

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

THE HON'BLE SRI JUSTICE G.SHYAM PRASAD

CRIMINAL APPEAL No. 1267 OF 2010

DATED 04TH JULY, 2016

Between:

Subramanyam @ Gangadharam
@ Gangappa and another

... Appellants

AND

The State of Andhra Pradesh,
Rep. by Public Prosecutor,
High Court, Hyderabad

... Respondent

Counsel for the appellants

:

Ms. Ammaji Nettem

Counsel for the respondent

:

Public Prosecutor

THE COURT MADE THE FOLLOWING

JUDGMENT: (*Per* Hon'ble Sri Justice G. Shyam Prasad)

1. This criminal appeal arises out of the judgment dated 14-10-2009 in Sessions Case No. 325 of 2007 on the file of the Court of I Additional Sessions Judge, Chittoor (for short, 'the trial Court'), whereby the appellants/A1 and A2 were convicted and sentenced to suffer imprisonment for life and pay fine of Rs.500/- each and, in default of payment of fine, to suffer rigorous imprisonment for six months for the offence under Section 302 read with Section 34 of the Indian Penal Code (for short, 'I.P.C.') and further sentenced to suffer imprisonment for ten years and shall pay fine of Rs.500/- each and, in default of payment of fine, shall suffer rigorous imprisonment for six months for the offence under Section 382 read with Section 34 I.P.C. Both the sentences were directed to run concurrently.

2. The brief facts of the prosecution case are as follows:

Sri K.S. Nanjundappa, Inspector of Police, Kuppam Circle (L.W.21) filed charge sheet against the accused in Crime No. 59 of 2006 of Rallabudugur Police Station for the offences punishable under Sections 302 and 379 read with Section 34 I.P.C. alleging that on 12-12-2006, P.W.3, who was working as Talari of Dandikuppam Village, noticed dead body of the deceased by name Amavasya Gounder @ Bakkidappa and informed the same to P.W.1 who was the Panchayat Secretary of Dandikuppam Village of Santipuram Mandal. Immediately, P.W.1 went to the place where the dead body was traced and he made enquiries with regard to identity of the dead body in the surrounding villages but nobody came forward to identify the dead body. On the same day at 3:00 p.m., he lodged a complaint before P.W.13 who, in turn, registered it as case in Crime No. 59 of 2006 under Section 174 of the Code of Criminal Procedure (for short, 'the Cr.P.C.') and issued First Information Report.

Thereafter, P.W.13 rushed to the scene of offence, noticed the dead body of the deceased in decomposed state and got photographed the dead body. P.W.13 examined P.Ws.1 and 3 and recorded their statements. P.W.13 made enquiry to ascertain the identity of the deceased but nobody came forward to identify the dead body. Later, P.W.13 got information through P.Ws.5 and 6 with regard to identity of the dead body. On 18-12-2006 at about 1.15 p.m., on reliable information, he along with P.W.13 and panch witnesses K. Srinivasulu (L.W.16) and P.W.12 went to Santipuram. Thereafter, all of them left Santipuram and reached the house of A1 at Siddareddipalle at 2:00 p.m. and noticed A1 and A2 present there. On seeing them, when the accused tried to skulk away, they caught the accused and interrogated them in the presence of panch witnesses. The accused confessed to the commission of murder of the deceased for his gold ear rings and silver waist thread. The accused further confessed that they have hidden the clothes worn by them at the time of commission of offence at the backyard of the house of A1. At the instance of A1, one plastic cover from the bushes of his backyard was recovered and at the instance of A2, his clothes were recovered. Bloodstained clothes of both the accused were seized under cover of panchanama. In pursuance of the confession of the accused, A2 produced the receipt issued by pawn broker accepting pledge of gold and the receipt was seized under cover of panchanama. Both the accused led the police officials and the panch witnesses to the agricultural well of one Venkataramana at Siddareddipalle Village, where they left the clothes of the deceased, and the same were removed from the well with the help of an iron hook, the shawl and the pancha, which were seized under cover of panchanama. Both the accused have led the police and the panch witnesses to the pawn broker shop of P.Ws.8 and 9 at Santipuram at 7:00 p.m., where they pledged silver waist thread and gold ear rings. P.Ws.8

and 9 produced the original receipt book containing carbon copy and they were seized under cover of panchanama. The police conducted test identification parade for the purpose of identification of silver waist thread and one pair of gold ear rings of the deceased through P.W.1, Panchayat Secretary. P.W.1 conducted test identification parade and the sons of the deceased, P.Ws.2 and 4, have identified the articles as belonging to the deceased. P.W.14 forwarded the material objects to the District Forensic Science Laboratory, Hyderabad, through the learned Judicial Magistrate of First Class, Kuppam, with letter of advice. Since P.W.14 was transferred, his successor L.W.21 (K.S. Nanjundappa) completed the investigation and filed charge sheet against both the accused.

3. The learned Magistrate of First Class, Kuppam, on receipt of charge sheet, committed the case to the Court of Sessions, Chittoor Division. The learned Principal Sessions Judge numbered the case as S.C.No. 325 of 2007 and made over the case to the Court of I Additional Sessions Judge, Chittoor, for trial.

4. The accused were supplied with copies of documents. During examination, the accused pleaded not guilty for the charges under Sections 302 and 382 read with Section 34 I.P.C. and claimed to be tried.

5. The prosecution has examined P.Ws.1 to 14 and got marked Exs.P1 to P18 and M.Os.1 to 11 to prove the guilt of the accused.

6. On closure of the prosecution evidence, the accused were examined under Section 313 Cr.P.C. When the incriminating circumstances appearing in the evidence were put to them, they denied the same and claimed to be tried. However, the accused had not led any evidence.

7. On hearing arguments of both the counsel and on consideration of the entire evidence on record, the trial Court convicted the accused for the offences under Sections 302 and 382 read with Section 34 I.P.C. and sentenced them as stated above.

8. Being aggrieved by the conviction rendered by the trial Court, the present appeal has been preferred by the appellants/A1 and A2.

9. In this case the accused have been defended by Ms. Ammaji Nettem, learned Counsel appointed by the High Court Legal Services Committee. During course of argument, learned counsel for the appellants submitted that the accused are in no way connected with the crime and the prosecution falsely implicated them by creating evidence in this case; that the very recovery of M.Os.1 and 2 is not proved and that therefore, the accused are entitled for acquittal.

10. *Per contra*, the learned Public Prosecutor appearing for the respondent-State argued totally in support of the findings of the trial Court and contended that there are no grounds to interfere with the impugned judgment of the trial Court.

11. Basing on the oral and documentary evidence available on record, and the rival contentions of both parties, the points that arise for consideration in this appeal are as follows:

1. Whether the prosecution has proved the guilt of the accused beyond reasonable doubt for the offences punishable under Sections 302 and 382 read with Section 34 of I.P.C.?
2. Whether the judgment of the trial Court suffers from any infirmity or illegality?

12. **POINT Nos.1 & 2:**

According to the version of prosecution, this is a case of murder for gain. The prosecution has examined P.Ws.1 to 14 and got marked Exs.P1 to P18 and M.Os.1 to 11 to bring home the guilt of the accused. The trial Court, on consideration of the evidence of prosecution and defence, has found the accused guilty of the offences under Sections 302 and 382 read with Section 34 I.P.C. and sentenced them accordingly.

13. The learned counsel for the appellants has raised the following contentions in this appeal:

- (i) That the prosecution has failed to prove that M.Os.1 and 2 belong to the deceased as they are not the same material objects seized at the instance of the accused; and
- (ii) That the test identification of the property was not conducted in accordance with Rule 35 of Criminal Rules of Practice and as such it is not proved that M.Os.1 and 2 belonged to the deceased;

14. The learned Public Prosecutor submitted that M.Os.1 and 2 were seized from the pawn brokers at the instance of the accused; that they were handed over to P.W.1 for conducting test identification parade of the property; that P.Ws.2 and 4, the sons of the deceased, have identified them correctly and as such, the recovery and identification of M.Os.1 and 2, is proved.

15. At the outset, it is to be seen whether test identification parade of M.Os1 and 2 is proved; whether they belong to the deceased and whether they are identified by P.Ws.2 and 4 correctly. As rightly contended by the learned counsel for the appellants, there is a procedure contemplated for

identification of property recovered from the accused or recovered at the instance of the accused . Rule 35 of Criminal Rules of Practice reads as follows:

"Identification of property: -

- (1) Identification parades of properties shall be held in the Court of the Magistrate where the properties are lodged;*
- (2) Each item of property shall be put up separately for the parade. It shall be mixed up with four or similar objects; and*
- (3) Before calling upon the witnesses to identify the property, he shall be asked to state the identification marks of his property. Witnesses shall be called in one after the other and on leaving shall not be allowed to communicate with the witness not yet called.*

16. The learned counsel for the appellants submitted that identification of the property, M.Os.1 and 2 recovered from the accused, is not done as per Rule 35 of Criminal Rules of Practice in this case and as such, the very recovery of M.Os.1 and 2 from the accused is not proved and that in the absence of proof of recovery of M.Os.1 and 2, there is no other material to substantiate the version of the prosecution and to connect the accused with the crime since the very motive for commission of this crime is for gain. That motive plays a very important role in the cases of circumstantial evidence and that in view of the failure to prove the recovery and identification of the property by P.Ws.2 and 4, there is every likelihood of M.Os.1 and 2 having been planted on suspicion against the accused.

17. As per this Rule, the Magistrate has to conduct identification of the property in the presence of mediators and it is mandatory. In this case, the testimony of P.W.14 reveals that he sent a requisition to P.W.1 along with M.Os.1 and 2 through a constable for conducting test identification parade of M.Os.1 and 2. On the next day, he received identification of

property proceedings Ex.P2. This piece of evidence would clearly reveal that P.W.14 asked P.W.1 to conduct test identification of the property in this case. P.W.1, Panchayat Secretary, was not competent to conduct test identification of the property as per Rule 35 of the Criminal Rules of Practice. The very identification of M.Os.1 and 2 in the presence of P.W.1 by P.Ws.2 and 4 is not proved in this case. The entire version of the prosecution with regard to very identification of M.Os.1 and 2 by the family members of the deceased P.Ws.2 and 4 is not proved as per the procedure contemplated under Rule 35 of the Criminal Rules of Practice.

18. **Motive:**

The motive for commission of this offence is that the accused took the deceased for showing P.W.7 and some other alliances for the marriage of the deceased. As a matter of fact, the deceased was 70 years old and the deceased going along with the accused for seeing alliances at that age appears to be highly improbable. On the other hand, there is no cogent and consistent evidence in this regard to prove that fact. The evidence in this regard is that the deceased had illicit intimacy with P.W.7 and lived with her for 5 years. P.W.6 states that the deceased used to go to the house of A1 only and on one occasion when the deceased came to her village, she saw him and she does not remember how many days after visiting the house of A1, the deceased died. This piece of evidence shows remote possibility of A1 having contacts with the deceased. It is not known for what purpose the deceased accompanied A1 to Siddareddypalle. In this regard, the testimony of P.W.7, who is a resident of Burugumakulapalle, shows that the accused used to come with the deceased to her village now and then. She deposed that about 3 years back, one day, when A1 came to her house and called the deceased to come along with him, she could not go with him as her elder

son was involved in a road accident. Then, the deceased accompanied A1 and while leaving the house, he gave her Rs.10/-. This version of the prosecution does not in any manner connect the accused with the crime except the fact that the accused were having some acquaintance with the deceased. The deceased going along with the accused to the village of Burugumakulapalle does not disclose any specific purpose. Therefore, the motive of the accused, as alleged by the prosecution that as the deceased did not give money to the accused for their expenses for taking him to the house of P.W.7, is not proved by any cogent evidence. Therefore, this circumstance belies the very motive for commission of this offence by the accused.

19. **Last seen together theory:**

The prosecution has failed to establish last seen together theory. The learned Public Prosecutor placed reliance on the testimony of P.W.5 who deposed that the deceased used to come to their village very rarely and at that time he used to move with A1 and A2. However, there is no evidence to show that prior to the incident, they were seen together. Interestingly, P.W.5, did not support the version of prosecution. Therefore, the prosecution has failed to prove the last seen together theory. The circumstance relied upon by the prosecution that the deceased used to move with the accused and they used to go to PW-7 is a very remote possibility of the accused involving in the commission of the crime. The evidence of prosecution on motive is very vague and makes its version unbelievable. It is the case of prosecution that the deceased had lived with P.W.7 for 5 years. As such, there is no necessity for the accused to introduce P.W.7 to the deceased for marriage alliance. Therefore, the version of the prosecution in this regard sounds highly unnatural and improbable.

20. In ***State of Uttar Pradesh Vs. Satish***¹, the Apex Court has observed on last seen together theory as under:

"The last seen theory comes into play where time/gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

21. In the instant case, there is a long gap between the accused and the deceased having been seen together by the witnesses in the village. There is every possibility of other persons coming in between for commission of the offence. There is no positive evidence to conclude that the accused and the deceased were last seen together and that thereafter the incident occurred in this case. Therefore, the evidence of prosecution that the deceased and the accused were last seen together has no relevance in this case. In this regard, the very motive for commission of offence by the accused is also not proved.

22. **Post mortem examination report:**

Ex.P8 is the *post mortem* certificate which reveals that the skull of the deceased was broken at left temporal parietal region and the brain matter exposed. No other external injuries were made out because the body decomposed. Further, both ear lobes lacerated and torn at the level of lobes. In Ex.P8, it is further revealed that the skin peeled of maggots found all over the body and highly pungent smell coming from the body and that the deceased would have died of head injury 48 to 72 hours prior to postmortem examination. The *post mortem* conducted on 13-12-2006

¹ 2005 (3) SCC 114

reveals that the death occurred about 72 hours prior to the incident which would be on 10-12-2006. The dead body was traced on 12-12-2006. The deceased left his home on 06-06-2006 and, therefore, the last seen theory is not proved with any cogent evidence except the fact that the deceased had connections with accused Nos.1 and 2 and moving in the village with them now and then very rarely, as spoken by P.W.5.

23. On careful consideration of the evidence of prosecution, a doubt arises about the time of death of the deceased. According to the version of prosecution, the deceased left his house on 06-12-2006 and the date of pledging of the ornaments was on 8-12-2006 which goes to the root of the case. On 12-12-2006, the dead body of the deceased was traced by the villagers and P.W.1 lodged a complaint on the same day. On 13-12-2006, inquest and *post mortem* were conducted and the inquest panchas opined that they have suspicion of involvement of A1 in the commission of offence and they did not state about the involvement of A2. On 18-12-2006, the accused were arrested and in pursuance of their confession, the material objects M.Os.1 to 4 have been discovered.

24. As a matter of fact, the time of death is very important in this case for arriving at a conclusion with regard to involvement of the accused in commission of the offence of murder and robbery. As per the report of medical officer, P.W.11, the dead body was in a decomposed state when it was brought for *post mortem* examination. The time of death was noted as 48 to 72 hours prior to *post mortem* examination conducted on 13-12-2006 at 1.30 p.m. and therefore probably the death would have occurred on 10-12-2006. It is the case of the prosecution that the accused took the deceased to a lonely place, killed him by hitting on his head with boulder and a small stone and robbed his gold ear rings and waist thread which must have occurred on 10-12-2006. The accused pledged

ornaments M.Os.1 and 2 with the pawn brokers on 08-12-2006. Even if it is considered that 24 hours plus or minus to the age of death given by the medical officer, the death would have occurred by 09-12-2006. As such, there was no possibility for the accused pledging M.Os.1 and 2 with P.Ws.8 and 9 on 08-12-2006. This circumstance clearly shows that the material objects M.Os.1 and 2 were pledged much prior to the death of the deceased and, therefore, the death of the deceased has no direct nexus with the pledging of the ornaments with P.Ws.8 and 9. The false implication of the accused in this case is clearly revealed by this circumstance. Since time of death is in dispute, the motive for commission of offence is not proved. The prosecution is trying to connect the accused with the crime, without considering this aspect, which makes its version totally unreliable and improbable.

25. The circumstances appearing against the accused in commission of the offence are:

- (1) P.Ws.2 and 4 are the sons of the deceased. On seeing the clothes of the deceased and shawl, they identified the dead body as that of their father. The deceased was wearing gold ear rings and waist thread. On identification of the dead body of the deceased, P.W.1 lodged a complaint to police, Ex.P1, which reveals that P.W.3 namely K.Anjaneyulu, Talari of Dandikuppam Village, informed him about tracing of an unknown dead body in Kuraboni Kunta, Morava Vanka, and on that information, they went to that place and found the dead body. P.W.3 informed P.W.1 that he saw an un-identified dead body and thereafter P.W.1 lodged a complaint to police suspecting the death of the deceased. This circumstance would clearly show that this is

a case of homicide as the father of P.Ws.2 and 4 aged about 70 years.

- (2) Tracing of dead body by P.W.1 and the villagers would clearly show that the death of the deceased was not natural;
- (3) The testimony of Medical Officer, P.W.11, reveals that he conducted *post mortem* examination on the dead body of the deceased and found that it was in a decomposed state and it was not possible for him to open the dead body to find out the internal injuries but opined that he found (1) that the skull broken at left temporal parietal region and brain matter exposed; and (2) that both ear lobes lacerated and torn at the level of lobes. The time of death was 48 to 72 hours prior to his examination and he opined that it was a case of homicide and the deceased would have died of head injury and issued Ex.P8 *post mortem* examination report. These circumstances show that this is a case of homicide and the injury on the head was sufficient in the ordinary course of events to cause death;

26. **Recovery of clothes of the accused and the deceased:**

The clothes of the accused have been recovered under mahazar in the presence of mediators. They contained bloodstains. The blood group could not be determined. The blood group of the accused is not tested. The clothes of the deceased do not contain blood as they were found in a well. Therefore, there is no possibility for comparison of the blood found on the clothes of the accused with the blood group of the deceased. The recoveries of clothes of the accused and the deceased were made from the places accessible to public, which is a well and another is from the backyard of the house of A2. The recoveries made from public places

cannot be relied upon and a conviction cannot be based on such recoveries.

27. **Conclusion:**

There are two views possible in this case from the evidence adduced, one pointing to the guilt of the accused and the other to his innocence. In such a scenario, it is a well settled principle of criminal jurisprudence that the view, which is favourable to the accused, should be adopted. The circumstances relied upon by the prosecution are not fully supporting its version as some of them are in favour of the accused, for instance the very motive for commission of the offence relied upon by the prosecution, as one of the important circumstances, is vague. The date and time of death of the deceased and the pledging of ornaments by the accused with P.Ws.8 and 9, pawn brokers, is another important circumstance which is not proved by the prosecution beyond reasonable doubt. The ornaments were pledged by the accused on 08-12-2006 whereas the medical officer's report shows that the death occurred 48 to 72 hours prior to the *post mortem* examination conducted on 13-12-2006 which clearly shows that the death must have occurred on 10-12-2006. The version of prosecution shows that after killing the deceased, the accused snatched away the ornaments from him but there is no cogent and consistent evidence in this regard as to the manner in which the incident occurred and also about the time of death. This benefit of doubt goes to the accused. In this regard, it is appropriate to refer to the decision in ***State of Uttar Pradesh Vs. Ram Veer Singh and another***², wherein the Apex Court held as follows:

"The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the

² 2007 (6) Supreme 164

other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the Appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not."

28. In ***Vijay Shankar Vs. State of Haryana***³, the Supreme Court held :

"The normal principle is, that in a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; that these circumstances should be of a definite tendency, unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete, that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and inconsistent with their innocence."

29. On a careful analysis of the circumstantial evidence available on record, we are of the considered opinion that it is not safe to convict the accused for the offences under Sections 302 and 382 read with Section 34 I.P.C. as the important links in the chain of circumstances, referred above, are missing and, consequently, the accused are entitled to benefit of doubt. We are unable to concur with the finding of the trial Court in convicting the accused without considering the foregoing reasons which give a benefit of doubt to the accused.

30. In the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellants/accused Nos. 1 and 2 in judgment, dated 14-10-2009, in Sessions Case No. 325 of 2007, on the file of learned I Additional Sessions Judge, Chittoor, for the offences punishable under Sections 302 and 382 read with Section 34 I.P.C. are

³ (2015) 12 SCC 644

set aside and they are acquitted of all the charges of which they were charged with. Consequently, the appellants/accused Nos. 1 and 2 shall be set at liberty forthwith, if they are not required in any other offence and the fine amount, if any, paid by them shall be refunded to them.

C.V.NAGARJUNA REDDY, J.

G.SHYAM PRASAD, J.

Date: 04-07-2016.

JSK

