

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR
AND
HON' BLE SRI JUSTICE N. BALAYOGI

CRIMINAL APPEAL No.1202 of 2012

JUDGMENT : (per the Hon'ble Sri Justice C. Praveen Kumar)

The appellants who are A1 and A2 in S.C.No.74 of 2011, on the file of the VII Additional District and Sessions Judge (FTC), Nizamabad at Bodhan, preferred this appeal, aggrieved by the judgment dated 04.10.2012, wherein both the accused were tried and convicted for the offences punishable under Sections 302 and 380 IPC and sentenced to suffer imprisonment for life and to pay a fine of Rs.100/- each and in default to undergo simple imprisonment for a period of 15 days for the offence punishable under Section 302 IPC and further sentenced to suffer rigorous imprisonment for a period of seven years and to pay fine of Rs.100/- each and in default to undergo simple imprisonment for a period of 15 days for the offence punishable under Section 380 IPC. MOs.1 to 8 were directed to be given to PW1 towards interim custody and PW1 was directed to retain the said properties under the same terms and conditions till the expiry of appeal time. MOs.9 to 12 and 17 were also directed to be returned to PW1 and MOs.13 to 16 were directed to be destroyed after expiry of appeal time.

2. The gravamen of the charge against the accused is that on 21.06.2010, in the morning hours, in the house of one Duvvori Seetharam, covered by H.No.4-1-478, situated behind Srinivasa Theater church colony, at Shakkarnagar Cross Road of Bodhan, the

accused caused the death of Smt. Anasuya by strangulation and also committed theft of gold ornaments from the house.

3. The facts as culled out from the evidence of the prosecution are as under:

(i) PW1 is the son of the deceased, while PW2 is the husband of the deceased. PW3 is the brother of the deceased. PWs. 4 to 6 are residents of the said village.

(ii) The incident in question is said to have taken place in the month of June, 2010. On the date of incident, PW2, who was working as a teacher in a private school, left the house at about 09.30 a.m. to go to school. At that time, he saw A1 and A2 nearby his house. PW2 claims to have returned to his house from the school at about 12.45 p.m., as there was no work in the school, and found the door opened. When he entered the house, he found his wife lying on the floor with a saree tied around her neck. Immediately, he informed about the incident to his brother-in-law, son and other relatives. The gold ornaments which were on the body of the deceased were also found to be missing. The evidence on record would show that ten days prior to the incident, at about 11.30 a.m., the deceased is said to have informed PW1 on telephone, that one male and female persons aged about 40 and 30 years respectively, came to see their house and that they have again come to the house on the date of incident. The deceased is said to have opposed in giving a portion of the room for rent. While the phone conversation was going on, the cell phone got disconnected. This conversation was said to have

taken place at about 11.30 a.m. By 12.30 p.m., PW2, is said to have returned to his house from the school. On 21.06.2010, at about 02.00 p.m., PW1 lodged a report with PW16, the SI of Police, Bodhan. Basing on the same, a case in Crime No.196 of 2010 came to be registered for the offences punishable under Sections 302 and 380 of IPC against the unknown persons. Ex.P.15 is the original FIR. Further investigation in this case was taken up by PW17, the then Inspector of Police, Bodhan. On the same day at about 02.15 p.m., on receiving a copy of the FIR, PW17 proceeded to the scene of offence along with dog squad. He also summoned PW4, the photographer to take photographs of the scene of offence. Ex.P2 is the bunch of photographs. In the presence of PW8 and two others, PW17 conducted panchanama of the scene and during the said process, he seized white thread (MO14), one towel (MO13) and material objects used in strangulating the deceased. He also seized broken spectacles and broken bangles of the deceased from the scene of offence, which were marked as MOs.15 and 16 respectively. Ex.P3 is the panchanama, while Ex.P5 is the rough sketch of the scene prepared at the scene of offence. During the said process, PW17 examined PWs.1,2,3,4 and others. Later, he conducted inquest over the body of the deceased, in the presence of PW3. Ex.P4 is the inquest report. After conducting inquest proceedings, he sent the body for post mortem examination. PW11, the Civil Assistant Surgeon conducted autopsy over the dead body on 22.06.2009 at 09.00 a.m. and issued Ex.P10 the post mortem report. According to him, the deceased died due to strangulation, to the best of his knowledge and

belief. Further examination in this matter was carried on by PW17. On 12.07.2010 at about 10.30 a.m., PW7 the goldsmith, informed through telephone to PW15, the Sub-Inspector of Police, Yedpally police station, that some persons came to his jewellery shop for sale of gold jewels. On receipt of such information, PW15 rushed to the jewellery shop at Yedpally and found A1 and A2 in the shop. The Inspector of Police conducted search of A1 and found one gold ring pustalathadu and also one gold chain in the purse. In the presence of PWs.9 and 10, the said ornaments were seized. Thereafter, the accused were interrogated in the presence of mediators, wherein the accused are said to have confessed about the commission of offence. Pursuant to the confession made, gold nalla puthala chain weighing about 28 grams, one gold ring colour with red stone weighing about 2 ½ grams, were seized from the possession of A1 and two rows of gold chain weighing about 2 tulas were seized from the possession of A2. The said articles pertain to the present crime, which are marked as MOs.1, 2 and 4. Pursuant to the confession of the accused, gold puthalatadu (MO3) weighing about 28 grams, one pair of gold ear tops studded with stone weighing about 3 grams (MO5), plain gold tops weighing about 3 grams (MO7), one gold bangle (MO6) weighing about 8 grams, one pair of gold bangles weighing about 23 grams (part of MO6), silver kumkum bharani (MO8) weighing about 2 ½ tulas, one Sonata wrist watch (MO11), one NOKIA cell phone (MO12), two silk sarees (MO9), two T-Shirts were recovered. PW17 is also said to have seized one pair of silver leg kadas weighing about 30 tulas relating to Crime No.79 of 2010, registered at Vemulawada police station,

Karimnagar District, apart from recovering some gold and silver ornaments pertaining to Crime No.160 of 2010 of Vemulawada police station, Karimnagar District. After completion of panchanama, the accused were arrested by issuing arrest memo, took the finger prints of the accused and sent them to judicial custody. PW17 forwarded the finger print impressions of A1 and A2 to PW14 the finger print expert for comparison of the chance prints which were available at the scene of offence. After examination and comparison of finger prints, PW14 the finger print expert opined that the chance print marked as 'C' is identical with right ring finger of A2. Thereafter, on 24.07.2010, PW17 conducted test identification parade of A1 and A2, wherein PWs.1 and 2, are said to have identified A1 and A2. Later, on 13.10.2010, he conducted test identification parade of the property through PWs.1 and 2 in the presence of PW12 and the properties were said to have been identified by PWs.1 and 2.

(iii) After completion of investigation, PW17 filed the charge sheet, which was taken on file as PRC No.3 of 2011 by the Judicial Magistrate of First Class, Bodhan Police Station, Bodhan. On committal to the Court of VII Additional District and Sessions Judge, (FTC), Nizamabad at Bodhan, the same came to be numbered as S.C.No.74 of 2011.

(iv) On appearance, charges under Sections 302 and 380 IPC were framed, read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

(v) In support of its case, the prosecution examined PWs. 1 to 17 and got marked Exs.P-1 to P-20 and M.Os.1 to 17. No oral or documentary evidence is let in on behalf of the defence.

(vi) After the closure of prosecution evidence, the accused were examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against them in the evidence of the prosecution witnesses, to which they denied.

(vii) Basing on the evidence of finger print expert and the test identification parade proceedings, wherein PWs.1 and 2 identified A1 and A2, learned Sessions Judge convicted the accused. Assailing the findings arrived at by the trial Court, the present appeal came to be filed, through legal aid counsel.

4. Sri B.S.Venkata Ramesh, learned counsel for the appellants, would submit that there is no material on record to point out that A1 and A2 committed the offences alleged. According to him, the evidence of PWs.1 and 2 would show that on the date of incident at about 09.30 a.m., when PW2 was proceeding towards the school, he saw A1 and A2 nearby his house. The circumstance of accused being found nearby the house of PW2 at about 09.30 a.m., does not by itself prove that these two accused would not have caused the death and committed theft of the ornaments. He would further submit that even the evidence of PW1 may not be of any help to the prosecution, since the version of PW1 with regard to the accused coming to the house for taking the said premises on rent and also calling the deceased on phone was never spoken to PW2. Insofar as the opinion

of finger print expert, he would submit that the procedure contemplated by the police, in sending the admitted finger prints is contrary to the procedure established by law. It is stated that a duty is cast upon the police to take finger prints of the accused before sending the same for comparison, with the chance prints, which were found at the scene of offence. According to him, there is any amount of doubt with regard to the recovery of gold ornaments and even if the said recovery is believed, the accused can at the most be convicted for an offence punishable under Section 411 IPC.

5. On the other hand, learned public prosecutor for the State of Telangana would contend that the prosecution was able to prove the guilt of the accused beyond reasonable doubt. According to him, the evidence of PW1 refers to the visit of A1 and A2, to their house, on the date of incident through her mother, who spoke to him on telephone on that day. While she was speaking on telephone, the same got disconnected. This piece of evidence coupled with evidence of PW2 would establish that these two accused are responsible for the commission of offence. He also submits that in the absence of any explanation as to how the accused came into possession of the gold ornaments, a presumption can be drawn that these accused are responsible for the death of the deceased, more so, when they are involved in more than one crime.

6. The point that arises for consideration is whether the accused can be held liable for the offences punishable under Sections 302 and 380 IPC?

7. As stated earlier, there are no direct witnesses to the incident and the case rests on the circumstantial evidence of the witnesses. The case of the prosecution as seen from the evidence is that on the date of incident, PW2 claims to have left the house at 09.30 a.m. While leaving the house, PW2 is said to have seen A1 and A2 nearby the house. When he returned back to the house at 12.45 p.m., he found his wife dead and gold ornaments on the body were found to be missing. PW2 is none other than the husband of the deceased. PW1 who is the son of the deceased deposed that he was informed by his mother that about ten days prior to the date of incident, one male person, aged about 40 years and one female, aged about 30 years, came to their house for rent and that they again came on the date of incident to take a portion of the room for rent, for which the deceased denied. Thereafter the cell phone got disconnected. This fact was said to have been informed by the deceased to PW1 at about 11.30 a.m. Thereafter, PW2 returned to the house by 12.45 p.m. In between the said period, the incident in question must have occurred. As seen from the record, there are no eye witnesses to the incident and nobody has seen A1 and A2 entering the house during the said period nor is there any evidence to show that A1 and A2 were seen near the house after 11.30 a.m. Relying upon the evidence of PWs.1 and 2, the learned public prosecutor would submit that if the evidence of both these witnesses is read together, the same would prove the commission of offence.

8. Insofar as the evidence of PWs.1 and 2 with regard to the incident of murder is concerned, it is to be noted that PW1 in his

evidence stated that one male and a female person visited their house about ten days prior to the date of incident, seeking a portion of the house for rent. What has been mentioned by PW1 is based on the information given by the deceased on telephone. Even otherwise, the information said to have been furnished to PW1 by the deceased on telephone relates to visit of one male and female persons, who aged about 40 and 30 years respectively, subsequent to which the cell phone got disconnected. A perusal of the averments in the charge sheet would show that ages of A1 and A2 are 28 and 33 years respectively, but not as 40 and 30 years, as stated above. Apart from that, as stated earlier, no description of the person of A1 and A2, who visited the house, ten days prior to the incident was given by deceased and PW1 never stated about the visit of these accused to their house at any point of time to PW2.

9. The evidence of PW2 would show only the presence of A1 and A2 near the house at 09.30 a.m. while he was going to school. He did not depose about A1 and A2 visiting their house earlier. Merely because the accused were present at the house at about 09.30 a.m., it cannot be said that these two accused are responsible for the death, which took place between 11.30 a.m. and 12.45 p.m.

10. At this stage, we intend to deal with the other evidence, which is sought to be relied upon by the prosecution to connect the accused with the crime. The first circumstance is with regard to the identification of the person in the test identification parade, which was conducted by PW13, the then Judicial Magistrate of First Class,

Banswada on 24.07.2010 i.e., nearly after ten days of the arrest of the accused. In the test identification parade, PW1 claimed to have identified A1 and A2, the proceedings of which are placed on record as Ex.P14 and Ex.P15. PWs.1 and 2 claim to have identified the accused, but the evidence of PW1, does not anywhere indicate as to when he saw the accused earlier. That being the position, the question of identifying A1 and A2 as the persons who have visited their house ten days prior to the incident does not arise. No explanation is forthcoming by the prosecution as to how PW1 could have identified the accused. Even at the time of test identification parade, he has not stated that he has seen them or that he was present in the house at the time when the incident took place. PW2, who is the father of PW1, is said to have identified A1 and A2 in the test identification parade. The identification of A1 and A2 by PW2 also gives some suspicion for the reason that he must have just had a glance towards A1 and A2, in the morning, when they were found nearby his house. Since he was not having any prior acquaintance with the accused, the question of PW2 remembering their face, that too after a period of one month from the date of incident, appears to be doubtful. Hence, doubt arises with regard to identification of the accused in the test identification parade, more so, in view of the manner in which the police made PW1 identify A1 and A2. It is also to be seen that PW2 never had an opportunity to see A1 and A2 at any point of time, except for the first time on the date of incident. That being the position, cloud of suspicion casts upon the identification of A1 and A2 in the test identification parade.

11. The next circumstance relied upon by the prosecution is the evidence of PW14, the finger print expert. According to him, on 21.06.2010, as per the telephonic information, he visited the place of offence, examined the scene and developed six chance prints. Out of the six chance prints, he noticed prints A, E and F found unfit for comparison. The remaining chance prints were marked as B, C, D and compared with finger prints of the inmates of the house. Chance prints were marked with right little finger of deceased and the remaining chance prints were unidentified. On 16.07.2010, the finger prints of both the accused were received from the office of Circle Inspector of Police, Bodhan for comparison with the chance prints. Comparison of chance prints with finger prints of A1 and A2, which were marked as C, were found to be identical with the finger print of A2. Ex.P17 is the finger print expert report. As seen from the evidence of investigating officer and also from the evidence of finger print expert, the finger print of the accused was received from the office of Circle Inspector of Police. The evidence of PW17, the CI of police would show that immediately after the accused were arrested, he took finger prints of the accused and then sent them to the judicial custody. From this it is clear that the admitted finger prints of the accused were never taken before the Court, as required under the provision of Identification of Prisoners Act. This issue came up for consideration before the Apex Court on more than one occasion wherein it has been held that once the accused is taken into custody, a duty is cast upon the investigating officer to take the

admitted finger prints of the accused before the Court before sending them for comparison.

12. In view of the above, the report of the hand writing expert may not carry much weight. Therefore, if this circumstance goes, the only other circumstance is the recovery of ornaments from the accused.

13. Issue identical to the case on hand, came up for consideration before the Apex Court in *Raj Kumar Vs. State (NCT of Delhi)*¹. It is a case where the Apex Court dealt with a situation where the High Court convicted the accused under Section 392 of IPC, while acquitting the accused for the offences punishable under Sections 302 and 411 of IPC. In the said case, the prosecution relied upon the theory of last seen and recovery of the gold ornaments within a week from the date of incident. While interpreting the finding of the High Court with regard to conviction under Section 302 IPC, the Apex Court in para 11 and 12 held as under:

“11...the last seen theory built up on the evidence of PW5 and 7 leaves a significant margin to time during which the crime could have been committed by somebody other than the accused. The said fact must go to the benefit of the accused. In this regard, it may be recollected that PW5 and PW7 have deposed that they had last seen the accused person in the early morning of the date of the occurrence i.e., 12.09.1991 and that they were going away to some other place. Even if the evidence of PW12 is to be accepted, all it can be said is that the evidence of the said witness read with the evidence of PW5 and PW7 disclose that the accused persons were seen in the vicinity of the neighborhood of the crime little before the same was

¹ = 2017 (1) ACR 740, AIR 2017 SC 614

committed. By itself, the said circumstance cannot lead to any conclusion consistent with the guilt of the accused.

12. The above circumstance, if coupled with the recovery of the ornaments of the deceased from the possession of the accused, at best, create a highly suspicious situation. But beyond a strong suspicion nothing else would follow in the absence of any other circumstance(s) which could suggest the involvement of the accused in the offence/offences alleged. Even with the aid of the presumption under Section 114 of the Evidence Act, the charge of murder cannot be brought home unless there is some evidence to show that the robbery and the murder occurred at the same time i.e., in the course of the same transaction. No such evidence is forthcoming.”

In the instant case, the theory of last seen at 09.30 a.m. is not proved, as both the accused were only seen near the vicinity of the house at 09.30 a.m. There is no evidence to show that both the accused were there in that area till 11.30 a.m. or that they entered the house on the date of incident. Further, the evidence of PW12, shows recovery of gold ornaments on 12.07.2016, i.e., nearly after 20 days from the date of the incident. These articles were identified by PWs.1 and 2 as belongs to deceased. But in view of the judgment of the Apex Court, the case of the accused stands on a better footing than the one referred to. As held earlier, the theory of accused being seen last in the company of accused is not established. Therefore, mere recovery of articles of deceased, does not establish that the accused have killed the deceased. At the most, it can create some suspicion. Nothing else would follow in the absence of any other circumstances being established by the prosecution to connect the accused with the crime. Since the property came to be

discovered nearly 20 days after the incident, it can at the most be held that the accused were found to be in possession of the stolen property.

14. In view of the above circumstances, the Criminal Appeal is allowed in part. The conviction and sentence awarded against the appellants in S.C.No.74 of 2011 by VII Additional District and Session Judge (FTC), Nizamabad at Bodhan, vide judgment dated 04.10.2012, for an offence punishable under Section 302 of IPC is set aside. The conviction for an offence under Section 380 IPC is altered to Section 411 IPC. For the altered conviction, the sentence of imprisonment is reduced to period already undergone. Consequently, the appellants shall be set at liberty forthwith, if not required in any other case. The order relating to MOs. stands confirmed.

Consequently, miscellaneous petitions, if any, pending shall stand closed.

C.PRAVEEN KUMAR, J

N. BALAYOGI, J

21.12.2017
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