

Mogalappa Vs. The State of Karnataka, Represented By Addl. State Public Prosecutor

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Court : Karnataka Kalaburagi

Decided On : Oct-01-2015

Judge : H.G. Ramesh & a.V. Chandrashekara

Appeal No. : Criminal Appeal No. 3529 of 2013

Appellant : Mogalappa

Respondent : The State of Karnataka, Represented By Addl. State Public Prosecutor

Judgement :

(Prayer: This Criminal Appeal is filed under Section 374(2) of Cr.P.C by the advocate for appellant praying that this Hon'ble court to set aside the order of conviction and sentence including fine dated 12.12.2012 in S.C.No.19/2012 passed by the I Additional Sessions Judge at Gulbarga, convicting the accused/ appellant p/u/s 302 of IPC, etc.)

1. Appellant was the sole accused in a criminal case in S.C.19/12 which was pending on the file of I Additional Sessions Judge, Kalaburagi. He has been convicted and sentenced to undergo imprisonment for life for the offence punishable under Section 302, I.P.C. and also to pay a fine of Rs.5,000/- vide considered judgment of conviction dated 12.12.2012. Charge had been framed to

that effect by the I Additional Sessions Judge on 5.4.2012. He had pleaded not guilty and had claimed to be tried.

2. The gist of the prosecution case as found in the charges levelled against him is that deceased- Sharanappa and this accused were residents of Adki village, Sedam Taluk, Kalaburagi District. Deceased- Sharanappa had sat on the katta of the house of Narasappa on 3.10.2011 at 9.45 p.m. Accused also came there and sat on the katta and started arguing with Sharanappa and due to old enmity, accused caught hold of his shirt and dragged him to and fro and pushed him towards the katta as a result of which Sharanappa came in contact with the sharp edge of the stone slab fixed to the katta and sustained severe injuries and died at the spot. Thus the accused is stated to have intentionally committed his murder.

3. In order to bring home the guilt of the accused, prosecution has examined in all 12 witnesses and 8 exhibits and 3 material objects. Accused has been examined under Section 313, Cr.P.C. His defence is one of denial of the allegations levelled.

4. Learned counsel for the appellant and learned Addl. SPP have submitted their arguments.

5. After going through the records, the following points arise for consideration of this court:

1) Whether the learned sessions judge is justified in convicting the accused for the offence punishable under Section 302, I.P.C.?

2) Whether any interference is called for in regard to the conviction and sentence and if so, to what extent?

REASONS

6. Point no.(1): Criminal investigation agency was set into motion on the first information lodged by Shivamma-wife of the deceased at 4.20 a.m. on the early morning of 3.10.2011. It was registered in Crime No.92//11 and submitted to the jurisdictional magistrate on 10.55 a.m. on 3.10.2011. First information can be used both for the purpose of corroboration or contradiction, as the case may be.

7. The first information lodged by Shivamma discloses that the accused had lodged a police complaint about 10 years ago against the appellant and his family members on the ground that the cattle belonging to them had trespassed into his land and caused damages. The said police case was concluded and since then accused was said to be having a grudge against them and therefore, the accused and deceased were not on talking terms. According to the first information, accused was proclaiming to take revenge against the deceased one day or the other.

8. At about 9.30 p.m. on 2.10.2011, herself, her husband and mother-in-law had sat on the phial of the house of the neighbourer-Narasappa. Accused had sat on the other side of the phial. After some time, she went inside the house to cook food. Later she heard the screaming sound of her husband and on coming out, she saw that the accused was quarrelling with her husband and threatening him that he would finish him off at any cost. Stating so, he held the collar of the shirt of her husband and pushed him towards the katta of the house of Narasappa and brother-in-law, Basappa tried to intervene and pacify both of them. Accused did not relent and forcibly pushed her husband towards the katta as a result of which his head came in contact with the sharp portion of the stone fixed to the katta and fell down and died. According to PW1, it was a clear case of murder being committed because of the earlier ill-will.

9. Inquest was drawn between 6.30 a.m. and 8.00 a.m. on 3.10.2011. Shivamma who is examined as PW1 has reiterated the contents of the first information in her examination-in-chief. She has specifically deposed that CW7-Venkatappa (PW5) is the brother of her husband and both of them are residing separately. She has admitted in her cross-examination that accused had filed a police case against her husband and others which ended in a compromise. According to her, accused had ill-will against them because of it. According to her, accused lifted her husband and pushed him to the wall forcibly. Whether this material aspect is forthcoming in Ex.P1, is the question.

10. What is mentioned in Ex.P1, detailed first information is that the accused held the collar of his shirt and forcibly pushed him towards the katta and her husband's

head came in contact with the stone and he fell down and breathed his last. It is in this regard a specific question was put to her asking as to whether she has told the police about the accused lifting him and pushing him forcibly towards the wall. This is a material omission amounting to contradiction.

11. Whether the other eyewitnesses have deposed to that effect and whether they have withstood the rigor of cross-examination on this aspect will have to be looked into. Basappa-PW2 is cited as CW6. He is also a resident of Adki village and knew both the deceased and accused very well. He also knew about the police case filed by the accused against deceased and others. In his examination-in-chief, he has deposed that at 10.00 p.m., deceased had sat on the katta of the house of CW8-Narasappa and at that time he was in his house. It is his case that the said katta could be seen if one were to stand from his house and see the same. He has deposed that accused had sat on another katta and held the collar of the shirt of the deceased and pushed him forcibly. Himself, Shivamma and Nagendramma tried to save him, but the accused did not relent. Then accused lifted Sharanappa and forcibly pushed him towards the wall which resulted in deceased sustaining injuries and becoming unconscious. PW1-Shivamma brought water and by that time, he was dead.

12. Evidence includes cross-examination. As already discussed, there is no reference about the accused lifting the deceased and forcibly pushing or dashing him to the wall, in Ex.P1-the first information. Whether PW2 has disclosed it to the IO, is the question. Basavaraj-PSI who was working in Mudhol police station on 3.10.2011 has deposed about the first information marked as Ex.P1 and registration of Crime No.92/11 and conducting investigation. He has deposed about recording of the statements of PW2- Basappa cited as CW6. In his cross-examination, he has specifically deposed that in Ex.P12 there is no reference about the accused lifting the deceased and dashing him to the wall forcibly. Therefore this part of the evidence is necessarily an important omission amounting to contradiction. He has further deposed that pW2 did not give any statement to that effect before him and that omission is also brought to the notice of PW2. In his further cross-examination conducted on 20.9.2012, PW-2 has stated having given statement to that effect before the IO, but the IO has denied the same.

13. Venkatappa-CW7 is examined as PW5. He is the younger brother of the deceased. He has deposed about the house of Narasappa and Nagendramma being adjacent to each other and existence of Katta in front of the house of Narasappa and if one were to stand in his house, the katta in the house of Narasappa could be seen. He has specifically admitted about the ill-will that accused had against the deceased and his family members relating to earlier police case registered about 10 years ago. He has deposed that he was present at 9.30 p.m. near his house and found accused lifting the deceased by holding the collar of his shirt and pushing him down forcibly and later lifting him again and forcibly dashing him against the wall and consequently deceased coming into contact with the stone portion of the katta and breathing his last. He has deposed having stated to the police about the accused lifting the deceased from the collar of his shirt and forcibly dashing him against the wall and causing injuries. But PW2-IO has denied the same. The said omission is elicited in his cross-examination and that omission is admitted by the IO. The said admission, as discussed earlier, is important or material contradiction.

14. Narasappa is the owner of the house where the incident took place. He has not deposed in his examination-in-chief about accused lifting the deceased and then forcibly dashing him against the wall. What he has deposed is that the accused held the collar of the shirt of the deceased and forcibly pushed him towards the katta, as a result of which the head of the deceased came in contact with the stone and he died due to the injuries. According to the prosecution, PW8 is also an eyewitness and he has not spoken about the accused lifting the deceased by holding the collar of his shirt and forcibly dashing him against the wall and consequently causing fatal injuries.

15. Nagendramma is the wife of PW6-Narasappa. She is also an eyewitness. Though she has deposed that the accused lifted the deceased by holding his collar and dashing him against the wall, the IO has denied her assertion. Therefore her statement made before court is nothing but an omission amounting to material contradiction.

16. Dr.Savithri, medical officer of Government Hospital, Sedam, conducted the post mortem and found the following injuries on dissection:

interiorcraneal haemorrhage with blood clots seen over the occipital lower of brain.

She has specifically deposed that the skull and vertebra and membrane were intact. Apart from this, all parts of thorax and abdomen and genito-urinary organs were also intact. She has opined that death of Sharanapa was due to sharp interiorcraneal haemorrhage due to head injury. She has further deposed that if a person were to come into contact with stone or katta due to forcible pushing by some one, interiorcraneal haemorrhage could be caused and death could be the consequence. She has further deposed that the injury was ante mortem in nature.

17. As already discussed, PSI-Basavaraj who conducted the entire investigation was confronted with material omissions elicited from the mouth of material witnesses and he has deposed that neither PW2- Basappa nor PW5-Venkatappa nor PW6-Narasappa nor PW7-Nagendramma have stated before him that the accused lifted the deceased by holding his collar and forcibly dashing him against the wall. He has deposed that even PW1-Shivamma has not disclosed anything about it while recording her statement.

18. The evidence of all eyewitnesses would go to show that the accused had sat on another phial on the house of Narasappa and deceased was sitting on the other phial. Their evidence is consistent insofar as it relates to a verbal exchange that took place between deceased and the accused and deceased coming into contact with the stone portion of the katta and sustaining injuries and consequential death. Motive is a double-edged weapon. If one edge of the weapon is blunt, the judicial process cannot sharpen it.

19. In a case like this, the evidence of eyewitnesses will have to be evaluated with some caution since there was admitted enmity between the family members of the deceased and accused relating to police complaint registered 10 years ago. PW1 herself has mentioned to that effect in Ex.P1 and also in evidence. Therefore motive could be the basis for committing the offence, or false implication or for modulation of the case. Though the wife and brother of the deceased are relatives,

their evidence cannot be rejected in toto. The only caution is that their evidence will have to be evaluated with caution. Nothing is elicited from the mouth of these witnesses inclusive of Shivamma-PW1 in regard to the verbal exchange that took place between the deceased and accused and accused pushing deceased towards the katta and deceased coming into contact with the stone portion sustaining interiorcraneal haemorrhage, causing his death.

20. The accused was unarmed and he had sat on the katta of the house of Narasappa. Somehow verbal exchange took place and it appears the in the scuffle deceased was pushed towards the stone portion and sustained injuries. The learned trial judge has convicted the accused for the offence punishable under Section 302, I.P.C. on the ground that he lifted the deceased by holding his collar and dashed him against the wall, causing injuries. Necessary discussion is found in paragraph 24 of the impugned judgment also. The said paragraph is reproduced below:

24. The evidence of PWs. 1 and 5 to 7 clearly goes to prove that since 10 years there was enmity between deceased and accused regarding grazing of cattles and accused used to threaten deceased by saying that he will kill him. The evidence of PWs. 1, 6 and 7 clearly goes to prove that accused with intent to commit murder of deceased shanappa took quarrel with him when he was sitting on the Katta situated in front of house of PW.6 Narsappa and caught-hold his shirt and lifted him and with force thrown him on the ground and later, he again lifted deceased Shanappa by holding his shirt and with force dashed him against the wall of the Katta, due to which deceased Shanappa sustained head injury and died on the spot. The facts stated by the complainant Smt. Shivamma in her complaint Ex.P.1 lodged before police also goes to prove that the accused took quarrel with deceased Shanappa and by saying that (KANNADAM ?) he caught-hold deceased Shanappa and lifted him and with force thrown him on the ground and he again lifted deceased Shanappa by holding his shirt and dashed him against the Katta due to which deceased Shanappa sustained head injury and died on the spot. Hence, evidence on record clearly goes to prove that on 2.10.2011, at about 10.30 P.M., at Adki village accused with intent to cause death of deceased Shanappa had took quarrel with him, when he was sitting on a Kata situated in-

front of house of PW.6 Narsappa and caught-hold him and with force thrown him in the ground and again he caught-hold deceased and dashed him against wall of the Kata, due to which deceased Shanappa had sustained head injury and died on spot, thereby accused had committed an offence punishable U/Sec. 302 of I.P.C. Hence, I answer Point No.2 in the affirmative.

Evidence will have to be carefully evaluated. Nowhere it is stated in Ex.P1 that the accused lifted the deceased by holding his collar and forcibly pushing him against the wall. Though material witnesses have deposed to that effect, they are definitely omissions amounting to material contradictions, more particularly when the IO has denied about these witnesses disclosing to him about the accused lifting the deceased by holding his collar and dashing him against the wall forcibly.

21. Insofar as the scuffle that took place between the two and the accused pushing the deceased towards the katta, it is corroborated by material particulars. The learned judge has held in paragraph 24 that the accused has committed the offence punishable under Section 302, I.P.C. because he lifted the deceased by holding the collar of his shirt and dashed him forcibly against the wall of the katta as a result of which he sustained head injury and died on the spot.

22. 'Culpable homicide' is found in Section 299, I.P.C. and 'murder' is defined in Section 300, I.P.C. Section 299 defines culpable homicide and it is of two kinds: (I) culpable homicide amounting to murder and (ii) culpable homicide not amounting to murder. Section 299 defines culpable homicide simpliciter. Murder is a species of culpable homicide. In determining the nature of the offence, regard must be had to all the essential elements which are common to all such offences. They are:

- (i) mentality of the accused,
- (ii) nature of the act and
- (iii) its effect upon human victim.

23. Section 299, I.P.C. deals with (i) causing of death,

(ii) doing of act and (iii) presence of intention to kill or knowledge that the act was likely to cause death. To consider as to whether the act of the accused amounts to culpable homicide as defined under Section 299, I.P.C., if the answer to the question is found to be in the affirmative prima facie, then the stage for consideration of operation of Section 300, I.P.C. arises. Therefore the court should determine whether the facts proved by the prosecution would bring the case within any of the four clauses of the definition of murder contained in Section 300, I.P.C. If the answer to that question is in the negative, the offence would be culpable homicide not amounting to murder.

24. Section 300, I.P.C. is extracted below:

300. Murder.- Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or- Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Whether the case on hand is 'murder' punishable under as defined under Section 302, I.P.C., is the question. In this regard, the evidence of eyewitnesses is to be looked into. PW1-Shivamma, wife of the deceased was cooking food in her house and one boy came and informed her that the accused had picked up quarrel with her husband and therefore she came out of the house. When she came out, she saw accused had held the collar of the shirt of her husband and pushed him down to the ground and again lifted him and forcibly dashed him against the wall. Prior to that, she had sat with her husband on the phial of the house of Narsappa and

went inside to cook. She does not know when the accused came there and why the quarrel took place.

25. Another witness-Basappa (PW2) is the brother of the deceased whose house is opposite the house of CW9-Nagendramma. He has specifically deposed in her examination-in-chief that his brother had sat on the phial of the house and CW8 and CW9 and accused had sat on another phial of the house of Narsappa. He does not speak anything about the quarrel that had ensued between the accused and the deceased and he has only spoken about the accused holding the collar of the deceased and pushing him down and later on lifting him and dashing him forcibly against the wall.

26. Venkatappa-PW5 is also an eyewitness to the incident in question and he has also not spoken anything about the accused having sat on the other phial of the house of Nagendramma and the quarrel that had ensued. He has deposed that the accused held the collar of the shirt of the deceased and forcibly pushed him on the ground and later on dashed him forcibly against the wall. Narsappa-PW6 is cited as CW8 in the charge sheet. The alleged incident is stated to have taken place on the phial of his house. He has deposed that he was going to his house at 9.30 p.m. and he saw the accused and deceased quarrelling with each other and Shivamma and Venkatappa were there at that point of time. His wife-CW9 was inside the house. He has not spoken anything about the accused lifting the deceased once again and dashing him forcibly against the wall.

27. Per contra, Nagendramma-PW7 is the wife of Narsappa-PW6. She has deposed that at about 9.30 p.m., herself, deceased Sharanappa, her husband-Narsappa and Shivamma-PW1 had sat on the phial and the accused caught hold of the collar of the shirt of the deceased and lifted him and forcibly dashed against the wall of the katta as a result of which his head came into contact with the stone of the katta and he died. According to the version of Narsappa, his wife-Nagendramma was inside the house when he came near the house. A doubt, therefore, arises as to whether Nagendramma was really present when the incident in question took place. Anyhow the evidence of PW1- Shivamma, wife of the deceased and the evidence of PW6-Narsappa discloses there was a quarrel

between the deceased and the accused, but none of the witnesses have spoken about the exact cause for the scuffle. In ascertaining as to whether death is culpable homicide amounting to murder or not, we will have to evaluate the background of the offence.

28. There cannot be any universal application that whenever a blow is given, Section 302, I.P.C. is applicable. It would depend on the facts of each case. The weapon used, size of the weapon, place where the assault took place, background of the case leading to assault, part of the body where the blow was given, are some of the factors to be considered, as observed by the Hon'ble apex court in the case of BHAGAWAN BAHADURE .v. STATE OF MAHARASHTRA ([2009] 3 SCC (Crl.) 162. The relevant discussion is found in paragraphs 166 and 167.

29. Section 304-II, I.P.C applies when the accused has knowledge that his act is likely to cause death but has no intention to cause death. This clause will not come into operation when there is an intention to cause such bodily injury as is likely to cause death. Where fatal injury is inflicted by the accused on the vital portion of the victim with a deadly weapon in the course of sudden and unexpected quarrel, conviction under Section 304-II will be justified. In this regard, the decision of the Hon'ble apex court in the case of STATE OF UTTAR PRADESH .v. HARIRAM (1998 SCC (Crl. 979) is relevant.

30. In the present case, a criminal case had been lodged by the accused against the deceased and his family members 10 years ago and it ended in a compromise as per the version of material witnesses. What is deposed by a few witnesses is that because of this enmity, accused was proclaiming that he would take revenge against the deceased. But this alleged proclamation is not substantiated in any manner.

31. After the criminal case was compounded, no quarrel had taken place between the two. Neither Narsappa nor Nagendramma have spoken about the alleged proclamation stated to have been made by the accused. From the evidence of PW2-Basappa, it is seen that accused had sat on one side of the house of Narsappa and deceased had sat on the opposite side. When exactly the quarrel took place between the two and what exactly was the reason is not forthcoming.

32. Prosecution has failed to prove that the accused lifted the deceased and forcibly dashed him against the wall as a result of which he sustained severe injuries. This part of the evidence is definitely material omission leading to contradiction. The learned judge of the trial court has ignored the material omission while evaluating the evidence. Admittedly accused had not used any weapon. The background of the case discloses that both of them had sat on different chairs and the genesis of the quarrel that ensued is also not forthcoming. The material witness-PW6, Narsappa has only stated that the accused pushed the deceased forcibly towards the katta and the head portion came into contact with the stone portion of the katta and he died. It does not disclose that accused had an intention to cause such bodily injury which was likely to cause death.

33. In the present case there was no intention on the part of the accused to cause death. But it is clear that the accused had knowledge that his act would likely cause death. He was conscious of the chair which had stone portion and therefore the case squarely falls within the parameters of Part II of Section 304, I.P.C. and neither Part I of Section 304 nor Section 302, I.P.C. In the light of the same, the trial court is not justified in convicting the accused for the offence punishable under Section 302, I.P.C. Rather prosecution has been able to prove that the accused has committed an offence punishable under Part II of Section 304, I.P.C. Hence we are of the opinion that the accused is to be convicted for the offence punishable under Part II of Section 304, I.P.C.

34. In the result, the following order is passed:

ORDER

The appeal is allowed in part. The appellant- accused is found guilty for the offence punishable under Part II of Section 304, I.P.C. Accordingly we convict the accused for the offence punishable under Section 304 Part II of I.P.C.

To hear regarding sentence.

ORDER REGARDING SENTENCE

Heard the learned Counsel Sri Ishwar Raj S. Chowdapur representing the appellant-accused and Sri Prakash Yeli, learned Additional State Public Prosecutor in regard to sentence.

Learned counsel for the appellant-accused has submitted that the appellant is unmarried and is hardly aged about 29 years and is handicapped. He has placed reliance upon the disability certificate issued by the District Disability Officer, Gulbarga on 29.07.2009 and has produced the same along with a memo for perusal of the Court, at the time of submitting argument today. He has further submitted that the accused did not use any weapon and that the death took place due to the scuffle and there was no intention to cause death.

Per contra, Sri Prakash Yeli, learned Additional State Public Prosecutor has submitted that the maximum punishment contemplated for the offence under Section 304 Part II of I.P.C. could extend up to ten years and that the circumstances under which the incident took place will have to be taken into consideration. Hence, he has requested the Court to award maximum sentence.

After hearing the learned counsel for the appellant and the learned Additional SPP, we are of the considered opinion that the accused is aged about 29 years and is an unmarried person. He does not have any criminal background and did not use any weapon as such in regard to the death that ensued on the fatal day. Taking all these into consideration, we are of the considered opinion that awarding four (4) years of rigorous imprisonment would meet the ends of justice. We do not like to interfere with the sentence of fine of Rs.5,000/- imposed on the appellant. Accordingly, we pass the following order:

Appellant - accused is directed to undergo rigorous imprisonment for a period of four (4) years and also to pay fine of Rs.5,000/- as imposed by the trial Court. The period already undergone by the appellant-accused shall be given set off as per Section 428 of Cr.P.C.

After dictating the order in regard to sentence, we are conscious of the mandate of Section 357A of the Code of Criminal Procedure, 1973 which has come into effect from 31-12-2009 by virtue of Act 5 of 2009. Sub-sections (1) and (2) of Section

357A are relevant and they are reproduced below:

"357A. Victim compensation scheme.- (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1)".

The Government of Karnataka had formulated a scheme in notification No.HD 1 PCB 2011 dated 22-02-2012 providing for compensation of Rs.2.00 lacs in the event of loss of life and compensation in respect of different kinds of injuries. The said notification has stood amended by virtue of another notification No.HD 1 PCB 2011, Bangalore, dated 19-09-2013. If the deceased was 40 years below, a sum of Rs.3.00 lacs would be awarded as compensation to the next of kin.

The deceased in this case was aged about 35 years as on the date of death and it is evident from Ex.P2 - the inquest mahazar drawn by the police. The post mortem report submitted by the doctor discloses that the deceased was aged about 35 years. The deceased was married and PW.1 - Smt. Shivamma is his wife and she has children. Taking all these into consideration, we are of the opinion that a recommendation is to be made to the Karnataka State Legal Service Authority, Siddayya Road, Bangalore to award suitable compensation to PW.1 - Smt. Shivamma W/o late Shanappa, Age: 30 years, Occ: Agriculture, R/o Adki, Taluq Sedam, Kalaburagi District who is the wife of the deceased.

Registry is directed to send a copy of this judgment to the Karnataka State Legal Service Authority, Siddayya Road, Bangalore, at the earliest to award compensation to PW.1 - Smt. Shivamma, in terms of Section 357A of Cr.P.C.

Office is directed to supply a copy of this judgment to the appellant-accused free of cost and also to intimate the operative portion of this judgment to the Deputy

Commissioner-cum-District Collector as per Section 365 of Cr.P.C.

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