

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE G.SHYAM PRASAD
Criminal Appeal Nos.1122/10 & 488/14

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Dated 11th July, 2016

Between:

Osman Bin Ali @ Osman and others

.....Appellants

And

The State of A.P., rep.by
the Public Prosecutor,
Hyderabad

.....Respondent

Counsel for the Appellants: Ms.Naseeb Afshan

Counsel for the Respondent: Public Prosecutor

The Court made the following:

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

Since both these appeals arise out of common judgment in S.C.No.443 of 2009, on the file of the learned II Additional Metropolitan Sessions Judge, Hyderabad, they are heard and being disposed of together.

Criminal Appeal No.1122 of 2010 is filed by accused Nos.1, 2 and 4; and Criminal Appeal No.488 of 2014 is filed by accused No.3 in

the above-mentioned Sessions Case. The case of the prosecution in brief is as under:

PW.1 is the elder brother of one Mohammed Asif Pasha (hereinafter referred to as 'the deceased'). On 03.10.2008 at about 9.00 pm, when PW.1 was not at home, a quarrel took place between the deceased and accused Nos.1 to 3, and by the time PW.1 returned home at about 9.30 pm, the deceased left the house. At about 10.00 or 10.30 pm, another quarrel took place between the family members of the deceased and accused Nos.1 to 3. Meanwhile, Rajendra Nagar Police came and took away the father of the deceased and accused Nos.1 to 3. On the next day i.e., 04.10.2008 at about 8.30 or 9.00 pm, PW.1 received a call from PW.2 that his brother was riding the scooter of PW.4 and he along with one Imran was sitting behind him as pillion riders, and that after having tea, on their return journey, they stopped the scooter and Imran went to purchase medicine, and meanwhile, about six to seven persons raised slogans and attacked the deceased, and that due to fear, he ran away. That PW.2 did not know who were those assailants nor could identify them, that when he returned with Imran, no one was there and the scooter was also missing. Then, PW.1 went to Bahadurpura Police Station and informed the incident. Later, on the advice of PW.13, Inspector of Police, Bahadurpura Police Station, he went to Rajendra Nagar Police Station and as he did not find his brother there, he returned and lodged a typed report in English with the Bahadurpura Police. PW.13 registered the same as Crime No.256 of 2008 under Section 363 r/w 34 IPC and issued express FIR, Ex.P10. Ex.P1 is the report given by PW.1. On 05.10.2008, PW.13 took up the investigation. He received a message from the main control room about an unknown dead body lying at Dattatreyanagar, Asifnagar, Hyderabad. Out of suspicion, he sent PW.1 and other relatives, who identified the dead body to be that of the deceased.

PW.7, Police Constable, Asifnagar Police Station was on patrolling duty and on the intervening night of 4/5.10.2008 at about

3.00 am, he got a message on his walkie-talkie alerting about suspicious movements of some suspected persons at Dattatreya Pahad. At about 5.30 pm or 6.00 pm, he found the dead body of a male person aged about 20 to 25 years with bleeding injuries on the back of the head and chest near Hanuman Temple. He kept the other constable as guard near the dead body, came back to the Police Station and lodged an English typed report. PW.12, SI of Police, Asifnagar Police Station registered the same as Crime No.410 of 2008 under Sections 302 and 201 of IPC and issued express FIR to all concerned. Ex.P9 is the express FIR issued by him. Ex.P3 is the report given by PW.7. Then, the Inspector of Police, Asifnagar took up investigation, visited the scene of offence, prepared scene observation panchanama, rough sketch and seized the scooter and two boulders in the presence of mediators. He also conducted inquest over the dead body. Ex.P4 is the scene observation panchanama and Ex.P5 is the rough sketch. Ex.P6 is the inquest report. He then sent the dead body for autopsy. PW.11 is the Doctor who conducted the post mortem of the dead body and found about 15 injuries. She opined that the deceased might have died due to injury Nos.13 to 15. She further opined that the time of death could be 12 to 24 hours before the autopsy. She issued Ex.P8, post mortem certificate.

On 06.10.2008, PW.13 received the investigation record from the Asifnagar Police Station. On 13.10.2008, accused No.1 to 5 surrendered before him. He then recorded the confessional statements of the accused and seized the auto at their instance in the presence of the mediators. PW.10 and another acted as mediators. Exs.P11 to P15 are the admissible portions of the confessional statements of the accused. Since some hair strands were found in the hands of the deceased, he sent the accused to the hospital and got collected their hair strands. He then produced the accused in the Court for being sent to judicial custody. After receiving the FSL report and the post mortem report, he laid charge sheet for the offences

punishable under Sections 364, 302 and 201 r/w 34 IPC.

As the accused have denied the charges, the prosecution examined PWs.1 to 13 and got Exs.P1 to P17 marked and produced MOs.1 to 6. On behalf of the defence, no evidence was adduced.

As accused No.5 has absconded, the case against him was split up. On appreciation of oral and documentary evidence, the trial Court convicted accused Nos.1 to 4 to undergo life imprisonment and to pay a fine of Rs.500/- each, in default to suffer simple imprisonment for one month each for the offence punishable under Section 302 r/w 34 IPC. It has also convicted them for the offence under Section 364 r/w 34 IPC and sentenced them to undergo rigorous imprisonment for seven years and to pay fine of Rs.500/- each, in default to suffer simple imprisonment for one month; and rigorous imprisonment for five years and to pay a fine of Rs.250/- each, in default to undergo imprisonment for two weeks for the offence under Section 201 r/w 34 IPC.

At the hearing, Ms.Naseeb Afshan, learned counsel for the appellants in CrI.A.No.1122 of 2010, and Sri Surepalli Madhava Rao, learned counsel for the appellant in CrI.A.No.488 of 2014, submitted that the prosecution failed to produce any evidence to connect the accused to the alleged offence and that in the absence of any such evidence, the trial Court has committed a serious error in convicting the appellants for various offences and imposing on them different sentences, including imprisonment for life. They have further submitted that the trial Court has drawn unwarranted inferences in holding that the appellants are guilty of kidnapping and murdering of the deceased; and also for trying to cause disappearance of evidence.

The learned Public Prosecutor (TS) has made efforts to sustain the judgment of the trial Court.

We have carefully heard the learned counsel for the parties and perused the record.

This is a case based on circumstantial evidence. As per the settled legal position, in order to succeed, the prosecution has to

establish all the links in the chain of circumstances. The foremost link in the chain of circumstances is 'motive'. PW.1, who is elder brother of the deceased, deposed that on 03.10.2008 at about 9.00 pm, a quarrel took place between the deceased and accused Nos.1 to 3 at the former's house, that at that time he was not present at the house, that he came to his house at about 9.30 pm, by which time, accused Nos.1 to 3 assaulted his father also and the deceased went away from the house. He has further deposed that at about 10.00 or 10.30 pm on the same night, another quarrel between the family members from both sides took place and Rajendra Nagar Police came to the spot and took away PW.1's father and accused Nos.1 to 3. He has further deposed that on 04.10.2008 at about 8.30 or 9.00 pm, he has received a phone call from PW.2 who informed him that six persons caught hold of the deceased at Kishanbagh and took him away in an auto rickshaw and that he went to the Police Station, Bahadurpura and informed about the incident and on the advice of the Inspector of Police, Bahadurpura he went to Rajendra Nagar and as he has not found his brother, he returned to Bahadurpura and lodged typed written complaint with his signature (Ex.P1).

Though in the charge sheet, it was alleged that on 03.10.2008 at about 8.00 or 9.00 pm, the deceased and his friends were sitting on pial of his house taking liquor and creating nuisance and that the objection by accused No.1 for the said behaviour of the deceased led to commission of offence in the following night, no prosecution witness has spoken to the said facts. Except PW.1, no other witness has referred to the alleged quarrels on 03.10.2008. On his own showing, PW.1 was not present when the alleged quarrel at 9.00 pm on 03.10.2008 had taken place. The prosecution has not produced any evidence to show that any crime was registered on the alleged incident on 03.10.2008. Therefore, the case of the prosecution on the aspect of motive remained unsubstantiated by any of the prosecution witnesses. In the absence of any shred of evidence produced by the

prosecution, it is difficult to accept the *ipsi dixit* reflected in the charge sheet regarding the motive. In our opinion, the prosecution failed to establish one of the vital links in the chain of circumstances i.e., motive.

As regards the evidence linking the accused to the alleged offence, the only person who allegedly witnessed the accused attacking the deceased is PW.2. However, his evidence is absolutely of no help to the prosecution case. He has deposed that the deceased came to his house on 03.10.2008 at 11.00 pm and stayed there, that on 04.10.2008 at 8.00 pm, he along with the deceased and one Imran went to a place called Akbar function hall on the scooter of PW.4 and that while returning from the said place, they have stopped their scooter for purchasing medicines and when Imran went to medical shop, some six or seven persons came to them raising slogans and assaulted the deceased and that on seeing the same due to fear, he ran away. He has specifically stated that he did not know the assailants and he cannot say as to whether any of the accused were in the assailants. Surprisingly, the prosecution has not treated this witness as hostile and confronted him with his statement under Section 161 Cr.P.C.

The only other witness worth mentioning is PW.5 who is the owner of auto rickshaw bearing No.AP10B 5939, in which the deceased was allegedly taken by the accused after attacking him. He has deposed that about one year ago at about 10.00 am, he has entrusted his auto to accused No.5 on hire, that five days later, he came to know that the said auto was seized by the police and kept in Bahadurpura Police Station. In the cross-examination, he has stated that he does not know accused No.5 directly and that he was doing business in auto rickshaws on hire.

While the oral evidence discussed above does not even remotely prove the participation of the accused in the commission of the offence, under Ex.P16, seizure report, auto referred to above was

seized in the presence of accused No.5. Except the alleged confessional statement of accused Nos.1 to 5, no other evidence was produced by the prosecution to prove the involvement of the accused in the commission of the offence. In view of Section 27 of the Indian Evidence Act, 1872 Exs.P11 to P15 have no evidentiary value except to the extent of discovery of the objects in consequence of information received from the accused. Though the alleged confessional statements leading to discovery of auto is admissible to that extent, mere recovery of auto does not in any manner prove the culpability of any of the accused including accused No.5 as the prosecution failed to prove through any evidence that the accused have used the said auto for committing the offence of kidnapping of the deceased and eventually killing him. In the absence of any evidence whatsoever, the trial Court fell into serious error in convicting the accused based on unsustainable inferences and baseless conjectures and surmises. In the light of the above discussion, the conviction and sentence of the appellants cannot be sustained in law.

In the result, the Criminal Appeals are allowed. The conviction and sentence recorded against the appellants in the judgment, dated 06.08.2010, in Sessions Case No.443 of 2009, on the file of the learned II Additional Metropolitan Sessions Judge, Hyderabad for the offences punishable under Sections 364, 302 and 201 r/w 34 IPC., are set aside. Consequently, the appellants shall be set at liberty forthwith, if they are not required in any other case or crime and the fine amount, if any, paid by them shall be refunded to them. Material Objects shall be disposed of by the trial Court according to law.

C.V.NAGARJUNA REDDY, J

G.SHYAM PRASAD, J

11th July, 2016
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