Andhra Pradesh High Court - Amravati
B.T.Prasanna Raju vs State Of Andhra Pradesh, on 3 September, 2021
Bench: C.Praveen Kumar, B Krishna Mohan

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR
AND
THE HON'BLE SRI JUSTICE B. KRISHNA MOHAN

CRIMINAL APPEAL No. 903 of 2011
&
CRIMINAL APPEAL No. 23 of 2012

COMMON JUDGMENT:- (Per Hon'ble Sri Justice C.Praveen Kumar)

1) Heard Sri. R.N. Hemendranath Reddy, learned Senior Counsel appearing for the Appellant/Accused in Criminal Appeal No. 903 of 2011 and Sri. Sricharan Telaprolu, learned Counsel appearing for PW3 in Criminal Appeal No. 23 of 2012, through Blue Jeans video conferencing APP and with their consent, the appeals are disposed of.

2) Sole accused in Sessions Case No. 54 of 2006 on the file of I Additional Sessions Judge, Kadapa, is the Appellant herein. Originally, he was tried for an offence punishable under Section 302 Indian Penal Code ['I.P.C.'] for causing the death of one C. Venkateswarlu Raju ['deceased'], on 18.04.2005 at about 8.40 P.M. By its Judgment, dated 28.07.2011, the learned Sessions Judge acquitted the accused for the offence punishable under Section 302 I.P.C., but, however, convicted him for the offence punishable under Section 304-A I.P.C., and sentenced him to suffer rigorous imprisonment for a period of two years and to pay fine of Rs.5,000/- in default to undergo simple imprisonment for three months. Challenging the same, two appeals came to be filed. Criminal Appeal No. 903 of 2011 is filed by the Appellant/Accused against his conviction, while Criminal Appeal No. 23 of 2012 is filed by the elder brother of the deceased [PW3] questioning the acquittal of the accused under Section 302 I.P.C.

3) The facts, in issue, are as under:

i. The accused along with PW1 and PW2 were on guard duty at Officers Quarters at 11th Battalion, Bhakarapet. The accused and the deceased belong to one selection batch. By the date of incident, the deceased was working as Police Constable in the 11th Battalion of A.P.S.P., in Bhakarapet.

ii. On 18.04.2005, in the late evening, there was Sree Rama Navami deity procession in the quarters. The deceased participated in the said procession and, thereafter, came down and laid on a cot, which was in- front of the tent of the guard duty place. The duty of the police guards was from 6.00 P.M. to 6.00 A.M. of the next day. The deceased was not on duty then. iii. PW1 along with accused and PW2 was on guard duty from 18.04.2005 till 6.00 A.M. on 19.04.2005. The guards on duty were supplied with 303 Rifle and 50 live rounds of bullets each. Ex.P1A is the relevant entry in Ex.P1, showing the charge taken by PW1 and handing over of charge to the accused at 8.00 P.M. The said entry was signed by both PW1 and the accused. It is said that, after relieving himself of duty at 8.00 P.M., he went to his quarters on motorcycle and returned back to Officers Quarters guard duty at 8.30 P.M. While he was at his motorcycle, heard a sound of gun fire from the tent side of the Centry duty. Immediately, he proceeded there and asked the accused as to what happened. The accused is said to have informed him that his weapon got misfired. PW1 also noticed the deceased with fire injury on the left side of his chest and blood oozing out from back side. PW2 who was taking rest on another cot, woke up on hearing the sound. Meanwhile, Chenchu Ramaiah - the Reserve Inspector also came there and all of them asked the accused as to what happened. The accused reiterated his version stating that there was a misfire. PW4 also came there and asked the accused as to what happened, but the accused kept quiet for a while. Then, Chenchu Ramaiah [not examined] called for an ambulance through his handset. PW5 who was on emergency duty took the ambulance bearing no. AP 9B 1836 and proceeded towards the scene, where he found the deceased lying on a cot with a blood injury on the left side of the chest. Chenchu Ramaiah closed the guard and asked PW1 to hand over the accused, 303 Rifle and 49 live cartridges to the Duty Officer - Bojappa. PW1 and P.C.711 took the accused, weapon and handed over them to Bojappa [not examined]. iv. PW8 who was working as Commandant of XI Battalion on receiving the said information proceeded to Government Hospital, Kadapa, and was informed that the duty doctor examined the injured and declared him dead. He then went back to Bhakarapet and visited the scene of offence. He noticed blood stains and iron strings of the cot were snapped with blood stains at the scene of offence. He wrote a report to Sidhout Police and sent it through concerned. Ex.P6 is the complaint sent by him.

v. PW13 received a report on 19.04.2005 vide Ex.P6 through PW9, basing on which he registered a case in Crime No. 30 of 2005 for an offence punishable under Section 302 I.P.C. Ex.P11 is the First Information Report sent to the court. He posted a guard at the scene and further investigation was handed over to PW15 - Inspector of Police, who on receipt of the copy of Ex.P11, proceeded to the scene of offence and recorded the statements of PW8 and PW9. He also prepared an observation report of the scene in the presence of PW10 under Ex.P7 [seizure panchanama]. During the course of the said panchanama, he also seized M.O.2 [iron cot], M.O.9 [blood stained earth], M.O.10 [control earth], Ex.P2 [in and out register of 'B' Company] and Centry relieve book. Thereafter, he visited Government Hospital, Kadapa, and in the presence of PW7 conducted inquest over the dead body of the deceased from 8.00 A.M. Ex.P5 is the inquest report. During inquest, he examined PW3 and others and recorded their statements. The clothes of the deceased were seized during inquest. Thereafter, the dead body of the deceased was sent for post-mortem examination. vi. PW11 - the

Civil Assistant Surgeon at District Hospital, Kadapa, conducted autopsy over the dead body of the deceased and issued Ex.P9 - post-mortem certificate. According to him, the deceased appear to have died of cardio respiratory failure due to shock and hemorrhage due to injury to vital organ like heart and lungs. vii. PW15, who continued with the investigation, visited the quarters guard of 11th Battalion, verified the Register of 'B' Coy, which contained an entry dated 18.04.2005 made at 5.00 P.M., which show the accused took But No.898 of 303 Rifle, Mark-III along with 50 rounds of cartridges, signed against the entry and on 19.04.2005 at 7.00 A.M. H.C. Sailesh Raju deposited the above said rifle along with 49 live rounds and one empty case, as per orders of DC Headquarters. Ex.P2A and Ex.P3 are the relevant entries at Pg. No. 82 and 83. The said rifle was seized as M.O.1 and the empty case as M.O.3, under Ex.P8 [Panchanama]. Later on, he prepared a letter of advice to send the property for examination of Forensic Science Lab, but, however, in the meanwhile, the investigation was taken up by PW14. However, he placed on record Ex.P12 - letter of advice and Ex.P13 - opinion of RFSL, which indicates that M.O.1 - rifle was used and the range of fire is about more than four feet i.e., not a close range firing.

viii. PW14, who took up further investigation, arrested the accused on 18.05.2005, on the eve of his discharge from hospital as he sustained injuries when he jumped from the A.P.S.P. Building to commit suicide. After collecting all the necessary documents, PW14 filed a charge-sheet, which was taken on file as P.R.C. No.17 2005 on the file Judicial Magistrate of First Class, Sidhout.

4) On appearance of the accused, copies of documents as required under Section 207 Cr.P.C., came to be furnished. Since the case is triable by Court of Sessions, the matter was committed to the Sessions Court under Section 209 Cr.P.C. Basing on the material available on record, charge as referred to above came to be framed, read over and explained to the accused, to which, he pleaded not guilty and claimed to be tried.

5) In support of its case, the prosecution examined PW1 to PW15 and got marked Ex.P1 to Ex.P14, beside marking M.Os. 1 to 11. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. with reference to the incriminating circumstances appearing against him in the evidence of prosecution witnesses, to which he denied. In support of his plea, the accused got marked Ex.D1.

6) Believing the version of PW1 to PW5 coupled with RFSL opinion [Ex.P13] relating to usage of weapon and absence of any 'motive' being suggested, the learned Sessions Judge while acquitting the accused for the offence punishable under Section 302 I.P.C., held that it was a case of accidental firing and accordingly, convicted the accused for the offence punishable under Section 304A I.P.C. Challenging the same, these two appeals came to be filed.

7) (i) Sri. R.N. Hemendranath Reddy, learned Senior Counsel appearing for the Appellant/Accused would submit that there are number of circumstances to indicate that the incident did not happen in the manner suggested by the prosecution. According to him, an adverse inference has to be drawn for not sending the cartridges to Forensic Science Lab for its report. According to him, the evidence of the witnesses throws as to whether it was the accused who fired at the deceased, more so, when there was more than one person present in the tent. In the absence of any eye witness being present,

it is not safe to convict the accused. He further submits that there is any amount of doubt with regard to the weapon and cartridges used in the incident, more so, when discrepancies are noted in the evidence of the witnesses as to when and by whom the rifle and the cartridges were deposited.

(ii) In view of the circumstances pointed out, the learned Counsel submits that the trial court having acquitted the accused for the offence punishable under Section 302 I.P.C. and having found that it was only a case of accidental fire, ought to have invoked the provisions of the Probation of Offenders Act, 1958, before passing the sentence.

8) Sri. Sricharan Telaprolu, learned Counsel appearing in the appeal filed by PW3 would submit that the evidence of PW3 and PW5 amply establish that it was the accused who intentionally fired at the deceased. He further took us through the RFSL report and the opinion given thereunder to show that it was not a case of accidental fire. He further submits that when the accused fired at the deceased while he was lying on a cot, the Trial Court ought to have convicted the accused for the offence punishable under Section 302 I.P.C. He further submits that this appeal filed by the accused is not maintainable as the appeal filed by the State was dismissed at the admission stage, confirming the conviction and sentence.

9) Before dealing with the merits of the case, the first question which requires consideration is whether this appeal filed at the instance of the accused against his conviction under Section 304A I.P.C., is maintainable, when the appeal filed by the State for the offence punishable under Section 302 I.P.C., was dismissed?

10) It is to be noted here that, against the acquittal of the accused for the offence punishable under Section 302 I.P.C., the State preferred an appeal before this court vide Criminal Appeal No. 1079 of 2013. At the admission stage itself, the court went into the merits of the case and on 04.11.2013 dismissed the appeal, stating that the conviction under Section 304A I.P.C., needs no interference by the court. It would be appropriate to extract the findings given in paragraph no. 15 and 16, as under:

> "15. Insofar as offence under Section 304-A IPC is concerned, it can be said to be negligent or rash act. Any prudent person can be careful with a firearm and he has to follow all reasonable precautions in handling with firearm. Negligence is a gross and culpable neglect or failure to exercise the reasonable and proper care which was the imperative duty of the person accused of an offence to have exercised. The precautions which ought to have taken by the accused, have not been taken by him and thereby he was negligent in handling the firearm, resulting loss of a human being. Therefore, considering these aspects, the trial Court found the appellant/accused guilty of the offence punishable under Section 304-A IPC and that judgment needs no interference by this Court.
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> 16. Accordingly, the Criminal Appeal is dismissed at the stage of admission confirming the judgment, dated 28.07.2011, in Sessions Case No.54 of 2006 on the file of the I Additional Sessions Judge, Kadapa. Miscellaneous Petitions pending, if

any, in this Criminal Appeal shall stand closed."

11) The issue as to whether an appeal would lie at the instance of the accused came for consideration before the Hon'ble Supreme Court in Nirbhay Singh v. State of Madhya Pradesh1. Dealing with the issue, the Hon'ble Supreme Court in paragraph no. 4 and 5, held as under:

(1969) 2 SCR 569 "4. There is however no warrant for the argument that when an appeal preferred by a person convicted of an offence is dismissed summarily by the High Court under Section 421 of the Code of Criminal Procedure, the judgment of the trial Court gets merged in the judgment of the High Court and it cannot thereafter be modified even at the instance of any other party affected thereby, and in respect of matters which were not and could not be dealt with by the High Court when summarily dismissing the appeal. When the High Court dismisses an appeal of the person accused summarily and without notice to the State, the High Court declines thereby to entertain the grounds set up for setting aside the conviction of the accused. That judgment undoubtedly binds the accused and he cannot prefer another appeal to the High Court against the same matter in respect of which he had earlier preferred an appeal. But it is a fundamental rule of our jurisprudence that no order to the prejudice of a party may be passed by a Court, unless the party had opportunity of showing cause against the making of that order. When an appeal of a convicted person is summarily dismissed by the High Court the State has no opportunity of being heard. The judgment summarily dismissing the appeal of the accused is a judgment given against the accused and not against the State or the complainant. If after the appeal of the accused is summarily dismissed, the State or the complainant seeks to prefer an appeal against the order of acquittal, the High Court is not prohibited by any express provision or implication arising from the scheme of the Code from entertaining the appeal. Where, however, the High Court issues notice to the State in an appeal by the accused against the order of conviction, and the appeal is heard and decided on the merits, all questions determined by the High Court either expressly or by necessary implication must be deemed to be finally determined, and there is no scope for reviewing those orders in any other proceeding. The reason of the rule is not so much the principle of merger of the judgment of the trial Court into the judgment of the High Court, but that a decision rendered by the High Court after hearing the parties on a matter in dispute is not liable to be reopened between the same parties in any subsequent enquiry.

5. Cases do frequently arise where a person is charged at the trial with the commission of a grave or major offence and he is convicted of a minor offence, the conviction for the minor offence amounting to his acquittal for the major offence. Where an appeal against the order of conviction of the minor offence at the instance of the convict is entertained and decided, the State having opportunity of being heard on the merits of the dispute, in an appeal subsequently filed at the instance of the State against the order of acquittal, the High Court is precluded from reconsidering all those matters which were expressly decided or flow as a necessary implication of the earlier judgment. Any other view is likely to cause the gravest inconvenience in the administration of justice and the principle of finality of judgments would be sadly disturbed. If, for instance, against an order of acquittal passed for a grave offence, the State prefers an appeal and the appeal is summarily dismissed, it would be impossible to contend that thereby the accused is prevented from filing an appeal against the order of conviction. Similarly where the accused prefers an appeal against the

order of conviction of a minor offence and that appeal is summarily dismissed, the accused cannot prefer another appeal, but the State will not be precluded from preferring an appeal against the order of acquittal because the State had no opportunity of being heard at the earlier stage. Where, however, notice had been issued in an appeal at the instance of the accused and the State had an opportunity of being heard, the decision of the court will be regarded as a decision on the merits of the transaction which resulted in the conviction of the accused and that decision cannot be reopened in any subsequent enquiry. These principles are, in our judgment, supported by abundant authority.

12) From the above, it is very much clear that, against an order of acquittal passed for a grave offence, the State prefers an appeal and when the appeal is summarily dismissed, it cannot be said that the accused is prevented from filing an appeal against the order of his conviction against minor offence. Having regard to the judgment of the Hon'ble Apex Court referred to above and more particularly the contents in paragraph 5, the argument of the learned counsel appearing in Criminal Appeal No. 23 of 2012 that appeal itself is not maintainable may not be correct.

13) Coming to the merits of the case, it is now to be seen whether the conviction recorded under Section 304A I.P.C., warrants interference?

14) It is no doubt true that there are no eye witnesses to the incident and the case rests on circumstantial evidence. PW1, PW2 and PW4 are the three witnesses who proceeded to the scene of offence after hearing the gun shot sound. They noticed the presence of A1 with a weapon in his hand and the body of the deceased on the cot near to the accused with a wound on left side chest and blood oozing out from back side.

15) PW1 in his evidence deposed that, on 18.04.2005 at about 8.00 P.M., he handed over the charge to the accused and left to his quarters for dinner. He returned back at 8.30 P.M., and while he was standing at the vehicle, heard gun shot sound. He immediately proceeded towards the tent and found accused with his weapon and when enquired, the accused stated that there was misfire of his weapon. He noticed the deceased lying on a cot with a injury on left side of the chest and blood oozing out from back side. PW1 also speaks about the presence of PW2 in the tent at that time, but, PW2 who was sleeping, woke up on hearing the gun fire sound. When PW2 enquired the accused, the accused told him that his firearm misfired. PW4 also came there and also asked the accused why he did like that, but, however, the accused kept quiet. Then the Reserve Inspector Chenchu Ramaiah informed about the incident in handset, pursuant to which, an ambulance came and the injured was shifted to hospital. The said Chenchu Ramaiah also asked P.C.1033 and PW1 to hand over the accused, 303 Rifle and the remaining 49 live cartridges to the Duty Officer - Bojappa. His evidence also discloses about the seizure of M.O.3 - the shell fire cartridge at the scene, and also M.O.1 - the rifle used in the commission of the offence. Though, PW1 was cross-examined, nothing, in our view, has been elicited to discredit his testimony, except his opinion that that it was an accidental fire. Further, the witness states that the deceased was allotted a family quarter and he was not on guard duty on the date of incident. He further admits that, the deceased entered into the guard area, and he did not hear the accused uttering the words "THUMB KHONE ATAHHAI". It is said that, if there is no response for the said word, in the absence of Guard Commandant, Centry has to take decision. Such liberty is given to the Centry to safeguard the guard area and safeguard the camp area. To a

suggestion that to safeguard him, the accused coined with the liability was denied by him.

16) PW2 was present in the tent at time of incident, and he was lying on a iron cot on the northern side. According to him, at about 8.30 P.M. he heard the sound of gun fire. On hearing the same, he jumped from the cot and saw a firearm injury on the left side chest of the deceased and blood oozing out. The accused was standing near the cot, armed with 303 Rifle. He also speaks about accosting the accused as to what happened, to which the accused replied stating that his rifle misfired. The evidence of this witness corroborates the evidence of PW1 in all material aspects.

17) PW4 in her evidence deposed that her husband was working as Additional Commandant of XI Battalion and that they used to reside at the quarters allotted to them at Bhakarapet. A security guard tent was erected in front of their quarters and that she knows the accused and the deceased, in the case. According to her, on 18.04.2005, which was Sree Rama Navami day, while she was at her house, the procession of deity came to her house, at which point of time, she performed puja and, thereafter, she and one Indravani were talking with each other inside her house. At about 8.45 or 9.00 P.M., she heard a sound of firearm. She came out and saw the accused holding a rifle with his hand in a standard position and another constable lying on the iron cot with bleeding injury. When PW4 questioned the accused why he did so, he kept silent. The injured was identified as orderly constable. Thereafter, the injured was shifted to hospital. Nothing has been elicited in the cross-examination of this witness to discredit her version in-chief.

18) From the evidence of these three witnesses, it is very clear that it was the accused who was holding the firearm at the time when they went there and when he was questioned by PW1 and PW2, he informed them that there was a misfire from his gun. However, when PW4 questioned the accused, there was no response from him.

19) At this stage one of the arguments advanced by the learned counsel appearing for the accused is that, since the deceased was an intruder, there is every possibility of accused using the firearm at the deceased. We are not in a position to accept the same. The deceased and the accused are from the same battalion and known to each other. Things would have been different had the deceased was a stranger. Further, if he wants to use the firearm in the absence of any commandant, he can do so, but, before the use of the same, he should warn him by uttering the words "THUMB KHONE ATAHHAI". The evidence of PW1 would show that the accused never uttered those words before using the firearm.

20) At this stage, it would be useful to refer to the evidence of PW6, who in his evidence deposed that on 18.04.2005 he delivered 303 Rifle with But No. 898 with 50 live rounds of cartridges to the accused and made an entry at page 82 of the "B" Register to that effect. The accused is said to have signed in token of receipt of the same. Ex.P2 is the In and Out register of 'B' Company, and the relevant entry is Ex.P2A. Thereafter, on 19.04.2005, he handed over 303 Rifle with But No. 898 and 49 live cartridges. Ex.P3 is the relevant entry in the Register.

21) The learned Counsel for the Appellant tried to contend that this circumstance by itself does not establish the prosecution case, as there is every possibility of handing over one cartridge less to PW6

so as to implicate the accused in the crime. At first blush, the said argument appeared to be impressive, but, a close perusal of the record proved it to be otherwise. The answers elicited in the cross-examination of all witnesses does not anywhere suggest any 'motive' for implicating the accused falsely in the case. In-fact, no motive was suggested to any of the witnesses to speak falsehood against the accused. All the suggestions given were with regard to the manner in which the rifle was used etc., and the same were denied. In-fact, PW6 categorically stated that, on 19.04.2005, he gave a complaint to the Duty Officer about non-return of rifle and live cartridge within half-an-hour after completion of his guard duty and, accordingly, Chenchu Ramaiah returned the weapon and cartridge given to the accused, but, he has not signed in Ex.P3 Register on that night. But, however, while giving evidence he speaks about handing over of the live cartridges and weapon on the next day and non-mentioning of time in Ex.P2. This circumstance, in our view, may not go to the root of the matter so as to throw out his entire version as false, more so, when he was treated hostile only when he mentioned that Ex.P2 register was seized on 20.04.2005 at 5.00 P.M. but in the cross- examination by Additional Public Prosecutor, he admits that it was seized on 19.04.2005 at 5.00 P.M. itself.

22) At this stage, it was argued that the version of the investigating officer - PW15 and the evidence of PW6 that the register was seized on 19.04.2005 cannot be believed because by the date of making seizure, entry at page no. 83 shows an entry dated 20.04.2005, which probabilizes that on 19.04.2005 a seizure entry was made with anti date of 20.04.2005. It is to be noted here that, whether the seizure was on 19.04.2005 or 20.04.2005 with anti-date does not assume much importance to doubt the prosecution case. It is the specific case of the prosecution that under Ex.P2A, the accused himself signed in respect of taking of M.O.1 - rifle and 50 live cartridges and only 49 cartridges were found with the accused. Neither PW1, PW2, PW4 nor to any other witness, it was suggested that the accused handed over 50 live cartridges and that the version of the prosecution that only 49 cartridges were handed over is false. This circumstance coupled with the fact that M.O.3 - empty shell was recovered at the scene, stands establish that it was the accused who fired at the deceased.

23) At this stage, it is also to be noted that, immediately after the incident, PW1, PW2 and PW4 proceeded to the scene and noticed the accused standing with the weapon and when questioned, he confessed about misfire of the weapon. This statement of the accused can also be treated as an extra-judicial confession and the same can be believed as it was made before persons who had neither enmity or ill-will to speak against the accused nor was it suggested to these witnesses that they are intentionally speaking false.

24) Coming to the M.O.1, [the weapon used], the Counsel mainly relied upon the entry in Ex.P13, wherein, there is a reference to No. 3903. Having regard to the above entry, it is urged that the rifle which was seized and the rifle which was used are different. But the entry in Ex.P2A show that what was given to the accused was a rifle having But No. 898 and what was deposited later on is also a rifle But No. 898. The same is also reflected in seizure panchanama by PW15, which is marked as Ex.P8. No. 3903 which is reflected in Ex.P13 was with reference to Maxine, which was found with the rifle. Therefore, it cannot be said that the prosecution tried to change the number so as to connect the accused with the crime.

25) Coming to the competency of rifle to fire, Ex.P13 report categorically states that the analyst testified and it fired well and its action mechanism was in perfect condition. At this stage, it would be refer to Order 522 of Police Manual. The order refers to the common causes for accidents of fire arms. Various reasons are given for accidental misfire of fire arms. When misfiring of firearm takes place, the culpability is attributable to the person maintaining it and holding it.

26) One another circumstance, which supports the case of the prosecution is the evidence of PW11 and contents of Ex.P9 - the post-mortem report, wherein the entry wound is over the left lower chest 7 cms., below the medial of the left nipple 6 cm., lower end of sternum round in shape, 7 cms., in diameter, margins charred and contuse, edges inverted going deep into thoracic cavity. Whereas the exit wound was penetrating firearm injury on the upper part of the back on the left side 15 cm., below the occipital protuberance 16 cm., medial to the left shoulder. From the above, it is clear that the bullet entry was at the lower end of sternum, which passed upward in the body and came out of the body of the deceased in the upper part of the back. The angular passage of the bullet show that the firing on the deceased was while he was lying. If firing was done against the deceased while he was standing, the entry and exist wounds would at the same height of the body without any angle.

27) Therefore the placement of entry and exit wound makes it clear that the incident in question took place while the accused was in standing position and the deceased was lying on cot, which is the case of the prosecution. From the circumstance referred to above, it is clear that the incident in question took place and the accused is responsible for the same.

28) At this stage, the learned counsel for the appellant in Crl. A. No. 23 of 2012 vehemently submits that this is a case where the accused should have been convicted for the offence punishable under Section 302 I.P.C.

29) In order to constitute an offence under Section 302 I.P.C., it is to be seen from the evidence of the prosecution witnesses, whether their evidence discloses any motive or intention for the accused to cause death of the deceased or the injury with knowledge that it is sufficient in ordinary course of nature to cause death.

30) As stated, the learned Counsel for the Appellant relies upon the evidence of PW3, who admittedly is not an eye witness to the incident. PW3 in his evidence deposed that, on 18.04.2005 at about 9.00 or 10.00 P.M., he received a phone call from a Constable, who informed that due to gun fire by the accused against the deceased, he received injuries and taken to the hospital. On such information, PW1 proceeded to the Government Hospital, where he came to know about the death of the deceased. His enquires revealed that the deceased went to the security post tent and laid on the cot, then the accused opened fire and that the accused is responsible for the death. He is not an eye witness to say that the accused intentionally opened fire at the deceased. He does not disclose the source of the said information as well.

31) Similarly, PW5 is also not an eye witness to the incident. He came to know on receipt of a phone call from the Commandant for bringing an ambulance to the scene. In cross-examination, he admits that he did not enquire any person who witnessed the opening of fire by the accused. He further

admits that, by the time he went to the guard duty place, the Commandant was not present and with the help of the persons present he took the injured to the hospital.

32) The evidence of these two witnesses do not anywhere indicate that the accused fired at the deceased intentionally with a view to cause his death. As stated by us earlier, none of the witnesses speak about any enmity or ill-will between the accused and the deceased. Further, in the Criminal Appeal filed by the State against the acquittal of the accused under Section 302 I.P.C., this court dismissed the same at the admission stage.

33) Having regard to the above and in view of the evidence of PW1, PW2 and PW4, before whom the accused is said to have confessed as to the manner in which the incident took place, the finding of the trial court convicting the accused for the offence punishable under Section 304A I.P.C., cannot be found fault with.

34) At this stage, the learned counsel for the Appellant submits that since the entire incident occurred in an accidental manner and there is no mens rea, pleads that the Appellant may be released under Probation of Offenders Act, 1958.

35) The Appellant herein is convicted for the offence punishable under Section 304A I.P.C. and the maximum punishment, which can be awarded is two [02] years, or with fine, or with both.

36) Section 3 of the Probation of Offenders Act, reads as under:

> "3. Power of court to release certain offenders after admonition.--
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> When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.
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> Explanation.--For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4."

37) Similarly, Section 4 of the Probation of Offenders Act, reads as under:

> "4. Power of court to release certain offenders on probation of good conduct.--

(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

38) It appears from the record that there is no previous conviction against the accused. To release a person under the provisions of the Probation of Offenders Act, the court shall take into consideration the report, if any, of the Probation Officer concerned in relation to the case. As stated by the Hon'ble Apex Court in Dalbir Singh v. State of Haryana2 AIR (2000) SC 1677 that, if the court

forms the opinion that it is expedient to release the offender on probation for his good conduct regard being had to the circumstances of the case. One of the circumstances which cannot be sidelined in forming the said opinion is "the nature of the offence". Thus Section 4 can be resorted to when the court considers the circumstances of the case, particularly the "nature of the offence" and the court forms its opinion that it is suitable and appropriate for accomplishing a specified object that the offender can be released on probation of good conduct.

39) In view of the findings, we hold that the conviction of the accused for the offence punishable under Section 304A I.P.C., warrants no interference. In a case punishable under Section 304A I.P.C., one cannot infer any mens rea or guilty intention. It is also to be noted here that the maximum punishment that can be imposed for an offence punishable under Section 304A I.P.C., is two [02] years. Having regard to the above, we feel that it is a fit case to invoke the provisions of the Probation of Offenders Act while maintaining the conviction under Section 304A I.P.C. Accordingly, Criminal Appeal No. 23 of 2012 filed by PW3 seeking conviction for the offence punishable under Section 302 I.P.C., is dismissed, while Criminal Appeal No. 903 of 2011 filed by the accused is allowed to the extent indicated above.

40) At this stage, it is to be noted that in order to release a person under Probation of Offenders Act, the court invoking the provisions of the Act, shall call for a report from the Probation Officer and then pass orders in terms of the provision of the Act.

41) Sri. R.N. Hemendranath Reddy, learned Senior Counsel appearing for the Appellant/Accused submits that since the Appellant is residing in Kadapa, a report may be called for from the Probation Officer of Kadapa District.

42) The learned Public Prosecutor on instructions submits that there is no Probation Officer in Kadapa District and, as such, pleads passing of an Order in terms of Section 13 (2) of the Probation of Offenders Act.

43) In view of the representation made by the learned Public Prosecutor, the District Magistrate, Kadapa, or any other person authorized by him or any person appointed by him to act as Probation Officer, shall submit a report to this court in terms of the provisions of the Probation of Offenders Act, in respect of the Appellant, within a period of two weeks from today, so as to enable this court to pass appropriate orders, on the terms on which he has to be released.

44) Further, the learned Public Prosecutor as well as the Counsel for the Appellant or the Appellant shall communicate a copy of this Order to the District Magistrate, Kadapa, for taking necessary steps in this regard. It is needles to mention that the Appellant/accused shall cooperate with the authorities, enabling them to send the report to this court at the earliest.

_____ JUSTICE C. PRAVEEN KUMAR

_____ JUSTICE B.KRISHNA MOHAN Date: 03.09.2021.

SM/ THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR AND THE HON'BLE SRI JUSTICE B. KRISHNA MOHAN CRIMINAL APPEAL No. 903 of 2011 & CRIMINAL APPEAL No. 23 of 2012 (Per Hon'ble Sri Justice C.Praveen Kumar) Date: 03/09/2021 S.M.