

SHAIKH KARIMULLAH @ BABU AND ORS.

v.

STATE OF A.P.

(Criminal Appeal No. 223 of 2009)

FEBRUARY 6, 2009

**[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]**

Penal Code, 1860 – ss. 302 and 325 – Conviction u/s. 325 instead of s. 302 – Accused along with other co-accused attacked deceased resulting in his death – Minor dispute between parties – One witness deposing that accused assaulted with stick and other witnesses deposing that accused had given fist blow – No charge framed u/s. 34 against accused – Conviction u/s. 302 by courts below – Justification of – Held: Not justified – Conviction altered to s. 325 with custodial sentence of three years.

The question which arose for consideration in this appeal was whether the courts below were justified in convicting the appellant-accused u/s. 302 IPC and imposing sentence of life imprisonment when one witness deposing that appellant assaulted with a stick, the other witnesses deposing that appellant inflicted a fist blow to the deceased.

Partly allowing the appeal, the Court.

HELD: The records clearly show that no charge was framed in terms of s. 34 IPC so far as the appellant is concerned. It is also accepted that except PW-1 who stated that the appellant assaulted the deceased with a stick, the other purported eye witnesses stated that the appellant had given fist blow. Considering the evidence of witnesses as brought on record the appropriate conviction would be in terms of s. 325 and not u/s. 302

A IPC. Custodial sentence of three years would meet the ends of justice. [Para 7] [956-F-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 223 of 2009.

B From the final Judgment and Order dated 11.10.2006 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 2286 of 2004

Chanchal Kumar Ganguli (SCLSC) for the Appellants.

C I. Venkatanarayana, D. Bharathi Reddy, Altaf Fatima and V. Prabhakar Rao for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J.1. Leave granted.

D 2. Challenge in this appeal is to the judgment of a Division Bench of the Andhra Pradesh High Court at Hyderabad dismissing the appeal filed by the appellants and two others. The trial Court by its judgment dated 9.9.2004 acquitted A1 to A5 for the offence punishable under Section 148 of the Indian Penal Code, 1860 (in short the 'IPC'). However A-1 to A-3 were found guilty for the offence under Section 302 IPC and they were sentenced to suffer imprisonment for life and fine of Rs.1000 with default stipulation, while A-4 and A-5 were not found guilty on the second charge. A-2 to A-5 were also found
E not guilty for the offence under Section 324 IPC. A4 and A5
F were acquitted of all the charges.

3. The present appeal is restricted to Shaik Ibraheem (A-3), as stated by learned counsel for the appellants.

G 4. Prosecution version in a nutshell is as follows :

H B. Nagabhusan (hereinafter referred to as the 'deceased') was a kerosene dealer. Al was having illicit intimacy with one Krupa and often used to come to the colony and make enquiries about her. On 14.1.2000 while P.Ws. 1, 3 to 6 and the deceased were performing Annadanam at Anjaneya Swamy Temple, Al

kicked the Shamiana and sat on a Mahalakshamma tree. When the said act was objected by Dastagiri, as it was a holy tree, he threatened them and went away. On 31.3.2000 at about 7.30 p.m. while the deceased, PWs 1, 3 to 6 were performing Bajana at the Anjaneya Swamy temple, all the accused persons armed with sticks and iron rods went to the temple and enquired about Krupa. P.W.3 told them that it was not proper for them to behave as it was a residential colony; on which A1 to A5 pushed him towards the house of Bellamkonda Venkateshwarlu abusing him; so saying A1 beat the deceased on right side of the head with an iron rod, A2 beat him with stick on his forehead, A3 beat with a stick on his forehead just above left eye and then fisted on his face, A4 beat him with a stick on his nose and A5 on his back; then the deceased fell down unconscious. When P.Ws. 1, 3 to 6 tried to intervene, all the accused attacked them with sticks and stones. A1 threatened them at the point of knife and ran away. Thereafter, the deceased was taken to Chilakaluripet Town Police Station as the deceased was unconscious, P.W.1 gave a report – Ex.P1. On the basis of the above report, P.W. 11, the then Sub-Inspector of Police registered the case in Cr.No. 193 of 2000 and issued FIR Ex.P-10. He then sent the deceased and the injured i.e. P.Ws. 1, 3 and 5 to the Government Hospital for treatment, visited the scene of offence, conducted panchanama, draw rough sketch of the scene Ex.P-11. At about 2 P.M., on receiving the death intimation altered the section of law and issued altered FIR-Ex.P13. Further investigation was taken over by PW-10, the Circle Inspector of Police, who visited the Government General Hospital, Guntur; held inquest over the dead body in the presence of P.W.7, covered under Ex.P3 and sent the dead body for postmortem examination. On 01.04.2000 P.W.9, the doctor conducted autopsy over the dead body of the deceased and issued postmortem report Ex.P9 opining that the cause of death was due to head injury. A1 to A5 were arrested on 13.04.2000 by P.W.10 in the presence of P.W.7 and as per the statements made by them M.Os. 4 to 8 were recovered under Ex.P5 panchanama and after completion of investigation

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A he laid the charge sheet for the offence under Sections 147, 148, 324, 302 read with Section 149 IPC.

On committal of the case, necessary charges were framed against the accused. All the accused persons pleaded not guilty and claimed for trial.

B In order to prove the guilt of the accused, prosecution examined 11 witnesses- P.Ws I to 11, marked Exs. P1 to P13 and exhibited M.Os. 1 to 8. On behalf of defence relevant portions of statements of P.Ws.1, 4 and 6 under Sec. 161 of Code of Criminal Procedure were marked as Exs.D1 to D5, but no oral evidence has been let in on their behalf. Trial Court, as noted above, recorded conviction. High Court did not interfere and by impugned judgment dismissed the appeal.

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D 5. According to learned counsel for the appellants Section 34 could not have been pressed into service as there was no charge framed and findings recorded are contrary to the evidence, as all witnesses except PW1 has stated that the appellant had given a fist blow. That being so, it is submitted that offence punishable under Section 302 is not made out.

E 6. According to learned counsel for the State the judgments of the trial Court and the High Court do not suffer from any infirmity.

F 7. The records clearly show that no charge was framed in terms of Section 34 so far as the appellant is concerned. This position is fairly conceded by learned counsel for the respondent. It is also accepted that except PW-1 who stated that the appellant assaulted the deceased with a stick, the other purported eye witnesses stated that the appellant had given fist blow. Considering the evidence of witnesses as brought on record the appropriate conviction would be in terms of Section 325 IPC and not Section 302 IPC. Custodial sentence of three years would meet the ends of justice.

8. The appeal is allowed to the aforesaid extent.

H N.J.

Appeal partly allowed.