

(1983) 03 AP CK 0011

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 1062 of 1980

Byyapagu Subba Rao

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 18-03-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 392
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (1983) CriLJ 1948

Hon'ble Judges : P. Ramachandra Raju, J

Bench : Single Bench

Advocate : T. Bali Reddy, for the Appellant; Addl. Public Prosecutor, for the Respondent

Judgement

Ramachandra Raju, J.—The appellant Byrapogy Subba Rao aged 20 years, a resident of Nellore town, is a Painter by profession. He was tried by the Sessions Judge, Nellore, in Sessions Case No. 23/80 for an offence under S. 302 IPC for causing the death of one Dontala Sivaiah, a college student at 9.30 p.m. on January 11, 1980 in front of the shop of one Palicherla Madhusudan Reddy (P.W. 1) at Tadikala Bazaar centre, Nawabpet, Nellore. The Sessions Judge convicted him under S. 302 IPC and sentenced him to suffer imprisonment for life. The appeal came up for hearing before a Division Bench of this court consisting of Madhava Rao, and Ramaswamy JJ. They were divided in their opinion. Madhava Rao, J. held that the offence under S. 304 Part II IPC only was made out against the appellant. While, therefore, acquitting the appellant under S. 304 Part II IPC and sentenced him to suffer rigorous imprisonment for seven years. Ramaswamy, J. on the other hand held that the appellant was properly convicted under S. 302 IPC and sentenced to suffer imprisonment for life. He accordingly dismissed the appeal. The appeal is, therefore, referred to a third Judge under S. 392 Cri.P.C. for his opinion. That is how the appeal has come up before me.

2. A picture "Yedantastula Meda" was released in Nellore town for exhibition on

11-1-1980. It was being exhibited in Sundar Deluxe theatre at Nellore. The prosecution case as set out in the charge-sheet reads as follows. The deceased Dontala Sivaiah and Byrapogu Bhaskara Rao (P.W. 4) each purchased a ticket in advance for the matinee show. While they were on their way to the theatre and came near a school, the accused met the deceased and demanded him to give his ticket to the accused. The deceased refused to part with his ticket in favour of the accused. The accused then tried to snatch away the ticket from the deceased forcibly. Both the accused and the deceased quarrelled with each other during that scuffle, the ticket in the possession of the deceased was torn. P.W. 4 interfered and separated the accused and the deceased and asked them to go away. The accused while going, threatened the deceased with dire consequence. P.W. 4, however, attended the matinee show but the deceased could not attend the matinee show and left the place. At about 9.30 p.m. on the same day the deceased on his way to the theatre went near the shop of P.W. 1 where P.W. 1 was sitting and talking with P.W. 2 the accused then came there and found fault with deceased for quarrelling with him earlier, took out a knife from his waist and stabbed the deceased on the left side of his chest. P.W. 3 who was also present at that time, witnessed the incident. On hearing the alarm, P.W. 5, another neighbour rushed to the spot and found Sivaiah lying down with the injury and the accused running away carrying a knife. P.W. 3 engaged a rickshaw and carried the injured Sivaiah to the Government Head Quarters Hospital, but Sivaiah died by the time the rickshaw could reach the hospital. P.W. 4 on hearing about the incident, immediately went to the shop of P.W. 1 and when he was informed that the accused stabbed Sivaiah, he proceeded on a cycle towards the hospital and came across the rickshaw in which Sivaiah was being carried and was informed that Sivaiah died. P.W. 4 returned back to the shop of P.W. 1 and informed him that Sivaiah expired. P.W. 1 then proceeded to II Town Police Station and lodged the report Ex. P. 1 with the Sub-Inspector of Police, P.W. 11. P.W. 11 and the Inspector of Police P.W. 12 investigated into the case. The accused was found near the Pennar River Bridge on the same night and he was taken into custody. When he was questioned, he made a statement leading to the recovery of the knife M.O. 1 which was found to be bloodstained.

3. I have been taken through the material evidence. P.W. 4 has given evidence regarding the quarrel which took place on that day between the accused and the deceased at about 2 p.m. and that the accused while leaving the place, said :

"You are trying to play with me. I know how to deal with you."

P.W. 4 is not, however, an eye-witness for the incident which took place in front of the shop of P.W. 1 at about 9 or 9.30 p.m. the eye-witness account regarding the attack made by the accused against Sivaiah is given by P.Ws. 1 to 3 and 5. The evidence of P.Ws. 1 and 2 is consistent that when the deceased Sivaiah came to the shop of P.W. 1, P.W. 1 enquired him why he had come there. Sivaiah told him that he was going to the theatre to see the picture and he was waiting for one of his friends. According to the consistent evidence given by P.Ws. 1 to 3 and

5, within a short time thereafter the accused came there and questioned Sivaiah as to whether he would pick up a quarrel with him and live and so saying, he whipped out a knife from his waist and gave a single stab on the left side of the chest. Sivaiah suffered a bleeding injury and slumped down. The medical evidence has disclosed that there was a transverse penetrating wound on the left chest entering the thoracic cavity and arterial blood was coming out from the wound. The internal examination revealed that the left ventricle and the right ventricle were both punctured and that the said wound is sufficient in the ordinary course of nature to cause death.

4. Mr. Bali Reddy has submitted that P.Ws. 3 and 5 could not have witnessed the attack and no reliance should be placed on the evidence of P. Ws. 3 and 5. He has also submitted that the presence of P.W. 2 is doubtful and no reliance should, therefore, be placed on the evidence of P.W. 2. His further submission is that through P.W. 1 would have been present at his shop, he has not given a truthful account of the incident and it is, therefore, unsafe to rely on the evidence of P.W. 1.

5. I have been taken through the evidence of P.Ws. 1 to 3 and 5. The presence of P.W. 3 as an eye-witness is extremely doubtful. In narrating the incident. P.W. 1 stated that P.W. 3 arrived at the scene after the accused stabbed Sivaiah and ran away. P.W. 3 no doubt carried the injured Sivaiah in a rickshaw. P.W. 3 also in giving a narration about the incident, referred to the arrival of P.W. 3 after Sivaiah was stabbed and the accused ran away from the scene, carrying the knife with him. P.W. 3 runs a shop in electrical goods at a place close to Takilala Bazaar centre. According to him, after closing his shop he came to the tea stall of one Rangaiah which is situated at a distance of few yards west of the shop of P.W. 1 and when he was at the tea stall, he noticed P.Ws. 1 and 2 talking to Sivaiah and that the accused then came there, questioned Sivaiah about something and immediately whipped out a knife and stabbed Sivaiah on his left chest. P.W. 3 was involved with the accused in some earlier incidents. A case against the accused and another is pending for accusing some axe injury to P.W. 3. P.W. 3 and one Sudhakar were also tried on a charge u/s 307 I.P.C. Having regard to the hostility that is existing between P.W. 3 and the accused, it is not safe to place any reliance on the eye-witness account given by P.W. 3. P.W. 5 runs a tea bunk near Tadikala Bazaar centre towards west of the shop of P.W. 1. Her husband is friendly with P.W. 3 who is known to their family since 8 years. In the charge-sheet it was alleged that on hearing the alarm, P.W. 5 rushed to the shop and found the deceased lying down with injury. P.W. 5 has, however, given evidence as if when witnessed the attack made by the accused against Sivaiah. Having regard to this discrepancy. I do not feel satisfied that P.W. 5 really witnessed the attack. She would have come there after the incident was over and would have known that the accused stabbed Sivaiah and ran away. I do not, therefore, feel impressed that P. Ws. 3 and 5 were really present at the time the incident took place. They would have arrived there a short time thereafter when there was a commotion in the locality about the incident.

6. P.W. 2 is a resident of Nawabpet locality of Nellore. According to his evidence, he was present at the shop of P.W. 1 on that night and the incident in question took place while he was talking with P.W. 1. The presence of P.W. 2 at the shop of P.W. 1 is referred to not only by P.W. 1 but also by P.Ws. 3, 4 and 5. The presence of P.W. 2 was also referred to in Ex. P-1 report given by P.W. 1 at 10.30 p.m. on the same day. P.W. 2 was examined at the inquest held over the body of Sivaiah on the morning of 12-1-1980. Though a suggestion is made that P.W. 2 had earlier quarrelled with the accused, the said suggestion is denied. I have, therefore, no hesitation in holding that P.W. 2 was present at the time the incident took place. The incident took place in front of the shop of P. W. 1. According to him, he was at that hour talking to P.W. 2. I have carefully considered the evidence of P.W. 1 and I have no hesitation in holding that P.W. 1 also saw the accused stab Sivaiah. It was P.W. 1 that gave the report Ex. P. 1 and in that report, he has clearly stated that it was in his presence that the incident took place. I have, therefore, no hesitation in holding that as a result of the single stab injury inflicted by the appellant on the chest of Sivaiah, Sivaiah died.

7. The more important question is to determine the exact offence which the appellant had committed. One can easily discern the over-anxiety of the prosecution in trying to exclude certain circumstances which are favourable to the accused. I have referred earlier to the averments made in the charge-sheet regarding the details of the incident which took place at 2 P. W. During that incident, the ticket earlier purchased by Sivaiah for witnessing the matinee show was torn. Even according to P.W. 4, the appellant remarked :-

"You are trying to play with me. I know how to deal with you."

P.W. 4 who is expected to speak to the details of the incident that took place at 2 p.m. on that day had scrupulously avoided speaking to the scuffle during which the ticket earlier purchased by Sivaiah was was torn. As a result of that incident, it was the deceased Sivaiah that would have felt more aggrieved because the ticket he had earlier purchased was torn in the scuffle he had with the accused on that afternoon. Sivaiah however, wanted to see the picture by attending the second show. It was for that purpose, he went towards the shop of P.W. 1 and was waiting there expecting a friend of his to come there. While Sivaiah was talking to P. Ws. 1 and 2, the accused arrived there. According to the evidence of P.Ws. 1 and 2, immediately after the accused arrived there, the accused remarked to Sivaiah whether he would dare pick up a quarrel with him and live and then whipped out a knife and stabbed Sivaiah. It is clear that the court should make some introspection before reaching any conclusion regarding the nature of the offence committed by the accused. The greater probability is that Sivaiah would have indulged in some abusive language against the accused for having earlier quarrelled with him and deprive him of the cinema ticket he had earlier secured for the matinee show. The incident which took place in the afternoon is not of such a nature as to have prompted the accused to take the first opportunity to stab Sivaiah when he came across him. When Sivaiah and the

accused came across each other near the shop of P.W. 1, there would have ensued a sudden quarrel between the two and it was in the course of such a sudden quarrel that the accused would have whipped out the knife available with him and stabbed Sivaiah. The fact that the accused was armed with a knife at that time cannot be taken as a circumstance to indicate that the accused armed himself with a pre-determination to stab Sivaiah the moment he came across him. There is clear indication in the evidence of P.W. 3 that the accused was involved in some incident with P.W. 3. In the charge-sheet itself it was stated that the accused was concerned in at least three cases. The accused, in the circumstances, would appear to be moving carrying some weapon with a view to at least protect himself if he were to be attacked by people who have a legitimate grievance to take some relative steps against him. The availability of a knife with the appellant cannot therefore be taken as a circumstance against him to imply therefrom that at the hour in question he went out in search of Sivaiah with a view to stab him. It is more by way of accident that the accused found Sivaiah near the shop of P.W. 1. As I have indicated earlier, the greater probability is that the accused and Sivaiah would have suddenly quarrelled amongst themselves for the incident that had taken place earlier on that afternoon and it was during the course of such sudden quarrel, the accused would have stabbed Sivaiah. The small incident which took place earlier does not afford sufficient motive for the accused to have intended to kill Sivaiah or intended to inflict an injury sufficient in the ordinary course of nature to cause death. True the stab given by the accused fell on the chest region of Sivaiah and had entered the heart. On these facts, the offence made out by the prosecution against the accused falls more appropriately u/s 304 Part-II, I.P.C.

8. In some analogous cases, Courts have taken the view that the offence on the facts found by me falls u/s 304 Part-II I.P.C. In *Kulwant Rai Vs. State of Punjab*, one blow was given with a dagger in the epigastrium area of the deceased by the accused who was aged 20 years. The offence was committed without any pre-meditation, following a short quarrel which preceded the assault. There was no prior enmity. The Supreme Court held :-

"It was something like hit and run. In such a case, part 3 of Section 300 would not be attracted because it cannot be said that the accused intended to inflict that particular injury which was ultimately found to have been inflicted. In the circumstances herein discussed, it would appear that the accused inflicted an injury which he knew to be likely to cause death and the case would accordingly fall u/s 304 Part II Penal Code."

In *Shankar alias Kallu Vs. State of Madhya Pradesh*, , the Supreme Court was dealing with a case where the occurrence took place without any pre-meditation. While the deceased along with the accused and others had just finished their meals, the accused gave a stab with a dagger on the neck of the deceased. The Supreme Court felt that the those circumstances, the offence u/s 304 Part-II I.P.C. was made out. In *Kunchapu Krikala Chinna Rosanna v. State of A.P.* CrI. A.

617/81 29-7-82 the accused who wanted to take back his wife, requested her to come and join him and when she refused, he gave a single blow in the stomach portion of his wife resulting in her death. A Division Bench of this Court held that there was no intention to cause death and no intention to cause such bodily injury as is likely to cause death and that the offence fell only u/s 304 Part II I.P.C.

9. The learned Public Prosecutor relied upon *Virsa Singh Vs. The State of Punjab*, to submit that the offence falls u/s 302 if once the prosecution established that the accused caused an injury and the said injury was sufficient in the ordinary course of nature to cause death, The other facts which become material to know the circumstances in which the injury was inflicted do not appear in that decision. The Supreme Court in that case no doubt set out the law, but each case has to be decided on the facts which preceded their attack made against the deceased. This decision cannot therefore be used in all cases for holding the accused guilty u/s 302, I.P.C. if once the prosecution established that the accused inflicted the injury and it is sufficient in the ordinary course of nature to cause death. *Gudar Dushadh Vs. State of Bihar*, is a case where there was a premeditated and not an accidental attack and the Supreme Court therefore held that the offence fell u/s 302 *Narayanan Satheesan alias Baboo Vs. State of Kerala*, was again a case of pre-meditated attack and cannot be pressed into service by the learned public prosecutor. *Morcha Vs. State of Rajasthan*, dealt with a case of attack which was pre-planned and cannot, therefore, justify the submission made by the Public Prosecutor that the offence falls u/s 302 I.P.C.

10. I have, therefore, no hesitation in altering the conviction of the appellant from Section 302 I.P.C. to one u/s 304 Part II I.P.C. The interests of justice will be satisfied if the appellant is sentenced to suffer rigorous imprisonment for seven years. He is accordingly sentenced to suffer rigorous imprisonment for seven years.

11. The records with my judgment are directed to be placed before the Division Bench consisting of Madhava Rao and Ramaswamy, JJ. for their judgment u/s 392, Cr.P.C.

Madhava Rao, J. and Ramaswamy, J.

12. Papers are placed before this Bench in view of the Judgment delivered by Ramachandra Raju, J., u/s 392, Criminal Procedure Code. In view of the opinion expressed by the learned Judge the conviction of the appellant u/s 302 IPC is to be altered to one u/s 304 Part-II of the I.P.C. and he is to be sentenced to suffer rigorous imprisonment for seven years.

13. In the result, the appeal is partly allowed and the conviction of the appellant u/s 302 I.P.C. is altered to one u/s 304 Part II of the I.P.C. and he is sentenced to suffer rigorous imprisonment for seven years.

14. Appeal partly allowed.