CASE NO.:
Appeal (crl.) 260 of 1996

PETITIONER:
Cherlopalli Cheliminabi Saheb & Anr.

RESPONDENT:
State of A.P.

DATE OF JUDGMENT: 31/01/2003

BENCH:
N.Santosh Hegde & B.P.Singh.

JUDGMENT:

J U D G M E N T

SANTOSH HEGDE,J.

The appellants were accused Nos.1 and 3 before the II Additional Sessions Judge, Chittoor at Madanapalle in S.C.No.53/92. They were charged for an offence punishable under Section 302 read with Section 34 IPC before the Additional Sessions Judge who found them guilty and convicted them for an offence punishable under Section 304 Part II and sentenced both the accused to undergo R.I. for a period of 4 years. The said conviction and sentence has been upheld in appeal by a Single Judge of the High Court of Judicature, A.P. at Hyderabad in Criminal Appeal No.1272/92.

Briefly stated the prosecution case is that on 25.5.1991 at about 8 p.m. there was an altercation between the wife of the Ist appellant herein and the wife of the deceased in regard to taking water from the tap. This altercation turned out to a fight in which members of both the families joined and it is stated that in the said fight the accused persons stabbed the deceased Mahaboob Saheb on the abdomen and chest. The deceased was then taken to Government hospital at Madanapalle where PW-9, Civil Assistant Surgeon, examined the deceased and sent the intimation of the crime Ex.P-3 to II Town Police Station Madanapalle. He also issued the certificate to Ex.P-2 and thereafter the said doctor referred the deceased to hospital at Tirupati for expert treatment. When the deceased was still in the hospital at Madanapalle, PW-10, Head Constable of II Town Police Station, Madanapalle who received Ex.P-3 from the doctor went to the hospital and recorded a statement of the deceased which is marked as Ex.P-4. Since the incident in question had taken place in the jurisdiction of another Police Station, P-10 informed Mudivedu Police Station of the incident and sent Ex.P-3 and Ex.P-4 to the SHO of the said station on the same night. PW-11 who is the Sub-Inspector of Mudivedu Police Station on receipt of the information from PW-10 registered a case against the accused under Section 324 IPC. It is stated that as per the advise of doctor, PW-9, the deceased was shifted to Tirupati hospital where another statement of the deceased was recorded by PW-11 which is marked as Ex.P-13. It is the prosecution case that the deceased died in the said hospital on 27th May, 1991 at about 4.35 a.m. After receiving the said death information, PW-11 changed the offences into 302 IPC and issued a fresh FIR Ex.P-14. All the four accused persons were sent for trial before the II Addl. Sessions Judge, Chittoor who transferred the case in regard to accused Nos.2 and 4 to Juvenile Court under the Juvenile Justice Act, 1986, and as stated above, only these two appellants were tried by the Sessions Court.

The prosecution before the trial court examined 12 witnesses out of whom PW-1 was the wife of the deceased, PW-2 was the

son of the deceased, PWs. 3 to 6 were neighbours who allegedly witnessed the incident while PWs. 7 and 8 were panch witnesses for the recovery of the weapon. But these witnesses including the wife and the son of the deceased did not support the prosecution. In the absence of any other direct evidence, the prosecution had to rely on the two dying declarations Ex.P-4 and Ex.P-13 and the evidence of the doctor, PW-9, who attested the dying declaration Ex.P-4 as also the evidence of other police witnesses. The trial court rejected the second dying declaration Ex.P-13 on the ground that the same was dated subsequent to the death of the deceased, therefore, it was not safe to rely upon the same. It, however, accepted the first dying declaration Ex.P-4 and after coming to the conclusion that it is safe to rely on the said dying declaration based a conviction solely on Ex.P-4 as spoken to by PW-9, the doctor, and PW-11, the S.I., and convicted the appellants, as stated above. The High Court also took a similar view and confirmed that sentence.

In this appeal before us, Mrs.Amareswari learned senior counsel appearing for the appellants contended that Ex.P-4 is not a document on which any court can safely place reliance. She submitted that it is the evidence of the doctor that the deceased at that point of time was not in a serious condition and there was no immediate apprehension of his death and if really PW-11 wanted to record the dying declaration in the hospital at that point of time, then he could have very well called the Magistrate who was residing hardly half a kilometer from the hospital which was not done, therefore, it is highly doubtful whether really the statement of this nature was ever recorded by PW-11 during the life time of the deceased. She also contended that even though admittedly deceased was capable of signing still PW-11 took only his thumb impression that too not using an ink pad but by using the grease of the motor cycle, which also creates a doubt as to the genuineness of Ex.P-4. She pointed out from the evidence on record that PW-9, the doctor, could not have witnessed the statement said to have been made by the deceased because he has admitted in his evidence that at that time he was attending to other patients also. Therefore, she contends that in the absence of there being any other corroborating evidence, it is not safe to rely on Ex.P-4. She also contended that according to prosecution itself, both the appellants herein had suffered injuries which the doctor had opined could have been caused by the use of a stick which indicates that there was a fight and in the absence of the prosecution explaining how these injuries were caused to the appellants, the prosecution case as to the incident in question could not be believed.

Mrs.Anamika, learned counsel appearing for the respondent-State contended that there is no reason to doubt the evidence of PW-11, the investigating officer, because no suggestion of any sort has been made to this witness as to his impartiality. She also pointed out that this witness PW-11 had no reason to depose or to falsely implicate these appellants because the case was not even being investigated by him, ultimately therefore, the result of the case would be of no consequence to this witness. She also submitted that PW-9, the doctor, had no reason whatsoever to depose falsely that deceased had made a statement as per Ex.P-4.

We have considered the arguments addressed on behalf of the parties and perused the records. In this case, as stated above, the prosecution has come out with a particular narration of the incident in question according to which these appellants and two others stabbed the deceased but the prosecution has recovered only one weapon, therefore, it is difficult to appreciate the prosecution case how by one single weapon all these four accused persons could have stabbed the deceased. That apart, the prosecution in its version of the incident has not explained how the accused persons suffered injuries and by whom. There is an obligation on the part of the prosecution to explain the injuries suffered by the accused.

In the instant case, the accused also came to the hospital almost at the same time as the deceased and the doctor examined them after examining the deceased, therefore, these injuries on the accused persons must have been caused in the same incident in which the deceased suffered injuries which later became fatal. Hence, in the absence of any explanation from the prosecution as to the injuries on the appellant, we are of the opinion that the prosecution version of the incident becomes doubtful. As noticed above, all the eye-witnesses and other panch witnesses have turned hostile including the wife and the son of the deceased. Therefore, there is none to speak about the incident in question except Ex.P-4. So far as Ex.P-4 is concerned as contended by the learned counsel for the appellant, the same is recorded by Police Inspector when he could have very well obtained the service of the Magistrate who was residing half a kilometer from the hospital. It is not the case of the prosecution that there was any imminent danger to the life of the deceased at that point of time, hence, PW-11 had no such urgency to record the statement. In Ex.P-4 the deceased does not explain the nature of attack on him except generally stating that all the accused persons attacked him. Then again, we find there is a correction in regard to nature of weapon referred in Ex.P-4 which also gives rise to suspicion as to the genuineness of Ex.P-4. It is also surprising that PW-11 could not get sufficient ink in the hospital to get the thumb impression of the deceased because of which he had to use grease from the motorcycle to take the thumb impression. All these suspicious circumstances surrounding Ex.P-4, coupled with the fact that the close relatives of the deceased have not supported the prosecution case and the absence of explanation from the prosecution as to the injuries on the accused gives rise to a serious doubt as to the correctness of Ex.P-4 which, in our opinion, cannot be relied for the purpose of basing a conviction. The courts below have not appreciated this aspect of the case and have merely accepted Ex.P-4 as a document on which the conviction could be based. As a matter of fact, the High Court even confused Ex.P-4 with Ex.P-13 and referred to the contents of that document while it accepted the prosecution case when in fact the trial court for good reasons had rejected Ex.P-13.

In regard to the nature of attack, the learned counsel for the respondent contended that it is not necessary for the prosecution to prove overt act of each of the accused persons when Section 34 is attracted, therefore, the fact that the deceased had not mentioned the particulars of the persons who attacked him may not be a ground for acquittal. Though it may not be necessary for us to go into the fact of the argument, because of our difficulty to accept the genuineness of Ex.P-4, still we would like to observe that it is not the case of the prosecution that all the accused persons came prepared to attack the deceased. It is their case that the fight started suddenly without pre-planing between the two ladies and the others joined in and somebody stabbed the deceased. Assuming this case of the prosecution to be true, in the absence of any material to show that there was any common intention, it will not be possible to attract Section 34.

Be that as it may, since we are not accepting the prosecution case in regard to Ex.P-4, this appeal has to succeed, hence, we set aside the judgment and conviction of the courts below and allow this appeal. The appellants shall be released forthwith, if not required in any other case.