

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO
+ CRIMINAL APPEAL Nos.1381 OF 2011 AND 135 OF 2012

% Dated 23.12.2017

Areshanapalli Kesavulu @ Kesava Rao

....Appellant

VERSUS

\$ The State of A.P.

... Respondent

! Counsel for Appellant : Sri D. Kodanda Rami Reddy

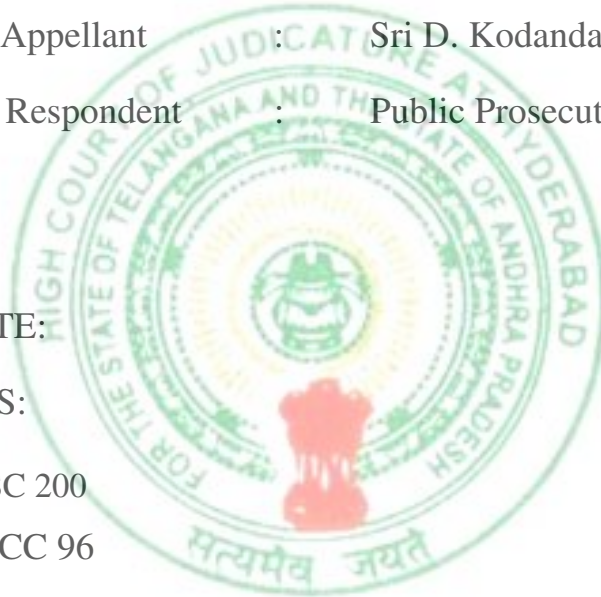
^ Counsel for Respondent : Public Prosecutor

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> HEAD NOTE:

? CITATIONS:

1. AIR 1963 SC 200
2. (1999) 5 SCC 96
3. 2003 (11) SCC 271
4. 2005 (3) SCC 114



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

CRIMINAL APPEAL Nos.1381 OF 2011 AND 135 OF 2012

Areshanapalli Kesavulu @ Kesava Rao

....Appellant

VERSUS

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... Respondent

DATE OF JUDGMENT PRONOUNCED: 23.12.2017

THE HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals? Yes/No
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? Yes/No

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

AND

HON'BLE JUSTICE MS. J. UMA DEVI

CRIMINAL APPEAL Nos.1381 OF 2011 AND 135 OF 2012

COMMON JUDGMENT : *(Per Hon'ble Dr. Justice B. Siva Sankara Rao)*

The appellants are accused Nos.1 and 2 of S.C.No.78 of 2010 on the file of the learned VI Additional District and Sessions Judge, Markapur of Prakasam District, they were convicted for the offences punishable under Sections 302 and 392 IPC to undergo life imprisonment and to pay a fine of Rs.5,000/- each respectively with default sentence of six months in each for the offence under Section 302 IPC and seven years rigorous imprisonment with fine of Rs.5,000/- each with default sentence of six months each for the offence under Section 392 IPC and by giving set off of the period of remand and in ordering to run the said sentences concurrently. Impugning the said conviction judgment, dated 18.11.2011, by the learned Sessions Judge, these two appeals are maintained.

2. Heard both sides and perused the material on record placed before the trial Court covered by the evidence of PWs.1 to 19 and Exs.P.1 to P.49, M.Os.1 to 16, there is no independent evidence adduced by the accused and no documents marked on behalf of the accused and no documents even filed much less any statement by the accused during Section 313 Cr.P.C. examination from the prosecution incriminating evidence when brought to his notice in recording his answers or explanations, if any, to that effect. The case is entirely

rested on circumstantial evidence other than the call data in relation to the cell phone of accused No.1 and the cell phone used by the deceased and the phone conversation soon before his death while accused persons and the deceased were travelling allegedly as per the prosecution case after the accused engaged the car driven by the deceased bearing No.AP 28 AT 3222 belongs to the travel agency booked under the guise of going to Tirupati via Kalahasti and in the way near Dornala, which is within the limits of Prakasam District, within the jurisdiction of the learned Sessions Judge of the Sessions Division Prakasam District, the deceased was brutally killed after midnight while taking rest with a pre plan having purchased in the transit the iron blade-M.O.6. The Crime No.19 of 2008 was registered by PW.18-the Station House Officer-cum-the then Head Constable, by name J.Avulaiah, on 01.05.2008, while he was on duty from the report submitted by PW.1-V.R.O. of Inamukkala (covered by Ex.P.30) which is near to Dornala. PW.1-V.R.O. but for saying police obtained his signature which is Ex.P.1 on the said report Ex.P.30 did not support even the contents of it, the crime registered is covered by Ex.P.29-original express F.I.R. submitted to the Court while transmitting copies to all concerned by handing over the copy to P.W.19-The Inspector of Police to take up investigation.

3. Though it is the suggestion on behalf of the accused that instead of registering the crime under Section 174 Cr.P.C., PW.18 was not right in registering the crime under Section 302 IPC, in fact, from

perusal of the very contents of Ex.P.30-report in registering Ex.P.29-F.I.R., it discloses a cognizable offence, thereby rightly stated he has registered the crime for the offence under Section 302 IPC.

4. In this regard, coming to the evidence of PW.1, what he deposed is that he did not give that report, he was not examined by police, he did not visit the scene of offence and he does not know the accused and deceased or one Guravaiah-LW.11 and police called him and obtained his signature in the so-called report on 01.05.2008. In the cross-examination by the Public Prosecutor, he denied the suggestion of it is having found the dead body on information by reaching there as stated by him in his report he came to the Police Station and presented the report and also in the course of examination stated as in Ex.P.2 and also visited the scene of offence and he is turning hostility to the truth of the prosecution case for the reasons better known. Leave it as it is, PW.2-father of the deceased, stated that his son died three years ago and prior to his death he left on his car for hire in evening hours and on the next day to it at about 11.00 a.m. having received a phone call from Dornala Police about the death of his son, of the body lying nearby Madarasa and Dornala-Kurnool road at a distance of 2 KM from Dornala on the road, he rushed to the said spot along with relatives by 8.30 p.m. and found the dead body of his son with bleeding injury on his head and on completion of formalities, the dead body was handover on the next day afternoon and he does not know the accused and he did not state before the

police as in Ex.P.2. No doubt, from his evidence it establishes that the deceased was killed with bleeding injuries on the head. As rightly pointed out by the trial Court of the deceased met with homicidal death not in dispute including by accused besides proved by the prosecution. It is not even a case of any animal killed for not such injuries with reference to the postmortem report of PW.16-the Doctor, who conducted autopsy, by name I.C. Lakshmi Reddy, Civil Assistant Surgeon of Headquarters Hospital of Markapur. The Postmortem report-Ex.P.24 shows there are five external injuries, which are lacerated cut injury on the forehead, contusion with frontal bone fracture underneath, lacerated cut injury on the frontal bone above right eyebrow, lacerated cut injury on left orbit on face with fracture of maxillary bone, lacerated cut injury on the chin with fracture of mandible and a depressed fracture of middle of skull of both parietal bones from which brain matter coming out. The internal injuries deposed by him are lungs, liver, kidney, spleen and brain are congested and the death was nearly 20 to 24 hours prior to the examination conducted on 02.05.2008 and the cause of death was due to haemorrhage and shock by the injuries to the vital organs as mentioned in his postmortem report. What are his answers from the cross-examination done by the accused persons are that he cannot say the time gap in between the exact death and receipt of injuries by the deceased. However, he stated that as brain of the deceased came out, deceased might have died instantaneously or within short span. It is

also categorically stated in the further cross-examination that it is not an accidental death from the nature of injuries. There is nothing more in the cross-examination and what is suggested is he mechanically conducted the postmortem examination. There is no dispute as to the deceased met with homicidal death. There is no even any specific dispute as to the time and place of the death and there is no dispute as to the conducting of the postmortem examination by him and finding of the injuries. It is not a mere opinion evidence but what he found in the postmortem examination is from what he noticed also an expert with all sanctity including for nothing to shatter from said cross-examination of him of the said factum of deceased met with homicidal death.

5. Now the crucial aspect is, it is whether the accused persons in the hands of whom the deceased was killed? The trial Court found with reference to the evidence of PW.15-the Finger Print Expert, who collected the chance prints and blood stains on the vehicle to say accused persons and deceased together travelled and are last seen in the company of accused the deceased, which are exhibited as Exs.P.19 to P.23. The other material the trial Court placed reliance in also saying once this is establishing that the accused and deceased were last seen and they were travelling together at the time the deceased met with the homicidal death in the absence of any explanation by accused within their special knowledge under Section 106 of the Indian Evidence Act, the only hypothesis, the Court has to draw from

the proved circumstances is but for accused none else could commit the murder of the deceased, thereby the prosecution could bring home the guilt of the accused beyond reasonable doubt from the circumstances in linking the chain for that the other material placed reliance on by the trial Court is the call data information collected by PW.19-Investigating Officer covered by Exs.P.35 to P.37 and also the tours and travels book of the travel agency where the deceased was working and the accused allegedly booked the vehicle for hire to go to the so-called pretended pilgrimage with a preplan to commit theft of the vehicle and in that course in murdering the deceased in committing the offence of robbery covered by Exs.P.38 and P.39.

6. The said findings of the trial Court are in grave attack by the appellants/accused in the present appeals. Thus, in deciding the two appeals of accused Nos.1 and 2 respectively, it is to be seen whether the prosecution could bring home the guilt of the accused beyond reasonable doubt from the circumstances and if not whether the trial Court's conviction judgment for the offences under Sections 302 and 392 IPC are unsustainable and liable to be set aside?

7. The Apex Court Constitutional Bench in **M.G.Agarwal v. State of Maharashtra**¹ particularly at para 18 with reference to Section 3 and 50 of the Indian Evidence Act, observed that it is the well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made basis of an accused persons'

¹ AIR 1963 SC 200

conviction, if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or inconsistent with his guilt, then the accused is entitled to the benefit of doubt. It is further observed that in applying this principle, it is also necessary to distinguish between the facts which are called primary or basic facts on one hand and secondary or other facts on the other hand and insofar as primary facts concerned, the question of applying benefit of doubt does not arise. The Apex Court in **State of Haryana v. Bhagirath and others**² observed that the benefit of doubt in a criminal case is not a legal dosage to be administered at every segment of the evidence of each and every witness even, but an advantage is to be afforded to the accused if at all at the fag end after consideration of the entire evidence, if the judge conscientiously and reasonably entertains doubt regarding the guilt of the accused. It is nearly impossible in any criminal trial to prove all the elements with scientific precision. Thereby, the benefit of doubt is to convict an accused or on finding guilty is only beyond the ranges of a reasonable doubt and not beyond doubt though it is incapable of definition, the modern thinking is in favour of the view that proof beyond reasonable doubt is the same as proof which affords moral certainty of the judge. It is no doubt the caution by subsequent expression of the Apex Court in **State of**

² (1999) 5 SCC 96

Punjab v. Karnail Singh³ that ‘exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy the social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law’.

8. From this principle, coming to the parameters required to link the chain from what the Apex Court in M.G.Agarwal supra laid down is further reiterated by catena of expressions including the one in **State of Uttar Pradesh v. Satish**⁴ that (1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) That circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) 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 none else; and (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence.

9. From the above, coming to consider whether the prosecution could bring home from the circumstantial evidence the guilt of the

³ 2003 (11) SC 271

⁴ 2005 (3) SCC 114

accused or the trial Court's finding as if could bring home are unsustainable. As referred supra, from the evidence of PWs.1 and 2 there is nothing to show any complicity of the accused to the crime. So also from the evidence of PW.3, wife of the deceased, who stated on 29.04.2008 her husband (deceased) left Hyderabad with his car to go to Tirupati by saying he would return on 04.05.2008 and on 01.05.2008 at about 11.00 a.m. PW.2, her father-in-law, received a phone call about tracing of her husband's dead body near Dornal, they all rushed to Dornal. That evidence is also no way helpful to show any complicity of the accused to the crime, but for to say the car belongs to the travells and she knows the owner of the car also and her husband was driver of the car. PW.4 another car driver of the said travels also stated about deceased was driver under the travels along with him and deceased was driving Chevrolet Tavera car bearing No.2223, which is the car in question where while under journey allegedly by the accused and deceased together, the deceased was killed in the hands of the accused as per the prosecution. PW.5-K. Rajaiah, the owner of Chevrolet Tavera Car bearing No.AP 28 AT 3222, stated deceased was the driver and on the day prior to his death, he has taken the car with his permission to Tirupati for marriage of his relatives and on next day Markapur Police intimated about the death of the deceased and tracing of dead body near at Dornala. The travel book Ex.P.38 regarding seizure of that book under cover of Ex.P.18 panchanama, dated 03.05.2008, he did not support the prosecution and

there is nothing that could be elicited from the cross-examination. He did not support any further case of the prosecution nor anything that could be elicited by the prosecution from the permission of the Court by cross-examination of own witness under Section 154 of the Evidence Act, much less to say therefrom he is hostile to the truth of prosecution. Coming to PW.6, no other than wife of accused No.1-J. Naga Vijaya Kumar, by name N. Jayamma, who stated she left her earlier husband and with development of intimacy to the accused No.1, married him, and they were residing at Ananthapuram, the native place of accused No.1, and accused No.1 used to visit Peddivaripalem now and then. A cell phone connection was taken by him in her name, however she says it is with her and police seized the phone from her and she stated that accused No.1 never used the cell phone. It at best shows with reference to Exs.P.35 to P.37 there are call conversations between accused and PW.6 and nothing beyond. Thereby, nothing could be shown from that evidence of her apart from nothing favourable to the prosecution from her statement recorded during investigation by cross-examination to show any complicity of accused to the crime.

10. Coming to PW.7, one of the crucial witnesses, by name D.Srinivasa Rao, a jeep driver of Vijayawada, as per the prosecution, the accused who killed the deceased and robbed the Chevrolet car supra and proceeded to Vijayawada and handed over the same to PW.7 to sell the same with a pretence that they are in need of money.

He deposed that he does not know the deceased and even any of the accused and he has not seen the car. No body asked him to sell, nothing could be elicited from his cross-examination with reference to the statement during investigation with the permission of the Court much less to say he is hostile to the truth of prosecution. Even the prosecution could not link the seizure of the car from him by any cogent evidence, but for that of the evidence of the Investigating Officer PW.9 for the witnesses not supported, leave apart there is no examination of the owner of the vehicle about delivering of the vehicle to the owner, but for showing the vehicle was handed over by police to the owner by obtaining an acknowledgment and the prosecution evidence in this regard was denied by the accused with a suggestive case that the car was not handed over to any so-called owner and the signature of the so-called owner is forged and the document as if there is an acknowledgment by owner and undertaking possession of the car is created by the prosecution. Thereby, there is no such link of using of car by accused and handing over of that car having robbed the same from the deceased, later to PW.7. Coming to the evidence of PW.8 attendar of Kasturba School of Dornala, he is a witness to the inquest not even supported, which is not germane as prosecution proved the factum of the death of the deceased is a homicidal one and he was murdered, but for to decide any complicity of accused to the crime and so far as that aspect concerned, there is no relevancy of the evidence of the witness.

11. PWs.9, 10, 12 and 13 so-called witnesses to the arrest of the accused by PWs.19-Investigating Officer at Peddivaripalem, and disclosure by accused and seizure of the blood stained shirts from the accused leading to discovery and the empty quarter bottles of Whisky and the iron rod allegedly thrown by accused that was shown as a fact discovered at the instance of the respective accused, which is earlier not known to the prosecution, but for from the so-called disclosure by accused, they did not support the prosecution though there is no dispute about PW.11 photographed the dead body covered by Ex.P.12 bunch of photos and even it is in his presence any assistant of him from the cross-examination taken that is not material, but for to say the deceased met with homicidal death even from seeing the very photographs that is not in dispute by the accused. PW.12 the another panch witness along with PW.13, their version is as if they signed at Police Station, police obtained at one time or different times and nothing could be brought in the cross-examination, but for in this saying earlier they have no habit of signing on blank papers or without reading the contents.

12. Coming to the crucial evidence of PW.15, the Finger Print Expert, who collected having examined the Chevrolet Car bearing No.AP 28 AT 3222, the wine bottles seized by police and the chance prints of the car and on the bottles and the blood stains at the seat of the driver and the rear seat meant for passengers also collected, he compared and found four chance prints disclosing on whisky bottles,

two chance prints disclosed from the chevrolet car and six chance prints of which unfit for comparison and coming to the fit chance prints, photographed copies marked as A B and C F when compared with the finger print of accused No.1 and accused No.2 respectively A=C of accused No.1 is tallied and B=F of accused No.2 tallied from their finger prints to the chance prints in the crime vehicle and on the crime whisky bottles. This is his report there from to show the complicity of the accused to the crime in support of the prosecution evidence by PW.19-Investigating Officer about the disclosure by accused leading to discovery of certain facts of accused thrown the iron rod etc., and on the clothes of the accused from their disclosure seized found blood stains detected as of human blood with reference to Ex.P.33. In this regard, the finger prints expert in his evidence as PW.15, the cross-examination by accused No.1 adopted by accused No.2, deposed that Investigating Officer collected finger prints of accused in this case without intervention of Court and the finger prints of accused are not collected in his presence and he did not visit the scene of offence. Whereas, PW.19 the only and crucial witness being the Investigating Officer stated in his evidence in the last portions of his chief-examination, dated 15.07.2011, that on 23.05.2008 he sent letter to the Inspector of Police, Finger Prints Beuro, Ongole, for lifting of blood stains and finger print samples for chemical analysis and on the same day he (PW.15) lifted the finger prints, chance prints from the handle of the car and other parts of the car and also blood

stains from the seat covers and he also lifted the chance prints available on the empty liquor bottles recovered at the instance of the accused. He examined the lifted chance prints with the standard finger prints of accused obtained by him in their presence and sent for his opinion and Ex.P.19 to P.22 are the opinion charts sent by PW.15 on comparison of the standards with the available chance prints on the property recovered at the instance of the accused and he also sent material objections to RFSL, Guntur, under a letter of advice through S.D.P.O., Markapur and obtained opinion covered by Ex.P.33, dated 19.06.2008 and Ex.P.34 is the letter of advice. Exs.P.33 and P.34 already discussed supra and coming to Exs.P.19 and P.20 with reference to evidence of PW.15 referred supra, what PW.15 stated is he did not collect those where what PW.19 stated is as if he collected those that is the crucial contradictory versions even in relation to that crucial link to show complicity of the accused to the crime from their chance prints available on the car on the liquor bottle, which was shown by the accused detected at their instance. Though otherwise within the purview of Section 27 of the Evidence Act of a fact discovered about their throwing of the clothes which contain human blood and throwing of the liquor bottles and the iron rod that were detected and on the liquor bottles, there are alleged chance prints of accused even to correlate, once the very process of collecting is not correlated crucially, it is difficult to rely on the testimony of these two witnesses only by taking corroboration of the telephonic conversations

between accused and deceased, particularly between accused No.1 and deceased, that too when but for showing one of the cell phone standing in the name of accused No.1, the other cell phone PW.6 stated only with her and not parted by her to accused No1. to correlate any calls from that to so-called phone used by deceased and even the so-called phone used by the deceased for the calls received from the number of accused No.1, that phone is when not shown either in the names of the deceased or in any of the name of his family members, but for as per Ex.P.35 in the name of one G. Balaprasad and PW.19- Investigating Officer admitted of not even examined that G.Balaprasad to establish if at all said G.Balaprasad given that phone to deceased or deceased obtained that phone for his use in his name with his permission, which is a criminal link. In the absence of which and there are no phone conversations with any cell phone owned by deceased and with the cell phone of accused even to link, it cannot be said including from the so-called chance prints with the phone conversations of the cell phones of the calls received in between those phones of complicity of the accused to the crime in saying accused and deceased were last seen or in their hands only the deceased was killed and the property was recovered from the accused and but for their explanation if any how otherwise the deceased was killed, but for by them. When these crucial facts are not established from said circumstantial evidence by the prosecution, it is suffice to say, the trial Court went wrong in convicting the accused despite the links of the

chain not clearly established. Suffice to say, the conviction judgment of the trial Court is unsustainable and accused are entitled to be acquitted.

13. In the result, the Criminal Appeals are allowed and the conviction and sentence awarded against the appellant in both the criminal appeals i.e., accused Nos.1 and 2 by the VI Additional District and Sessions Judge, Markapur, in S.C.No.78 of 2010, dated 18.11.2011, are hereby set aside. The appellants/accused Nos.1 and 2 are found not guilty of the offences under Sections 302 and 392 IPC and they are acquitted of the same. They shall be set at liberty forthwith, if they are not required in any crime. The bail bonds executed by accused Nos.1 and 2 shall stand cancelled. The fine amount, if any, paid by the accused Nos.1 and 2 shall be refunded.

Miscellaneous petitions pending, if any, shall stand dismissed.

Dr. B. SIVA SANKARA RAO, J

J. UMA DEVI, J

23rd December 2017.

L.R. Copy to be marked – Yes.

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