CASE NO.:
Appeal (crl.) 1592 of 2007

PETITIONER:
D. Sailu

RESPONDENT:
State of A.P.

DATE OF JUDGMENT: 20/11/2007

BENCH:
Dr. ARIJIT PASAYAT & AFTAB ALAM

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl.) No.3627 of 2006)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Andhra Pradesh High Court upholding the conviction of the appellant (hereinafter referred to as \021Accused No.1\024) for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the \021IPC\022) and sentence of imprisonment for life and fine of Rs.200/- with default stipulation.

3. Background facts as projected by the prosecution are as follows:

Accused persons D. Sailu, Ramaiah, D. Pentamma and Yadaiah are described as A-1, A-2, A-3 and A-4. Samuel (hereinafter referred to as the deceased) was the husband of Shantamma (P.W.1). A-1 is the son of the elder brother of the deceased, A-2 is the father of A-1, A-3 is the wife of A-2 and A-4 is the younger brother of A-1. The deceased and the accused were not on good terms as they quarrelled with each other over bore water for the fields. Fifteen days prior to the date of incident, the accused and the deceased quarrelled with each other. On the date of incident i.e. 24.11.1999 at about 8.00 P.M., A-1 asked the deceased as to why he (deceased) scolded the mother of A-1. The deceased told him that he did not scold his mother. Then P.W.1, the wife of the deceased, caught hold of the hands of A-1. A-4, the younger brother of A-1, came and attempted to beat the deceased. P.W.1 pushed the younger brother of A-1. A-2 beat P.W.1 with hands and A-1 stabbed the deceased at the instigation of A-2 with a knife on the left side of the stomach. As a result, the deceased fell down. A-3 also came there along with A-2 and beat P.W.1. Thereafter, the deceased was taken to the Sangareddy Hospital in an auto.

4. The Village Administrative Officer gave Ex.P8 report to P.W.14, who registered the case in Cr.No. 82 of 1999 under Section 302 read with 34 IPC against Al to A4. P.W.15 took up investigation, visited the scene of offence and conducted scene of offence panchanama in the presence of P.W.10 and another and seized controlled earth from the scene. Thereafter, he proceeded to Government Hospital and held inquest on the dead body of the deceased in the presence of P.W.12 and others. He seized blood stained clothes from the body of the

deceased. On inquest it was found that the deceased died as a result of the injuries sustained by him. P.W.8 is the Doctor, who conducted the autopsy, opined that the deceased died due to shock and hemorrhage due to injury to vital organ. On 13.11.1999, A-1 to A-4 were arrested by the Sub-Inspector of Police, Kondapur and produced before P.W.15. P.W.15 interrogated A-1 and A-1 gave confessional statement in Ex.P6 and in pursuance of the confessional statement, a knife was recovered under Ex.P7. As A-1 also sustained injuries, he was referred to hospital and examined by the Doctor and Ex.P.10, wound certificate was issued. After receipt of the Forensic Sciences Laboratory Report, he filed the charge sheet against A-1 and A-3 for the offence under Section 302 read with 34 IPC. As A-4 was juvenile, he was produced before the Judicial First Class Magistrate, Nizamabad, which is a juvenile Court. A-2 was absconding.

5. The learned Additional Judicial First Class Magistrate, Modak at Sangareddy, after considering the material on record, came to the conclusion that the offence alleged against the accused is exclusively triable by the Court of Session and therefore, he committed the case to the Court of Session. The learned Sessions Judge took the case on file in S.C. No. 129 of 2001 and after hearing the prosecution and the defence and after considering the material on record, charge for commission of offence punishable under Section 302 read with 34 IPC was framed against A-1 and A-3. As A-1 and A-3 denied the charge levelled against them, the prosecution examined P.Ws. 1 to 15 and marked Exs. P1 to P12 besides marking of M0.1 to prove its case. PWs. 1 to 4 were stated to be eye witnesses to the occurrence.

6. The stand of the appellant before the trial court was that the evidence of PWs 1 to 4 cannot be believed particularly when they are related to deceased and the presence of A2 and 3 at the time of incident is very much doubtful as they belong to some other village. It was also contended that the medical evidence corroded credibility of ocular testimony of PWs 1 to 4 as the injuries noticed were lacerated injuries which could not been caused by a knife. PWs. 1 to 4 falsely implicated to accused. The trial court found the evidence of PWs 1 to 4 to be credible and cogent and therefore convicted the accused appellant. It did not accept the plea of the accused that offence under Section 302 IPC is not made out.

7. The learned Sessions Judge accepting the evidence of P.Ws. 1 to 4, to be cogent and credible came to the conclusion that A-1 caused injuries to the deceased and therefore he was convicted and sentenced as stated above. Benefit of doubt was given to A-3 and accordingly he was acquitted.

8. The judgment of the trial court was challenged before the High Court and the pleas canvassed before the trial court were reiterated. The High Court as noted above did not find any substance in the appeal and upheld the conviction and sentence imposed.

9. It was submitted by learned counsel for the appellant in support of the present appeal, that PWs. 1 to 4 were related to the deceased and therefore their version is tainted. The medical evidence rendered the ocular version improbable.

10. Learned counsel for the respondent-State supported the judgments of lower court and High Court.

11. We shall first deal with the contention regarding

interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

12. In Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364) it has been laid down as under:-

\023A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.\024

13. The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan (1974 (3) SCC 698) in which Vadivelu Thevar v. State of Madras (AIR 1957 SC 614) was also relied upon.

14. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh\022s case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

\023We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in \026 \021Rameshwar v. State of Rajasthan\022 (AIR 1952

SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.\024

15. Again in Masalti and Ors. v. State of U.P. (AIR 1965 SC 202) this Court observed: (p. 209-210 para 14):

\023But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.\024

16. To the same effect is the decision in State of Punjab v. Jagir Singh (AIR 1973 SC 2407), Lehna v. State of Haryana (2002 (3) SCC 76) and Gangadhar Behera and Ors. v. State of Orissa (2002 (8) SCC 381).

17. The above position was highlighted in Babulal Bhagwan Khandare and Anr. V. State of Maharashtra [2005(10) SCC 404] and in Salim Saheb v. State of M.P. (2007(1) SCC 699).

18. The further plea related to primacy of medical evidence. The ocular testimonies has been analysed in great detail and has been rightly held to be cogent.

19. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses\022 account which had to be tested independently and not treated as the \023variable\024 keeping the medical evidence as the \023constant\024.

20. It is trite that where the eyewitnesses\022 account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses\022 account would require a careful independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the \023credit\024 of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

21. The above position was reiterated in Krishan and Another

v. State represented by Inspector of Police [(2003)7 SCC 56].

22. Even otherwise, factually also the medical evidence is not contrary to ocular evidence as claimed. On the contrary the doctor (PW 8) has clearly stated as to under what circumstances lacerated injury can be caused by a knife.

23. Learned counsel for the appellant submitted that the occurrence took place in course of sudden quarrel and, therefore, the trial court and the High Court were not justified in holding the accused-appellant guilty of offence punishable under Section 302 IPC.

24. In essence the stand of learned counsel for the appellant is that Exception IV to Section 304 IPC would apply to the facts of the case.

25. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

26. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men\022s sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A \023sudden fight\024 implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the \023fight\024 occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or mo re persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question

of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and that there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression \023undue advantage\024 as used in the provision means \023unfair advantage\024.

27. The above position is highlighted in Sandhya Jadhav v. State of Maharashtra (2006) 4 SCC 653).

28. Considering the background facts, appropriate conviction would be under Section 304 Part I IPC and not Section 302 IPC. The conviction is accordingly altered. Custodial sentence of ten years would suffice.

29. Appeal is allowed to the aforesaid extent.

JUDIS