
(1977) 12 AP CK 0008
In the Andhra Pradesh High Court

Attepalli Gopaiah

APPELLANT

Vs

The State of Andhra Pradesh

RESPONDENT

Date of Decision : 07-12-1977

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 304, 307

Citation : (1978) CriLJ 798

Hon'ble Judges : Punneya, J; Madhusudan Rao, J

Bench : Division Bench

Judgement

Punneya, J.—The appellants are A-1 to A-7 in Sessions Case No. 43 of 1976 on the file of the Sessions Judge, Warangal. They were tried for rioting and murder in connection with the death of Maidam Venkataiah (who will hereinafter be referred to as the "deceased") in an incident that took place on 22-4-1976 at 9 A. M. at the thrashing floor of the deceased near Theerthagadda well. The learned Sessions Judge found A-1 to A-7 guilty of the offence u/s 148 I. P. C, and sentenced them to suffer rigorous imprisonment for six months each. Regarding the murder of the deceased, the learned Sessions Judge framed a charge u/s 302 IPC or in the alternative u/s 302 read with Section 149 IPC But he found them guilty under ,S. 302 read with Section 34 IPC and sentenced each of them to imprisonment for life. The learned Sessions Judge framed the third charge against A-1 to A-7 u/s 307 I.P.C. for attempting to commit murder of the deceased or in the alternative u/s 302 read with Section 149 I.P.C. But he did not find A-1 to A-7 guilty of the offence u/s 307 IPC and acquitted them of the offence. Instead, he found A-4 and A-5 guilty of the offence, u/s 324 I.P.C. and sentenced them to rigorous imprisonment for three months each. The fourth charge is against A-1 to A-7 u/s 307 IPC for attempting to commit murder of P. W. 2. The learned Sessions Judge did not find A-1 to A-7 guilty of the offence u/s 307 I.P.C. and acquitted them of this offence. But he found A-6 and A-7 guilty of the offence u/s 324 instead of Section 307 IPC and sentenced them to suffer rigorous imprisonment for three months each. He directed the sentences under all the counts to run concurrently.

2. Aggrieved with the convictions and sentences passed by the learned Sessions Judge, the seven accused preferred these seven appeals separately. Since all these appeals are directed against the convictions and sentences passed by the learned Sessions Judge, they are disposed of by one judgment.

3. The case of the prosecution in brief is as follows:

P. W. 1 is the son of the deceased. P. W. 5 is the wife of the deceased. P. W. 2's mother and the wife of the deceased, (P. W. 5) are sisters. A-2 to A-6 are the sons of A-1. A-7 is the son of A-2. A-1's sister is the mother of the deceased. There were disputes between the deceased and his family on one side and the family of the accused on the other regarding the lands allotted to the sister of A-1 i. e., the mother of the deceased. The deceased owned six acres of dry land and five acres of wet land at Thatigadda well. The accused are also having lands double the extent of the deceased near the same well. According to the arrangement in existence, the lands of the deceased are irrigated by the channel passing through the lands of the accused and similarly the lands of the accused are irrigated through the channel passing through the lands of the deceased. But the accused stopped water from flowing through their lands to the lands of the deceased. The deceased also stopped flow of water from passing through their channel to the lands of the accused. Because of this, the accused dug another channel through their own lands from their well to irrigate their lands.

4. On 20-4-1976 the deceased went to Nekkonda to bring his daughter, Vijaya, from her parents-in-law for Dasara festival. He stayed there on 20th and 21st and returned with his daughter to his village by 6 A. M., on 22nd of April, 1976. After reaching the village, the deceased sent this daughter Vijaya to his house and he straightway came to their thrashing floor at Theerthagadda well. At that time, P. Ws. 1 and 2 were thrashing the harvested crop at their Kallam. A-2 and A-7 were watering their fields. After seeing the deceased, A-2 and A-7 went into the village and they came back to the field along with A-1, A-3 to 6.

They all came to their well. By then, P. W. 1 was digging the ground and levelling it for preparing the kallam adjacent to the ridge of the lands. A-2 came to P. W. 1 and asked him not to dig the ground near the ridge of the land. So saying A-2 beat P. W. 1 with his hands giving him two or three blows. P. W. 1 retaliated and beat with the stick portion of the spade on the legs of A-2. A-2 called for the other accused. Then all the accused came to the kallam of the deceased. A-4 and A-5 threw P. W. 1 down and beat him with stones on back, knees and other parts of the body. A-6 and A-7 went to P. W. 2 and beat him with stones. P. W. 1 in order to save himself, ran to the well of Kanakamma. P. W. 2 also ran to the well of Kapu Yakayya, Then all the accused surrounded the deceased, threw him down and beat him with stones indiscriminately. P. W. 1 cried for help from the well of Kanakamma. On hearing his cries, P. Ws. 3, 4 and some others came to P. W. 1. P. W. 1 told P. Ws. 3 and 4 that A-1 and his sons and A-7 beat him (P. W. 1) and P. W. 2 and they were beating the deceased at the Kallam. P. W. 1 asked Bikshapathi who came to him along with P. Ws. 3 and 4 to inform his mother, P.

W. 5 about the incident and bring her. P. Ws. 1, 2, 3, 4, and others went to Kallam where the deceased was beaten. On seeing them, all the accused ran away towards Perikedu village. P. Ws. 3 and 4 saw all the accused going away leaving the deceased. The deceased was lying with bleeding injuries all over his body. The deceased told them that the accused beat him and they were running away. Then P. Ws. 1 to 4 lifted the deceased in their hands and carried him to a nearby tree. In the meanwhile, P. W. 5 and her daughter came to the deceased. P. W. 5 asked the deceased as to who beat him. The deceased informed her that Gopaiah and his sons and A-7 beat him. P. Ws. 3 and 4 were carrying the deceased keeping him in a cloth cradle to the house of the deceased. But on the way the deceased died. Then they removed the dead body to the house of the deceased. P. Ws. 1 and 2 boarded the bus at about 12 noon or 1 P. M. and went to Vardhannapet Police station for giving a report. They reached the Police station at 2 P. M., and they informed two constables who were present in the police station about the incident. Then the constables informed P. Ws. 1 and 2 that they are illiterates and they could not write report. They also told him that the Sub-Inspector went to a nearby village and they would go and inform the Sub-Inspector. At 4 p.m. the Sub-Inspector came to the Police Station along with the one Purushothama Rao. P. W. 1 got a report Ex. P. 1 written by Purushothama Rao who belonged to the village of the deceased and it was read over to P. W. 1 and P. W. 1 admitted the contents as correct. Then he affixed his thumb impression on Ex. P. 1 and it was presented to the Sub-Inspector. On the basis of Ex. P-1 the Sub-Inspector, P. W. 11 registered a case as Crime No. 28/1976. He issued express F. I. Rs. to all the concerned. P. W. 11 sent P. Ws. 1 and 2 with requisitions, Exs. P. 6 and P. 8 to M. G. M. Hospital, Warangal for treatment. At about 6 P. M. P. W. 11 started from the Police Station to the scene of offence with some constables. He reached the scene of offence at 10-30 P. M. P. W. 12, the Inspector of Police, who was holding additional charge of Warrangal Rural Circle within the jurisdiction of which Vardhannapet Police Station lies, proceeded in a bus to Vardhannapet and reached the village at 8 P. M., on the same day (22-4-1976). On 23-4-1976 he reached Kondapur village at 7-A. M. By then P. W. 11 (Sub-Inspector) was present there. Then P. W. 12 took over investigation from him. He held inquest over the dead body of the deceased in the presence of Panchayatdars P. W. 7 and others from 7 A. M. to 10-30 A. M. During the inquest he examined P. Ws. 2, 3, 4 and 5 and some others. After the inquest, he sent the dead body to P. W. 8, the Assistant Professor of Forensic Medicine in Kakatiya Medical College, Warangal for post-mortem examination. P. W. 8 conducted autopsy over the dead body of the deceased from 2-30 P. M. to 4 P. M., on 23-4-1976, and found eight external injuries on the person of the deceased. On dissection, he found four internal injuries, out of which injury No. 1 is a fracture of 3rd, 4th, 5th and 6th ribs posterior on right side with contusion of the surrounding tissues and also fracture of 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th and 12th ribs at posterior angles on right side with contusion of the surrounding tissues and also fracture of 10th rib at the posterior angle on the left side with contusion of the surrounding tissues. He was of the opinion that the cause of

death was due to shock as a result of multiple injuries and both the internal as well as the external injuries might have been caused by blunt weapons like stones. He issued the postmortem certificate, Ex. P. 5. P. W. 9. the Civil Assistant Surgeon, in M. G. M. Hospital, Warangal examined P. W. 1 and found two injuries and issued the wound certificate Ex. P. 7. He also examined P. W. 2 and found one injury on his person and issued the wound certificate, Ex. P-9.

5. P. W. 12 also examined P. W. 6 and some others. On 24-4-1976 he deputed P. W. 11 for the apprehension of the accused. On 29-4-1976 at 7 P. M., he arrested the accused and produced them before P. W. 12. P. W. 12 noticed an injury on one of the knees of A-2 and hence he sent him to M. G. M. Hospital with a requisition Ex. P-10. P. W. 10 on receipt of Ex. P. 10, requisition, examined A-2 and found one injury on his person and issued a wound certificate, Ex, P. 11, P. W. 12 remanded them to judicial custody on 30-4-19-76. After completion of the investigation charge-sheet was filed by the Inspector of Police who succeeded P.W. 12.

6. The prosecution examined 12 witnesses in all, out of whom P. Ws. 1 and 2 are the eye witnesses to the incident and P, Ws. 3 to 5 are the witnesses that deposed about the dying declaration of the deceased made to them.

7. The plea of the accused is one of denial. The accused examined no defence witnesses.

8. The learned Sessions Judge took into consideration the evidence of P. Ws. 1 to 4 and also the dying declarations of the deceased made to P. Ws, 3, 4 and 5 and the medical evidence which corroborated the evidence of P. Ws. 1 and 2 with regard to the injuries on the person of the deceased and also weapons with which the injuries were caused and held that the prosecution proved its case that A-1 to A-7 beat the deceased with stones causing the injuries, as described by P. W. 8, resulting in the death of the deceased and that A-4 and A-5 beat P. W. 1 and A-6 and A-7 beat P. W. 2 and hence A-1 to A-7 are liable for offences punishable u/s 148 IPC and Section 302 read with Section 34 IPC and that A-4 and A-5 are liable for an offence punishable u/s 324 IPC for causing injuries to P. W. 2 and sentenced the accused as stated above.

9. Sri Padmanabha Reddy, the learned counsel for the appellants, contends that the case of the prosecution cannot be believed in view of the delay in giving Ex. P-1 and also in view of the fact that Ex. P-1 does not mention the assailants of P. Ws. 1 and 2 and the overt acts attributed to A-2 and A-3 in Ex.-P. 1 were given go-bye in the evidence of the witnesses and also in view of the fact that P.Ws. 1 and 2 could not have witnessed the occurrence when their evidence discloses that they ran away after they were beaten and the evidence of P. Ws. 3 and 4 that they came see the accused running away .on seeing them cannot also be believed and also that the dying declarations are of doubtful nature when the versions given by P. Ws, 3 and 4 are at variance with each other.

10. As stated above P. Ws. 1 and 2 are the injured eye-witnesses. According to

their evidence P. W. 1 was beaten by A-4 and A-5 and P. W. 2 was beaten by A-6 and A-7. As to why and the manner in which the incident took place, P. Ws. 1 and 2 narrated the facts that led to the incident in which they were beaten. They also narrated as to how the deceased was beaten by A-1 to A-7. Their evidence is corroborated by the medical evidence. P. W. 8 conducted post-mortem over the dead body of the deceased and was of the opinion that the injuries both external and internal found on the person of the deceased could have been caused by stones, P. W. 9 who examined P. Ws. 1 and 2 was also of the opinion that the injuries on the persons of P. Ws. 1 and 2 could be caused with stones.

11. A-2 also received injuries as could be seen from the evidence of P. W. 10. As to how A-2 received injuries, P. Ws. 1 and 2, explained. According to them, A-2 beat P. W. 1 with hands and P. W. 1 retaliated by beating A-2 with the stick portion of the spade, on the knees and then A-2 cried for the assistance of the other accused and A-4 and A-5 then beat P. W. 1. This version of P. W. 1 is fully corroborated by the medical evidence both with regard to the injuries caused on himself & as well as on A-2.

12. It is true that Ex. P-I was received in the Police Station by 5 P. M., and hence there is a delay of eight hours in giving the report after the incident. But the delay is explained by P. W. 1 satisfactorily. After the incident, the deceased was being taken to the house of the deceased and on the way the deceased died and after removing the dead body of the deceased to the house at the deceased, they proceeded to the Police Station and for that purpose they boarded the bus at 12 noon and reached the Police Station at 2. P. M. and at the Police Station the Sub-Inspector was not available as he had been to Kondur village and then they informed two constables who were in the Police station about the incident and the two constables were illiterates and hence they could not reduce to writing the report given by P. W. 1 and a constable, therefore told P. Ws. 1 and 2 that he would go and inform the Sub-Inspector and accordingly the constable went to Kodur and informed the Sub-Inspector, P. W. 11 at 3.30 P. M. and P. W. 11 came back to the Police Station at 5 P. M. on the motorcycle of one Purushothama Rao and Purshothama Rao in fact drove the motorcycle to the Police Station and after arriving at the Police Station, Purshothama Rao drafted Ex. P-I on the information furnished by P. W. 1 and on the basis of Ex. P-I, P. W. 1 registered a case and issued express F. I. Rs. Thus there are no laches on the part of P. Ws. 1 and 2 as they started as early as possible to give report to the Police after the incident and the delay was caused due to the presence of illiterate constables at the Police Station and also due to the non-availability of the Sub-Inspector, P. W. II at the Police Station. The delay is, therefore, properly explained. Hence the comments made by the learned counsel for the appellants, in this regard, are devoid of merit.

13. Ex. P-I of course, does not mention as to who are the assailants of P. Ws. 1 and 2, though it mentions that both of them received injuries. Since Ex. P-I mentions that P. Ws. 1 and 2 received injuries, the non-mention of their

assailants in Ex. P. 1 does not throw any suspicion, on their evidence. It is not a case in which large number of accused and prosecution party participated. It is a simple incident that too started with attack on P. W. 1 and after him, P. W. 2 and after him, the deceased. The scribe of Ex. P. 1 might have felt it necessary to mention the details about the attack on the deceased, since he died. But at the same time, the evidence of P. Ws. 1 and 2 in the Court as against their assailants should be subjected to strict scrutiny.

14. Sri Padmanabha Reddy contends that as P. Ws. 1 and 2 ran to some distance after they were beaten, they could not have witnessed the assault on the deceased. We do not think that there is substance in his contention. The accused chased P. Ws. 1 and 2 to some distance after beating them and then they went to the deceased and attacked him. When the accused left P. Ws. 1 and 2 after chasing them to some distance P. Ws. 1 and 2 could certainly have a halt and then could see from that place as to what the accused were doing. In such a case, there cannot be any difficulty for them to witness the deceased being beaten.

15. With regard to the dying declarations, the comment is that that Ex. P. 1 does not mention about P. Ws. 3, 4 and 5 questioning the deceased and the deceased making a statement as to who caused the injuries on him. As stated above, the scribe appeared to have noted the details as to the attack on the deceased as furnished by P. W. 1. P. W. 1 admitted that he could not get all the facts which they deposed in the court written in Ex. P. 1. P. W. 1 is an illiterate villager. He did not offer a false explanation on these omissions. The evidence of P. Ws. 3, 4 and 5 in so far as dying declarations are concerned cannot be viewed with any suspicion. Further, the evidence of P. W. 8 who conducted post-mortem examination clearly shows that the deceased could be in a position to make such statement, as P. Ws, 3, 4 and 5 immediately went to the deceased and asked him as to who beat him.

16. Now we would like to examine the evidence of P. Ws. 1 and 2 with reference to medical evidence. There are two injuries on the person of P. W. 1-P. W. 9 who examined the injuries on the person of P. W. 1 deposed that they could be caused with stones. Hence P. W. 1's version that he was beaten by A-4 and A-5 is corroborated by the medical evidence.

17. On the person of P. W. 2, there is only one injury. P. Ws. 1 and 2 deposed that P. W. 2 was beaten by A-6 and A-7, If A-6 and A-7 had beaten P. W. 2 there could have been at least two injuries on his person. The presence of only one injury gives rise to the conclusion that he was beaten by only one person in between A-6 and A-7. A-7 is aged 16 years. He cannot, therefore, be held to have caused the injury present on the person of P. W. 2.

18. Even with regard to the injuries caused to the deceased. A-7 could not have participated in the beating of the deceased as could be seen from P. W. 3's evidence, P. W. 3 deposed that when he asked the deceased as to what had

happened, the deceased stated that A-1 and his sons beat him with stones. It is, therefore, clear that the deceased did not mention about A-7. But P. Ws. 4 and 5 deposed that the deceased told that he was beaten by A-1 and his sons and grandson. The grandson is no other than A-7. When P. W. 3 did not mention about A-7, the evidence of P. Ws. 4 and 5 against A-7 cannot be given weight. Thus we hold that A-7 did not participate in beating P. W. 2 or the deceased. It is in this view that we find ourselves unable to agree with the learned Sessions Judge with regard to his finding that A-7 also participated in the attack on the deceased and also in the attack on P. W. 2.

19. But we have no hesitation to hold that there is ample and satisfactory evidence that A-1 to A-6 beat the deceased with stones causing the injuries which resulted in his death and that A-4 and A-6 beat P. W. 1 and A-6 beat P. W. 2.

20. The learned Sessions Judge is, therefore, justified in convicting A-4 and A-5 u/s 324 IPC and sentencing each to three months rigorous imprisonment. He is also justified in convicting A-6 u/s 324 I. P, C. and sentencing him to three months rigorous imprisonment.

21. The learned Sessions Judge declined to convict A-1 to A-6 u/s 302 read with Section 149 IPC though a charge to that effect was framed, but convicted them u/s 302 read with Section 34 IPC and sentenced to imprisonment for life.

22. The question is whether the learned Sessions Judge has committed any illegality in convicting the accused u/s 302 read with Section 34 IPC without framing a charge u/s 302 read with Section 34 IPC even though he framed charge u/s 302 read with Section 149 IPC but did not convict the accused thereunder.

23. It admits of no doubt that there is substantial difference between the common object and common intention. But both the sections to some extent overlap, as they deal with combination of persons who become punishable as sharers in an offence. If the evidence discloses the commission of the offence in prosecution of the common object and also in furtherance of common intention of all the accused, then charge u/s 149 I.P.C. is no impediment to a conviction by the application of Section 34 IPC

24. The Supreme Court in *Karnail Singh v. State of Punjab* AIR 1954 SC 204 : 1954 Cri Lj 580 considered the question and held that though there is substantial difference between Section 34 and Section 149, the sections also to some extent overlap and it is a question to be determined on the facts of each case whether the charge u/s 149 overlaps the ground covered by Section 34. If the common object which is the subject matter of the charge u/s 149 does not necessarily involve a common intention then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge u/s 149 would be the same if the charge were u/s 34, then the failure to charge the accused u/s 34 could not result in any prejudice and in such cases

the substitution of Section 34 for Section 149 must be held to be a formal matter. The Privy Council in *Barendra Kumar v. Emperor* also took the same view.

25. In the case on hand, the evidence is to the effect that A-1 to A-6 conjointly attacked the deceased and caused injuries with stones. Thus it is clear that all the accused attacked the deceased in prosecution of the common object of beating him or in furtherance of their common intention to beat him. Hence the evidence covering the ground u/s 149 overlaps the ground covered by Section 34. As the facts to be proved and the evidence to be adduced with reference to both the charges Under Sections 149 and 34 is the same, then the failure to frame a separate charge against the accused u/s 34 does not result in any prejudice, in such a case, the substitution of Section 34 for Section 149 should be held to be a formal matter. The learned Sessions Judge, therefore, has not committed any error or illegality in substituting Section 34 for Section 149 IPC

26. Sri Padmanabha Reddy, the learned counsel for the appellants, contends that the accused in the case on hand ought to have been convicted u/s 304 Part II I.P.C. read with Section 34 I.P.C. but not u/s 302 read with Section 34 I.P.C.

27. We find force in the contention of Sri Padmanabha Reddy. The incident is the result of a sudden quarrel. A-1 to A-6 beat the deceased with stones which were lying there. It cannot therefore, be said that they attacked the deceased with the intention to cause death nor did they intend to cause such bodily injuries as they knew them to be likely to cause death or to cause bodily injuries which are sufficient to cause death in the ordinary course of nature. But as the accused beat the deceased with stones on the ribs, they could be presumed to have known that the injuries caused by them are likely to cause death of the deceased though each of them while beating the deceased with stones did not know that they are causing fractures of the ribs. Hence the offence committed by the accused does not come u/s 302 read with Section 34 IPC but it comes within the mischief of Section 304 Part II read with Section 34 I.P.C.

28. But the question is whether Section 34 I. P. C, which deals with the common intention applies to an offence u/s 304 Part II IPC which deals with the commission of the offence with the knowledge that the injuries are likely to cause death.

29. It is true that Section 34 deals with the common criminal acts by group of persons in furtherance of common intention, while Section 304 Part II relates to the knowledge that the injuries are likely to cause death. Thus there is essential difference between the common intention postulated by Section 34 and the knowledge of the likelihood of death referred to by Section 304 Part II. The common intention contemplated by S, 34 relates to the criminal act and it is thus mainly concerned with the common intention with regard to the criminal act i.e., the act of beating. Hence the common intention referred to u/s 34 is not similar to the intention which Section 299 mentions in its first part. If the result of the beating is the death of the victim and if the beating was done by group of

persons in furtherance of the common intention and if each of the assailants possesses the knowledge that their beating is likely to cause death, the offence would come u/s 304 Part II read with Section 34 I.P.C

30. We are fortified with the decisions of the Supreme Court in *Afrahim Sheikh and Others Vs. State of West Bengal*, The Supreme Court held that the common intention which is required by S, 34 is not the intention which Section 299 mentions in its first part. That intention is individual to the offender unless it is shared with others by a prior concert in which case Sections 34 and 35 again come into play. Their Lordships posed the question whether the second (part of Section 304 can be made applicable to Section 34. Their Lordships answered that second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death was the likely result of the beating that the requirements of Section 304 Part II are not satisfied in the case of each of them? If it could be said that knowledge of this type was possible in the case of each one of the appellants, there is no reason why Section 304 Part II cannot be read with Section 34. The common intention is with regard to the criminal act i.e., the act of beating, if the result of the beating is the death of the victim, and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, i.e. beating, there is no reason why Section 34 or Section 35 should not be read with the second part of S, 304 to make each liable individually.

31. That being the legal position, A-1 to A-6 can be convicted for offence punishable u/s 304 Part II read with Section 34 I.P.C. We have given finding that A-7 is not guilty of any offence either in respect of the deceased or in respect of P.W. 2. We, therefore, set aside the convictions and sentence passed against A-7 and acquit him accordingly. He is set at liberty forthwith if he is not required in any other case. His appeal Cri. A. No. 1122 of 1976 is allowed.

32. We also set aside the convictions and sentences passed by the learned Sessions Judge against A-1 to A-6 u/s 302 read with Section 34 I.P.C., but convict them u/s 304 Part II read with Section 34 I.P.C. and sentence them to suffer rigorous imprisonment for five years each. The convictions and sentences of A-4, A-5 and A-6 u/s 324 I.P.C. are confirmed. The sentences of these three accused shall run concurrently.

33. In the result, Cri. A. Nos. 1116 to 1121 of 1976 preferred by A-1 to A-6 are partly allowed.