

Karnataka High Court

G M Krishna @ Krishna Kumar @ Shani ... vs State Of Karnataka By on 5 August, 2020

Author: B.Veerappa And E.S.Indiresh

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 05TH DAY OF AUGUST, 2020

PRESENT

THE HON'BLE MR. JUSTICE B. VEERAPPA

AND

THE HON'BLE MR. JUSTICE E.S. INDIRESH

CRIMINAL APPEAL NO.78 OF 2015

Between:

G.M. Krishna @ Krishna Kumar
@ Shani Mahathma
Aged about 21 years,
S/o late G. Muniraju
Residing at No.4, 27th Cross,
6th Main, Nadugadde, Ejipura,
Vivek Nagar,
Bangalore - 560 047.

...Appellant

(By Shri Hashmath Pasha, Senior Advocate,)

And:

State of Karnataka by
Vivek Nagar Police
Bangalore - 560 047

Represented by Learned
State Public Prosecutor

...Respondent

(By Shri Vijayakumar Majage, Addl. SPP)

2

This Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure praying to set aside the order dated 21.11.2014/22.11.2014 passed by the Presiding Officer, Fast Track Court-XIV, Bangalore City in SC No.368 of 2011 convicting the appellant/accused No.2 for the offence punishable under Sections 302, 392, 323 read with Section 34 of the Indian Penal

Code; and etc.

This Criminal Appeal coming on for hearing, this day, VEERAPPA J, delivered the following:

JUDGMENT

This criminal appeal is filed by the Accused No.2-G M Krishna against the judgment and the order of conviction dated 21st November, 2014 and order of Sentence dated 22nd November, 2014 made in Sessions Case No.368 of 2011, sentencing the Accused 1 and 2 for imprisonment of life and a fine of Rs.5,000/- each under the provisions of Section 302 read with Section 34 of the Indian Penal Code; convicting Accused 1 and 2 for rigorous imprisonment for one year with fine of Rs.1,000/- each under Section 392 read with Section 34 of the Indian Penal Code; and so also, convicting the Accused 1 and 2 under Section 323 read with Section 34 of the Indian Penal Code to undergo simple imprisonment for one month with fine of Rs.500/- each.

I. The factual matrix of the case of the prosecution:

2. It is the case of the prosecution that accused 1 and 2 being friends, on 07th November, 2010 at about 3.00 pm within the limits of Viveknagar Police Station at Ejipura 21st Cross on Bachappa Road near Bharat Stores, gave a threat to CW3-Ajit Kumar and snatched Rs.55/- from him. Thereafter, CW3 informed snatching of his money to CW2-Aravind Kumar and deceased Praveen Kumar. Thereafter, CW2, CW3 and deceased- Praveen Kumar, came to the spot and deceased Praveen Kumar asked Accused 1 and 2 as to why they have snatched money from CW3. Accused No.1 told the deceased Praveen Kumar that, "who are you to ask?" and punched Praveen Kumar on his face and chest and Praveen Kumar fell down; Accused again went to assault Praveen Kumar and thereby deceased-Praveen Kumar, run towards Jangamappa Road. Accused 1 and 2 chased him and in front of house No.30, Jangamappa Road, accused No.1 assaulted Praveen Kumar with stone on his head. Praveen Kumar fell on the ground; Accused No.2 assaulted Praveen Kumar with hand. When CW2 to 4 came to rescue Praveen Kumar; Accused No.1 and 2 assaulted them with hands. Thereafter, CW2 informed CW1 and CW1 came to the spot and took Praveen Kumar to Hospital belonging to CW21; thereafter, Praveen Kumar was taken to St. John's Hospital where the Doctor informed that Praveen Kumar is dead. The jurisdictional police registered a case in Crime No.342 of 2010 for the offences punishable under Sections 302, 323 and 392 read with Section 34 of the Indian Penal Code. The jurisdictional police, after detailed investigation, filed charge-sheet against Accused 1 and 2. After filing of charge-sheet by the Investigating Officer, the X Additional Chief Metropolitan Magistrate, Bangalore City had taken cognizance and registered case in CC No.22035 of 2011 and thereafter, the matter was committed before the Principal City Civil and Sessions Judge, Bengaluru. That is how, Sessions Case No.368 of 2011 came to be registered.

3. In order to prove its case, the prosecution examined witnesses PW1 to PW20, marked documents as Exhibits P1 to P29(a) and marked seven Material Objects as MO1 to 7. Thereafter, the learned trial judge recorded the statement of accused No.1 and 2 under Section 313 of the Code of Criminal Procedure to enable them to explain incriminating circumstances appearing against them in the

prosecution evidence. Accused 1 and 2 denied the statement in toto and further stated that they have no defence.

4. The learned Sessions Judge, after considering both oral and documentary evidence on record, recorded a finding that the prosecution has proved the accusation against accused beyond reasonable doubt that Accused 1 and 2 being the friends, on 07th November, 2010 at 3.00 pm, within the limits of Viveknagar Police Station near Ejipura 21st Cross on Bachappa Road near Bharathi Stores gave a threat to CW3-Ajit Kumar and snatched Rs.55/- from him, thereby Accused No.1 and 2 have committed offence punishable under Sections 302, 392 and 323 read with Section 34 of the Indian Penal Code. Learned Sessions Judge further recorded a finding that the Prosecution has proved beyond reasonable doubt that accused No.1 and 2 on 07th November, 2010 gave a threat to CW3 and snatched Rs.55/- from him and thereafter, when Praveen Kumar asked Accused 1 and 2 as to why they snatched money from CW3, the accused No.1 told the deceased that 'who are you to ask" and punched him on his face and chest. Thereafter, accused 1 and 2 chased the deceased in front of House No.30 where accused No.1 assaulted Praveen Kumar with a stone on his head and CW1 carried Praveen Kumar to St. John's Hospital, where the Doctor declared, "brought dead". Thereby, the accused 1 and 2 committed the offence punishable under the provisions of Section 302 read with Section 34 of the Indian Penal Code; and the learned Judge further, recorded a finding that the accused No.1 and 2 assaulted CWs.2 to 4 when they came to rescue Praveen Kumar and caused simple injuries, thereby committed offence punishable under Sections 323 read with Section 34 of the Indian Penal Code. Accordingly, the learned Sessions Judge proceeded to pass the impugned judgment and the order of conviction and imposed punishment to both the accused under the provisions of Sections 302, 392 and 323 read with Section 34 of the Indian Penal Code.

5. The present appeal is filed by only Accused No.2. It was made known to us by the learned counsel for the parties that, Accused No.1 has not filed appeal against the impugned judgment and the order of conviction.

6. We have heard the learned counsel appearing for the parties to lis.

7. Shri Hashmath Pasha, learned Senior counsel appearing for accused No.2 contended with vehemence that the impugned judgment and the order of conviction passed by the learned Sessions Judge convicting Accused No.2 under the provisions Sections No.302, 392 and 323 read with Section 34 of the Indian Penal Code is erroneous and contrary to material on record and is liable to be set aside. He further contended that the learned Sessions Judge failed to notice that absolutely there is no play of Accused No.2 in the incident cropped by the prosecution and there are no over acts against accused No.2 to attract the provisions of Section 302 of the Indian Penal Code and therefore, the learned Sessions Judge is not justified in convicting the Accused No.2 under the provisions of Section 302 read with Section 34 of the Indian Penal Code. Therefore, he sought to set aside the impugned judgment and the order of conviction passed by the Sessions Court.

8. He would further contend that in the First Information Report, as per the complaint made by PW3 who is the complainant, there is no allegation against the accused No.2 having assaulted Praveen Kumar with hand. Therefore, in the First Information Report there is no overt act of assault

against the appellant to deceased Praveen Kumar. Therefore, the conviction cannot be sustained under Section 302 of the Indian Penal Code. He further contended that accused No.1 and 2 are strangers to the deceased. Though, according to the complaint, the accused No.1 assaulted the deceased with stone and accused No.2 on his head, but there is no direct witness or eye-witness to the incident. Though the accused No.1 has snatched Rs.55/- from CW3, merely because Accused No.2 has accompanied accused No.1, that cannot be a ground to implicate accused No.2 who has no role under the provisions of Section 392 read with Section 34 of the Indian Penal Code.

9. He would further contend that there is no material against accused No.2 to involve under Section 323 of the Indian Penal Code as the prosecution relied upon the evidence of prosecution witnesses PW5, PW6 and PW7, and absolutely, there is no material against accused No.2 either under the provisions of Section 302, 392 and 323 read with Section 34 of the Indian Penal Code. He further contended that as per the complaint, somebody assaulted the deceased Praveen Kumar, and further, the complainant says that the accused No.1 has punched the deceased on his face and chest and thereafter, when Praveen Kumar had fallen, the accused No.1 has assaulted Praveen Kumar with stone on his head. It is further contended that the evidence of PW3, who is the complainant is, that somebody has assaulted deceased Praveen Kumar. He would further contend that there is inconsistency with the statements made by PW3 and PW5 at every stage that there is an improvement, and therefore, the prosecution has not proved any case against accused No.2. Therefore, he sought to allow the appeal filed by accused No.2.

10. In support of his contentions, the learned Senior Counsel relied upon the following decisions:

(i) RAM KUMAR PANDEY v. STATE OF MADHYA PRADESH
reported in AIR 1975 SC 1026 and referred to
paragraph 9;

(ii) STATE OF ANDHRA PRADESH v. PUNATI RAMULU AND

OTHERS reported in (1994)1 SCC 90 and referred to paragraph 5; and

(iii) ABANI K. DEBNATH v. STATE OF TRIPURA reported in (2005)13 SCC 422 and referred paragraph 4.

(iv) In the case of MEHBOOB SAB V. EMPOROR reported in AIR (32) 1945 PRIVY COUNCIL 118 to the effect that, care must be taken not confuse the same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. In their Lordships' view, the inference of common intention within the meaning of the term in Section 34 should never be reached unless it is necessary inference deducible from the circumstances of the case. That cannot

be said about the inference sought to be deduced from the facts relied on by High Court is distinguishing the case of appellant.

11. Per contra, Shri Majage, the learned Additional State Public Prosecutor while justifying the impugned judgment and the order of conviction passed by the learned Sessions Judge contended that the prosecution, based on the oral and documentary evidence of case, proved beyond reasonable doubt that the accused 1 and 2 involved in extortion of Rs.55/- from CW3-PW6 and also proved that when CWs3 to 5 reached the spot and questioned Accused No.1, accused told the deceased "who are you to ask?" and punched the deceased Praveen Kumar on his face and chest and the material documents also prove that the accused No.1 assaulted Praveen Kumar with a stone on his head and accused No.2 assaulted with his hand, thereby both the accused 1 and 2, with a common intention, murdered Praveen Kumar which attract provisions of Section 302, 323 and 392 read with Section 34 of the Indian Penal Code.

12. He would further contend that admittedly the accused No.1 has not filed an appeal against the impugned judgment and the order of conviction. The appeal is filed only by accused No.2, who has, with a common intention along with accused No.1 supported accused No.1 in order to kill Praveen Kumar, and thereby the Prosecution has proved beyond reasonable doubt that both the accused 1 and 2 involved in the case of death of Praveen Kumar and the Prosecution, based on the oral and documentary evidence, clearly proved beyond reasonable doubt that they involved in the offence punishable under the provisions of Section 302, 392 and 323 read with Section 34 of the Indian Penal Code. Therefore, he sought to dismiss the appeal. He would further contend that the Prosecution recovered MO1 at the instance of Accused No.1, as Accused No.2 was with accused No.1 and with a common intention they extorted Rs.55/- from PW3. Therefore Section 34 of the Indian Penal Code attracts. He would further contend that Exhibit P27-Forensic Science Laboratory report clearly depicts that blood-stains of deceased on MO1 tally with the blood-stained clothes of the deceased Praveen Kumar. Therefore, he sought to dismiss the appeal.

13. In view of the rival contentions urged by the learned counsel for the parties, the only question arise for consideration in the present appeal is:

"Whether the accused No.2 has made out a case to interfere with the impugned judgment and the order of conviction in the facts and circumstances of the present case?"

14. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties and carefully perused entire material including the original records.

15. In order to reappraise the entire case on merits, it is relevant to consider the evidence of the prosecution witnesses and material documents relied upon by the prosecution.

16. P.W.1/C.W.7-Udaykumar, father of the P.Ws.5 and 6 has deposed that he learnt about the incident. He went to the police station on 08.11.2010 and his statement was recorded. Ultimately, he turned hostile.

17. P.W.2/C.W.10-Rajeshwari, the mother of the deceased has deposed that, on 07.11.2010, at 2.00 pm, deceased Praveen Kumar went out on his bike. After some time, P.W.5 came and informed that Praveen Kumar met with an accident. She went to St.John's Hospital and saw the dead body. In the hospital, she came to know that two persons assaulted her deceased son.

18. P.W.3/C.W.1-Prasad Kumar, the younger brother of the deceased who lodged the complaint with the jurisdictional police on 07.11.2010 at 5.30 pm has stated that P.W.2 is his mother. Deceased Praveen Kumar is his elder brother. C.W.2 and 3 are his friends. The house of C.W.2 and 3 is situated near his house. The accused are residing near his area. One and a half year prior to the incident, when he was in house, he received phone call from Aravind. He told some one has assaulted his brother Praveen Kumar and asked him to go and he went to Ijipura church. There his brother was lying. Injuries were found on the nose and near the ears. He further stated that myself, Aravind, my friends-Prashanth, Murali, took my brother Praveen to Appollo clinic and thereafter, to St.John's Hospital. There, the Medical Officer told that Praveen Kumar is brought dead. When we asked Aravind as to who assaulted Praveen, he told that Vinod and Krishna assaulted Praveen. He further stated that, the accused snatched Rs.55/- from the Aravind's brother and when his brother asked about the same, the accused assaulted the deceased on his face with stone and hand. Therefore, he lodged the complaint Ex.P.2. He has further stated that the police seized the stone identified by him under mahazar- Ex.P.3. His signature is Ex.P.3(a). He further stated that he was not remembering whether accused No.1 has given Rs.20/- to the police in the Police Station before him and police have seized the same by drawing up mahazar under Ex.P4.

19. PW4-Dr.G.Babu Rao, Casualty Medical Officer of St.John Hospital has deposed that on 07.11.2020 at 4.30 p.m one patient by name Praveen was brought to the hospital with the history of assault and on examination of Praveen, he found that Praveen was dead. He has intimated the same to the police and identified the intimation under Ex.P6 and his signature as Ex.P6(a).

20. PW5-Aravind Kumar elder brother of PW6-Ajith Kumar who is friend of the deceased Praveen Kumar in his evidence has stated that PW1 is his father, CW3 is his younger brother and he knows deceased Praveen Kumar, PW3 and accused No.2. He stated that accused No.1 was also attending to the same school where he was attending. He further stated that two years earlier to his evidence after Deepavali festival, one day in the afternoon he and Praveen Kumar were returning from Garage on motor cycle, at that time, his younger brother Ajith Kumar-PW6 came weeping. He asked his brother why he his weeping? He told them that near Choura Church two persons have assaulted him and snatched Rs.55/-. Thereafter, he along with his younger brother Ajith Kumar and Praveen Kumar came near Choura Church. Ajith Kumar has shown accused persons who snatched Rs.55/- from him. At that time, Praveen Kumar asked the accused persons to return the money snatched by them but they told that they will not return the money. When Praveen Kumar asked the accused why they will not return the money snatched by them for that accused No.1 assaulted Praveen Kumar on his face. He further stated that when he went to rescue Praveen Kumar, accused No.2 assaulted him with his hand and when Praveen Kumar fell on the ground accused No.2 caught hold of him and accused No.1 assaulted Praveen Kumar with stone on the back side of the ear. Praveen Kumar sustained blood injuries. At that time, the people who were residing near his house have seen the incident. Thereafter, immediately he went to the house of Praveen Kumar and brought PW3-Prasad

to the spot. At that time, accused ran away from the spot and Praveen Kumar was lying on the ground. He further stated that they took Praveen Kumar to the Green View Hospital and when the Doctors were not there, they took Praveen Kumar to St.John's Hospital and after examined Praveen Kumar, the Doctor told that he is dead. He further stated that he informed the mother of Praveen Kumar regarding the incident who came to the hospital. On the same day in the evening, accused were taken to the Police Station and enquired the accused about the incident. He further stated that accused were taken to the spot and accused No.1 has narrated the incident to the police for assaulting Praveen Kumar with the stone used by him and produced the same and he has identified the said stone at the instance of accused persons as MO.1.

21. PW6-Ajit Kumar, the eye witness has stated in his evidence that PW1 is his father, PW5 is his elder brother, PW2 and PW3 are residing near his house and deceased Praveen Kumar was residing nearby his house. He stated that two years earlier to his evidence in the afternoon his father gave him Rs.55/- and told him to go to the grocery shop and bring some house hold articles. When he went to the shop, at that time, accused No.1 and 2 who were present before the Court were there and asked him to give the money. He told them that he will not give the money. Thereafter, accused Nos.1 and 2 assaulted and snatched the money from him. He went to inform the said incident to his family members, when he was on the way, he met Praveen Kumar and his brother Aravind Kumar who were returning from garage. He told them that the accused persons have snatched money from him. Praveen Kumar and his elder brother Aravind Kumar have brought him to the place where the accused persons have snatched the money, the accused persons were near Choura Church. He has shown the accused persons to Praveen Kumar and his brother Aravind Kumar. The deceased Praveen Kumar asked the accused persons to return back the money snatched by them but accused persons told that they will not return. When Praveen Kumar insisted the accused persons to return the money, accused No.1 assaulted him with hands on his face and blood started coming from his nose and he fell on the ground. When he and his brother Aravind Kumar went to rescue Praveen Kumar, at that time, accused have also assaulted him and Aravind Kumar. He further stated that accused No.1 assaulted Praveen Kumar with stone near his ear and head and accused No.2 assaulted Praveen Kumar with his hand. When Praveen Kumar was unable to get up, at that time, Aravind Kumar called Prasad the complainant-PW3 and thereafter, Praveen Kumar was shifted to St. John's Hospital. There the Doctors have told that Praveen Kumar is dead. He further stated that on the same day in the evening, the accused persons were taken to the police station. After enquiry by the police, the accused persons have admitted the incident. He further stated that the police have taken the accused persons to the spot where the mahazar was drawn. He identified his signature under Ex.P3 and Ex.P3(b) and stated that he has not seen MO1.

22. PW7-Stephen, eye witness has stated in his evidence that Ajith Kumar is his friend. He further stated that on 07.11.2010, in the afternoon Ajith Kumar had taken him to the shop near the Church and accused Nos.1 and 2 who are present before the Court have snatched Rs.55/- from Ajith Kumar. He and Ajith Kumar returned to inform the said fact to the family members of Ajith Kumar and on the way they met Aravind Kumar, brother of Ajith Kumar and Praveen Kumar. Ajith Kumar told them that accused persons have snatched money from him. Therefore, Aravind Kumar brother of Ajith Kumar and Praveen Kumar came to the spot and Praveen Kumar asked the accused persons 'Why they have snatched the money?' and told them to return the money and for that accused No.1

assaulted Praveen Kumar with hands on his face. At that time, when Praveen Kumar started to run, accused chased Praveen Kumar and accused No.1 assaulted him with stone on his head near his ear. Accused No.2 assaulted Praveen Kumar by his hand. He further stated that the stone used by the accused persons is identified by him as MO1 and he has identified Pant, Shirt, Underwear belonging to Praveen Kumar as MOs.2 to 4.

23. PW8-Prabhakaran, elder brother of deceased on information he has deposed that on 07.11.2010 at 4.30 p.m PW3 informed him that there was an accident for his brother Praveen Kumar and he is in St. John's hospital. He went to hospital and saw the dead body of the deceased.

24. PW9-Sreenivasan, cousin of deceased has deposed that he learnt that deceased Praveen Kumar was assaulted by some one on 07.11.2010 and admitted to St.John's Hospital where he went and saw dead body of the deceased.

25. PW10-Sharavana, cousin of the deceased has stated in his evidence that as he has come to know about the death of the deceased on 08.11.2010, he went and saw the dead body of the deceased in the hospital. When he enquired PW3 learnt that he was assaulted by accused persons.

26. PW11-K.Puttaswamy, Head Constable 2782 has deposed that along with Police Constable 1299, he went to the house of accused No.1 on 07.12.2010 at 9.30 P.M and on apprehension, accused No.1 was brought and produced before Police Inspector at 10.45 P.M and he has identified the report as Ex.P10.

27. PW12-S.Nagaraj, Police Constable has deposed that he went to St. John's Hospital on 23.11.2010 and brought Post Mortem report of the deceased. The clothes of the deceased and two viscera bottle are produced before Investigation Officer. He identified report as Ex.P11, Clothes as MOs.2 to 5 and bottles as MO.6.

28. PW13-Dr.Varghese has stated in his evidence that on 12.01.2011 police have sent one sealed article and requisition and requested to examine the said article and also to submit the report. He opened the said article and the same was cement block measuring 7 x 7 x 7 cms and the weight of the said article was 1 Kg. He examined the same. The Investigating Officer further questioned him Whether the same is a deadly weapon? After examination, he stated that said article is a deadly weapon and if a person is assaulted with that article, it is likely to cause the death of a person. He further stated that injuries appearing on the dead body of Praveen Kumar were likely to be caused death with said article. He conducted the autopsy of the deceased and opined that death was due to shock and hemorrhage as a result of head injury sustained. He identified the postmortem report-Ex.P12. The report submitted by the Doctor is identified as Ex.P13 and his signature as Ex.P13(a). He further stated that after examination, he returned the said article to the police and identified the said article as MO.1 and stated that if a person is assaulted with MO.1 on the head, it is likely that the person may die.

29. PW14- J.Venkatesh, Police Constable 6107 has deposed that on 07.11.2010 at 6.00 P.M he was deputed to carry FIR and delivered the same to Magistrate at 9.30 P.M.

30. PW15-H.Manjunath, Police Inspector and Investigation Officer who stated on oath that he has conducted earlier part of investigation and on examination he has stated that on 07.11.2010 when he was in the Police Station, the complainant-PW3 came to the Police Station and lodged a written complaint and registered the case in Crime No.342/2010 and submitted FIR to the Court. He further stated that on the same day, his officials have produced accused Nos.1 and 2 before him and has recorded their voluntary statement as per Exs.P17 and P8 respectively. He further stated that he has seized Rs.20 in presence of CW.3, CW.8 and CW.9 as per Ex.P4 Mahazar and identified the money seized by him as MO.7. He further stated that on 08.11.2010 accused persons have taken along with him, CW1 and panchas to the spot, there CW3 has shown the spot where the accused have snatched the money from him. He further stated that accused No.1 has shown the stone used by him for assaulting Praveen Kumar and he has seized the stone by drawing mahazar and identified the mahazar drawn by him as Ex.P3. He further stated that he has visited St. John's Hospital and conducted inquest mahazar of the dead body of Praveen Kumar and identified the inquest mahazar as Ex.P21.

31. PW16-Penchaliah is the inquest pancha to Ex.P21- Inquest Mahazar. Ex.P26 is the notice issued to inquest pancha.

32. PW17- Shahnaz Fathima, FSL Scientific Officer has deposed that on 30.11.2010, the Investigation Officer of Viveknagar Police Station has sent six sealed articles seized for examination in the case. The said article were intact and tallying with the samples sent by the Investigating Officer. She opened the said articles and said articles were 1) Stone 2) Baniyan 3) Jeans Pant 4) Belt 5) Underwear 6) Blood samples. She further examined the said articles and stated that articles 1 to 5 were having blood stains and the said blood stains was human with 'B' Group. The sample blood article No.6 was not fit for examination and for examining the article she has issued the certificate and identified the same as Ex.P27-FSL report.

33. PW18-Lokesh is the panch witness for Ex.P4- Mahazar for seizure of Rs.20/- from accused No.1. He identified Rs.20/- as MO.7.

34. PW19-H.K.Mahanand, Police Inspector has took up further investigation and conducted further investigation and has filed final charge sheet against accused Nos.1 and 2 under the provisions of Sections 323, 302 read with Section 34 of IPC.

35. PW20-Nanjegowda, Head Constable 1299 has deposed that on 07.11.2010 he and PW11 apprehended accused No.2 in his house and produced before the Police Inspector.

36. By careful perusal of aforesaid evidence of the prosecution material relied upon clearly depicts that as per Ex.P2-complaint filed by PW3-Prasad Kumar, has stated that somebody has assaulted Praveen Kumar and he was taken to hospital. When Aravind and deceased Praveen Kumar went to the spot and insisted the accused persons to return the money, accused No.1 punched on the face and chest of Praveen Kumar who fell down and thereafter accused No.1 assaulted the deceased Praveen with stone. The evidence of PW2, PW3, PW4, PW5 and PW7, the eye witnesses have stated that accused No.1 assaulted the deceased on his head with MO.1-Stone. MO.1- stone recovered at the

instance of accused No.1 as stated by the police officer, and Rs.20/- recovered and seized in the presence of CW.3, CW.8 and CW.9 from accused No.1 and all the witnesses and material documents clearly depicts that accused No.2 has assaulted the deceased Praveen Kumar with his hands. The entire material on record clearly depicts that accused No.1 assaulted the deceased with stone on his head and not by accused No.2. The learned judge proceeded to convict the accused persons mainly on the basis of the evidence of PW5, PW6, PW7 that accused persons assaulted the deceased and thereby, the deceased died. Therefore, provisions of Section 302 read with Section 34 of IPC attracts.

37. The fact remains that the material on record clearly depict that absolutely there is no overtact against accused No.2 with regard to assault on his head and thus Section 302 does not attracts. The entire case of the prosecution is that accused persons while assaulting the said Praveen Kumar died. From the evidence of eye witnesses PWs.5 to 7 and other material evidence and under Ex.P2 clearly indicate that only accused No.1 assaulted the deceased with stone MO.1 and accused No.2 only assaulted with his hand. It is also not in dispute that when CW3 went to the shop to get grocery, accused Nos.1 and 2 snatched Rs.55/- from CW3, who is PW6, and both accused Nos.1 and 2 were present. If there was no intention of accused No.2 it was required for accused No.1 to return the money. Unfortunately for snatching Rs.55/-, had ended with death of Praveen Kumar who is nowhere in the picture.

38. The material on record clearly proved that accused No.1 snatched Rs.55/- from CW3, accused No.2 was along with him, therefore the provisions of Section 323 read with Section 34 of IPC attracts. Considering the entire material on record, absolutely there is no material against accused No.2 to invoke Section 302 of IPC read with Section 34 of IPC as there was no pre-meditation on the part of accused No.2 had intention to kill the deceased. When there was an altercation between the accused persons, Praveen Kumar, Aravind Kumar and others, by sudden provocation accused No.1 assaulted the deceased with MO.1-stone. It is the evidence of the prosecution that accused No.1 assaulted the deceased with MO.1 and not by accused No.2 and accused No.2 assaulted only with hand. Therefore, there was no pre-meditation for accused No.2 or intention to assault the deceased. Therefore, the provision of Section 302 read with Section 34 of IPC would not attract to the accused No.2. The material on record clearly depicts that the learned judge proceeded to convict both the accused persons mainly based on the evidence of PWs.5, 6 and 7, Ex.P1, Ex.P2-complaint, Ex.P3-spot mahazar, Ex.P12-Postmortem report and inquest report without verifying the material on record whether there is any direct overtact against accused No.2. The material on record clearly depicts that accused No.2 has not committed the offence under Section 302 read with Section 34 of IPC. He has only accompanied accused No.1 who snatched Rs.55/- from Ajit Kumar-PW6, and he has assaulted with his hand to the deceased, thereby the provisions of Section 392, 323 read with Section 34 of IPC attracts.

39. On careful perusal of the record, the prosecution has failed to prove beyond reasonable doubt that accused No.2 has involved in the murder of deceased Praveen Kumar. At the most, he has to be invoked under the provisions of Sections 392, 323 read with 34 of IPC and therefore, the point raised in the present appeal has to be answered in part in the affirmative holding that accused No.2 has not involved in the incident and the impugned judgment and order of sentence insofar as

convicting accused No.2 under the provisions of Section 302 read with 34 of IPC and he has not made out any ground to interfere with impugned judgment and order of conviction sentencing him to undergo rigorous punishment for a period of one year and to undergo simple imprisonment for one month under the provisions of Section 392, 323 read with 34 of IPC.

40. The learned Senior Counsel for the appellant-accused No.2 relied upon the judgment in the case of State of A.P V/s Punati Ramulu and others reported in 1994 Supp (1) SCC Page 590 with regard to provisions of Section 302 wherein the Court considering the material on record, recorded the finding that the prosecution has not made out any case beyond reasonable doubt against accused No.2 with regard to provisions of Section 302 IPC r/w Section 34 of IPC. The judgment relied upon may not be applicable to accused No.2 in respect of offence punishable under Section 392 and 323 IPC.

41. For the reasons stated above, the impugned judgment and order of conviction passed against accused No.2 for the offence punishable under Section 302 r/w Section 34 of the Indian Penal Code, is set aside, Accused No.2 is acquitted for the offence punishable under Section 302 r/w Section 34 of IPC.

42. The learned judge has rightly convicted the accused No.2 for the offences punishable under Sections 392 and 323 r/w 34 of the Indian Penal Code, sentenced him to undergo imprisonment for a period of one year and to pay a fine of Rs.1,000/- and for a period of one month and to pay a fine of Rs.500/-.

43. The Accused No.2 has not made out any ground to interfere with the impugned judgment and order of conviction insofar as offences punishable under Sections 392 and 323 r/w Section 34 of the Indian Penal Code passed by the learned Sessions Judge in exercise of powers under Section 374(2) of the Code of Criminal Procedure. At this stage, it is brought to the notice of the Court that accused No.2 was in custody from 08.11.2010 to 07.05.2011 and from 21.11.2014 to 29.11.2015. Therefore, the accused No.2 shall be released under the provisions of Section 239 of the Code of Criminal Procedure, after following the Standard Operating Procedure, in accordance with law. The bail bond executed before this Court shall stand discharged.

Accordingly, the Appeal is disposed off.

Sd/-

JUDGE Sd/-

JUDGE LNN KCM-para 16,17,18.

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