

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

TUESDAY, THE TWENTY SIXTH DAY OF APRIL
TWO THOUSAND AND SIXTEEN

(26.04.2016)

PRESENT

**THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
&
THE HON'BLE SRI JUSTICE M.S.K.JAISWAL**

CRIMINAL APPEAL No.1089 of 2010

Between:

Mingi Pottaiah @ Nandigama Pottaiah

..... APPELLANT/ACCUSED

AND

State of A.P., rep.by Public Prosecutor,
High Court, Hyderabad

.....RESPONDENT

Counsel for the Appellant : **Sri K.VENKATESH GUPTA**

Counsel for the Respondent : **PUBLIC PROSECUTOR (TS)**

The Court made the following:

**THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
&
THE HON'BLE SRI JUSTICE M.S.K.JAISWAL**

CRIMINAL APPEAL No.1089 of 2010

JUDGMENT: (per Hon'ble Sri Justice C.V.Nagarjuna Reddy)

This appeal is filed against judgment, dated 16.04.2010, in S.C.No.411 of 2009, on the file of the Sessions Judge, Mahabubnagar, whereby, the appellant/sole accused was convicted for the offence under Section 302 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs.500/- (Rupees five hundred only), in default to undergo simple imprisonment for a period of six months.

2. For convenience, the appellant is referred to as "the accused". In brief, the case of the prosecution is as follows:

On 30.01.2009 at 17.00 hours one Pomala Yellappa, the brother-in-law of the deceased Pomala Yadamma, gave a report to the police at the police station, Shadnagar, stating that the wife of his paternal uncle's son was found missing for the last 5 days, that on 30.01.2009 at about 16.00 hours he came to know that the dead body of an unknown female person was lying at Gundlakunta, situated in the limits of Hajipally village, and that on the said information, he along with his co-villager Yenugu Anantha Reddy (PW 2) went to the said place and identified the dead body as that of Yadamma, that the dead body was highly putrefied and lying in the bushes. He expressed suspicion over the death. On receipt of the said report, PW 8 examined and recorded the statement of the *de facto* complainant (PW 1) in the police station, visited the scene of crime, got the same as well as the dead body photographed, examined and recorded the statements of PWs 2 and 3 and LWs 3 and 5. He has conducted scene of crime panchanama, in the presence of PW 5 and LW 8 and seized the towel tied around the neck of the deceased. PW 8 conducted inquest over the dead body of the deceased in the presence of PW 5 and LW 8 and subjected the dead body for post mortem examination at the Government Civil Hospital, Shadnagar. PW 7 who conducted autopsy over the dead body has issued Ex.P6 post mortem

report, wherein he has opined that the cause of the death was due to asphyxia from strangulation pending his final opinion. Based on the said short opinion, PW 8 altered the section of law from Section 174 Cr.P.C to Section 302 IPC and issued express alteration memos. Thereafter, PW 9 took up further investigation and based on the statement of PW 4, the accused, who was found absconding was strongly suspected. PW 9 deputed circle I.D.party to apprehend the accused. Meanwhile, on 10.02.2009 at 15.30 hours the I.D.party apprehended the accused at his house and brought him to the Circle Inspector's Office, Shadnagar and produced him before PW 9. On interrogation, when the accused was about to confess the crime, PW 9 secured the presence of LW 9 and PW 6 and recorded the confessional statement of the accused. The accused thereafter led the mediators and PW 9 to the scene of offence and re-constructed the scene, with respect to which, a panchanama was drafted. PW 9 has brought the accused to the Circle Inspector's Office at Shadnagar at 19.00 hours, arrested and produced him before the Judicial Magistrate.

3. After receipt of the viscera analysis FSL report, PW 7 has furnished his final opinion stating that the cause of the death of the deceased was due to asphyxia from strangulation. The investigation by the police revealed that the wife of the accused has deserted him about 10 years ago and eloped with someone and since then the accused was having illicit intimacy with a widow by name Chandramma and was living with her and he was in the habit of having sex with prostitutes after consuming toddy. The deceased Yadamma is a widow and was stated to be involved in prostitution at Shadnagar. She has got acquaintance with the accused by participating in sex with him. 15 days prior to the occurrence, the accused paid Rs.500/- cash to the deceased at the toddy shop situated at Hajipally cross roads, at Shadnagar after she agreed to accompany him to the outskirts of the village for satiating the sexual desire of the accused. But after taking

the amount, she did not satisfy the lust of the accused and went away. Five days thereafter the deceased met the accused at the same toddy shop of Shadnagar and a quarrel ensued between them as the accused demanded return of Rs.500/- paid to her. PW 4 witnessed the quarrel and pacified them. Five days thereafter, the deceased met the accused at the toddy shop and both of them consumed toddy and the deceased went with the accused to the scene of crime, situated in the limits of Hajipally village, chose by them as ideal place for their activities at about 18.00 hours and the same was witnessed by PW 4.

4. After reaching the scene of crime, when the accused asked the deceased to lie down, she asked the accused to pay the money. The accused questioned the deceased as to why she was demanding money again as he has already paid her the amount 10 days ago. As the deceased did not relent, her conduct annoyed the accused, and with an intention to kill her, the accused put his towel around her neck and strangled her to death by sitting on the deceased. After completion of investigation, PW 9 filed the charge sheet.

5. The accused denied the commission of offence and chose to be tried. The prosecution examined PWs 1 to 9 and marked Exs.P1 to P13. It has produced M.O.1. On behalf of the defence, no oral evidence was let in, however, Ex.D1 was marked. On appreciation of oral and documentary evidence, the lower Court has disposed of the case in the manner, as stated above.

6. At the hearing, the learned counsel for the accused has submitted that the prosecution has miserably failed to establish the necessary links in the chain of circumstances to prove the guilt of the accused, that the prosecution case based on last seen theory by PW 4 remained unsupported by the said witness as she has deposed that she has seen the accused and the deceased 15 days prior to the death of the deceased and therefore, there is no proximity between the time

when PW 4 allegedly last saw the accused and the deceased together and the time of the death of the deceased, and therefore, the last seen theory set up by the prosecution has no application to the facts of the present case. He has further argued that Ex.P4, the alleged confessional statement of the accused, did not lead to the discovery of any material, including the body of the deceased, and therefore, the said statement is not admissible in evidence and it does not in any manner help to the prosecution, that barring the evidence of PW 4 and Ex.P4, there is no evidence whatsoever on record to link the accused with the alleged crime and as the two pieces of evidence are of no help to the prosecution, the lower court has erroneously convicted the accused.

7. On the other hand, the learned Public Prosecutor made strenuous efforts to sustain the judgment of the lower Court.

8. We have carefully considered the respective submissions of the learned counsel for the parties and perused the material on record.

9. The case of the prosecution is based on circumstantial evidence and the last seen theory. The motive alleged by the prosecution is the alleged quarrel between the accused and the deceased over the refusal of the latter to oblige the accused to satisfy his sexual desire after her taking Rs.500/- from the accused. Though in the charge sheet, it is alleged that the deceased was living on prostitution, none of the witnesses spoke to this fact. On the contrary, PW 4, who was the co-labourer of the deceased, and the main witness for the prosecution, denied the suggestion that the latter was a prostitute and that she does not do any cooli work. She did not utter a word about the deceased being prostitute or that the quarrel between her and the accused was in connection with sexual affair. In the absence of any evidence to show that the deceased was living by prostitution and that a quarrel ensued between her and the accused in that connection, the whole edifice of the prosecution case will crumble.

10. In a case based on circumstantial evidence, motive plays an important role and the prosecution failed to establish motive for the accused to kill the deceased.

11. As noted hereinbefore, the main case of the prosecution is rested on the evidence of PW 4, who was examined to establish the last seen theory. PW 4 has stated in her evidence that about 15 days prior to the death of the deceased, she saw the accused and the deceased in a corner at Shadnagar and they were altercation with regard to some amount, that after she advised both of them not to quarrel, they have invited her to consume toddy and she went away saying that her daughter was unwell. She deposed that thereupon, both the accused and the deceased went away, and after 5 days, she came to know that the deceased died. There is an inherent contradiction in the evidence of PW 4. At one place, she stated that about 15 days prior to the death of the deceased, the above mentioned incident has happened during which she has last seen the deceased and the accused, whereas at another place, she stated that 5 days after the above incident, she came to know about the death of the deceased.

12. In order to succeed on the plea based on last seen theory, the prosecution must establish the close proximity between the time when the witness has last seen the deceased and the time of the death of the deceased. Even if we consider one of the two conflicting statements of the witness that she has seen the accused and the deceased 5 days prior to the death of the latter, the time gap is too long rendering the last seen theory wholly inapplicable. It could quite well be that anything might have happened during those 5 days and it is not safe to presume that the deceased has not come into contact with anybody other than the accused during those 5 days.

13. On a careful consideration of the evidence of PW 4, we are

unable to accept the last seen theory, set up by the prosecution. If we discard the evidence of PW 4, there is no other evidence which can link the deceased with the accused.

14. Coming to the alleged confessional statement, under Section 26 of the Indian Evidence Act, no confession made by any person whilst he is in police custody unless the same is made in the immediate presence of a Magistrate shall be proved against such person. However under Section 27 of the said Act, when any fact is deposed or discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, alone is deemed to be proved.

15. From the evidence of PW 1, as well as that of PW 9, it is clear that on identifying the body as that of the deceased, PW 1 has given Ex.P1 report to the police on 30.01.2009. 11 days later i.e., on 10.02.2009 the police have apprehended the accused and recorded Ex.P4 statement. Nothing was recovered as a consequence of the confessional statement of the accused. Therefore, the statement is hit by the provisions of Section 26 of the Evidence Act.

16. Once the evidence of PW 4 and Ex.P4 are eschewed from consideration, no other evidence is available to connect to the accused to the crime.

17. In the light of these facts, it is unnecessary for this Court to deal with the other aspects relating to medical evidence etc. The Court below has committed a serious error in convicting the accused in the absence of evidence to prove his involvement in the commission of offence. Hence the conviction and sentence of the accused cannot be sustained and the same are accordingly set aside. The Criminal Appeal is accordingly allowed. The accused shall be forthwith released from the custody, if he is not required in any other case or

crime. The fine amount, if any, paid by him shall be refunded to him.

C.V.NAGARJUNA REDDY,J

M.S.K.JAISWAL,J

Date:26.04.2016

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