, it is not a dying declaration and is not admissible under Section 32 of the Evidence Act. In the instant case, the maker of the statement Exhibit P-21, is not only alive but is examined as PW-3. Her statement, therefore, is not admissible under Section 32; but her statement, however, is admissible under Section 157 of the Evidence Act as former statement made by her in order to corroborate her testimony in court. In the instant case Exhibit P-21 does not corroborate the testimony of PW-3 in Court. It is obvious that PW-3 later on improved the story and

roped in the appellant. In ***Ramprasad Vs. State of Maharashtra***[1] this Court held:

> "As long as the maker of the statement is alive it would remain only in the realm of a statement recorded during investigation. Be that as it may, the question is whether the Court could treat it as an item of evidence for any purpose. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before "any authority legally competent to investigate the fact" but its use is limited to corroboration of the testimony of such a witness. Though a police officer is legally competent to investigate, any statement made to him during such an investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code. But a statement made to a Magistrate is not affected by the prohibition contained in the said section. A Magistrate can record the statement of a person as provided in Section 164 of the Code and such a statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. A statement recorded by a Magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof."

14. Considered in the light of the law declared by this Court the statement of PW-3 in Exhibit P-21 can be used for corroborating the testimony of PW-3. The evidence of PW-3 is completely at

[1] (1999) 5 SSC 30

variance with what has been stated by her in Exhibit P-21. This vital aspect of the matter has completely escaped the attention of the courts below which resulted in miscarriage of justice. Enmity between her husband (deceased) and the appellant may be one possible reason for her to implicate the appellant in the case after deliberations.

15. What remains for our consideration is the statement of PW-4 who is none other than the daughter of the deceased. The incident according to her took place at about 2.00 A.M. in the night when the appellant hacked her mother and father. She stated that on her raising hue and cry one Kanniah Tata and others came to the spot. She did not reveal the name of the appellant to the neighbours when they came to the house on her raising hue and cry. Kanniah Tata who is examined as PW-7 stated in his evidence that PW-4 informed him that her father and mother were beaten by somebody. The evidence on record suggests that even PW-4 has also acquaintance with the appellant but she did not mention the name of the appellant at any point of time prior to her evidence in the court. Her evidence is also vague based on which it would be difficult to record

any finding of commission of any crime by the appellant. There is no other acceptable evidence available on record based on which the appellant could be held guilty.

16. We are conscious that normally this Court would not substitute its opinion by re-appreciating the evidence with that of concurrent findings of the two courts below. But in the present case, having considered the findings of the courts below, we hold that the courts below found the appellant guilty on the basis of evidence of PWs-3 and 4 upon which no reliance could be placed for the reasons stated herein above. The facts, based on which we have arrived at the conclusion not to rely upon the evidence of PWs-3 and 4, are very much available on record which were altogether ignored by the courts below. The same has resulted in miscarriage of justice. This Court in ***Zafar Vs. State of U.P.***[2] while considering the scope of interference in exercise of its jurisdiction under Article 136 of the Constitution observed:

"Though it is a case of concurrent finding by both the courts resting on the appreciation of evidence, we are of the view that the trial court and the High Court

[2] [(2003)3 SCC 51]

overlooked certain important aspects in the practical application of the rule of prudence and caution which the High Court itself proceeded to apply in appreciating the evidence of the child witness. The High Court failed to take note of certain telling factors emerging from the evidence on record. There was no critical appraisal of the evidence of PW 2 except focusing attention on two alleged contradictions of no significance and repelling the arguments based on them. Even if the finding that the medical evidence does not go counter to the prosecution case is allowed to remain, there are other fatal infirmities in the evidence relied upon by the prosecution which were not adverted to by the High Court. In these circumstances, we are of the view that it is a fit case for interference under Article 136."

17. In the present case there was no critical evaluation of the evidence of PWs-3 and 4, and there was no consideration of material contradictions having crucial bearing on the veracity of the version given by PWs-3 and 4. They went on making improvements from stage to stage which makes their evidence doubtful. It is under those circumstances, we are compelled to interfere with the concurrent findings of the courts below in order to prevent the miscarriage of justice.

18. For the aforesaid reasons, the impugned judgment is set aside. The appellant is acquitted of the charges under Sections 302 and 307 IPC. The conviction and sentences awarded against the appellant are set aside. The appellant is directed to be released forthwith. The bail

bonds earlier executied by him and the sureties, if any, shall stand discharged.

19. The appeal is, accordingly, allowed.

……..J.
(B. SUDERSHAN REDDY)

……..J.
(J.M. PANCHAL)

NEW DELHI,
November 10, 2009.