

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

CRIMINAL APPEAL No.27 of 2011

Between:

Rokalla Dharmarao @ Busayya,
S/o Late Dandasi

... Appellant

And

State of A.P., repled by Public
Prosecutor, Hyderabad.

... Respondent

JUDGMENT PRONOUNCED ON 24.7.2017

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

HON'BLE MS JUSTICE J.UMA DEVI

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

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE J.UMA DEVI

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

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> Head Note:

! Counsel for the Petitioner: Mrs. A.Gayathri Reddy

^ Counsel for the Respondents: Public Prosecutor (AP)

? Cases Referred:

1. (2016) 4 SCC 604
2. (2011) 6 SCC 288
3. (2016) 2 SCC 607
4. 2005(2)ALT(CrI.)(AP) 240 DB
5. 1999 (1) ALT APP 364
6. 2004 (2) ALT (CrI.) (AP) 571
7. (2001) 2 SCC 205
8. (2012) 6 SCC 403

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

Counsel for the appellant: Mrs. A.Gayathri Reddy

Counsel for the respondent: Public Prosecutor (AP)

The Court made the following:

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

This Criminal Appeal is filed by the sole accused in Sessions Case No.206 of 2008 on the file of the learned II Additional District and Sessions Judge, (Fast Track Court), Srikakulam, against judgment, dated 07.12.2016.

By the afore-mentioned judgment, the appellant was convicted for the offences under Sections-302 and 498-A of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay a fine of Rs.3,000/-, in default, to suffer simple imprisonment for three months for the offence under Section-302 IPC and also sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.3,000/-, in default, to suffer simple imprisonment for three months for the offence under Section-498-A IPC.

The case of the prosecution, as reflected from the charge sheet, is as follows:

One Bhagyamma (hereinafter referred to as "the deceased") was given in marriage to the appellant about 22 years ago and the couple was blessed with two sons and two daughters. While so, four years prior to the occurrence, the appellant developed illicit intimacy with one Narasamma of Bendigate and used to hate and ill-treat the deceased by suspecting her fidelity. The deceased brought the matter to the

notice of Pathapatnam Police and the caste elders, who subsided the matter at the request of the deceased. On 31.3.2007, the appellant got wild against the deceased and beat her severely. The deceased informed to her brother over phone about the continuous harassment by the appellant. Thereupon, her brother-PW-1 along with L.W-7-S.Venkatarao and P.W-3, the Villagers of Kurigam, visited Temburu and convinced the deceased in a smooth manner and returned on that day itself. On 01.4.2007, the appellant again picked up a quarrel with the deceased with heated altercation, left for Hyderabad on 02.4.2007 along with his two sons, came back to Temburu on 05.4.2007 and quarrelled with the deceased. The appellant, who had an evil intention of marrying one Narasamma of Bendigate, decided to do away with the life of the deceased and accompanied her to the quarry on 06.4.2007 at 9 am. Both had a cup of tea each in the tea stall of P.W-4 at Sariyapally Junction and left from there. When the deceased reached a culvert near Maridamma Donka, the appellant attacked her from behind, throttled her neck with her saree, made her fall down, dragged her into the culvert and strangulated her to death with her saree.

On 06.4.2007, at 22 hours on receipt of report, a case in Crime No.10 of 2007 was registered under Section-302 I.P.C.

and copies of the FIR were sent to all the officers concerned. On coming to know about the occurrence over phone from P.W-11, visited Saravakota Police Station at 22.30 hours on 06.4.2007, posted his staff to safeguard the crime scene as it was midnight and on 07.4.2007, he took up further investigation, examined the scene of offence including the dead body of the deceased in the presence of the mediators, prepared a rough sketch of the scene of offence, got the scene of offence photographed by P.W-9, got the scene observation drafted by the mediators, held inquest over the dead body of the deceased in the presence of P.W-8 and L.W-17-Devadi Neelam and sent the dead body of the deceased to P.W-10 for autopsy. He examined P.Ws.1 to 9 and other witnesses and recorded their statements. On 07.4.2007, at about 3 pm, the appellant surrendered himself before P.W-12, who got drafted the observation report by P.W-8 and L.W-17 -D.Neelam and forwarded the appellant to the Court of the Judicial Magistrate of First Class, Pathapatnam, for judicial remand. P.W-10 conducted autopsy on the dead body of the deceased and issued Ex.P-13-Post-mortem certificate opining that the death of the deceased would appear to have been caused due to cardiac respiratory failure due to asphyxia due to strangulation. Thereafter, P.W-12 filed a memo to record the statement of P.W-7 under Section-164 Cr.P.C. and

accordingly, the statement of P.W-7 was recorded, wherein he stated the same facts before L.W-19-Judicial First Class Magistrate, Tekkali, as he stated in his statement to P.W-12. After the completion of investigation, P.W-12 filed the charge sheet.

As the plea of the appellant is one of denial, the Court below has framed the following charges:

“Firstly, that you the above named accused since last four years prior to 06.4.2007 at Temburu Village developed illicit intimacy with one Regu Narasamma of Bendigate and used to ill-treat your wife-Bhagyam on the plea that she is having illicit intimacy and by suspecting her fidelity and on 31.3.2007, you beat your wife Bhagyam severely when she brought to the notice of the Pathapatnam Police and also before caste elders about your ill-treatment and that you thereby committed an offence punishable under Section-498-A IPC and within my cognizance.

“Secondly, that you the above named accused on the 06.4.2007 at about 10.30 hours near a culvert on Temburu-Bonthu road at Asarla Sagaram tank near Maridamma Donka with an intention to do away with the life of your wife-Bhagyam with an evil intention to marry a woman by name Narasamma, a resident of Bendigate, attacked your wife and strangulated her with saree and intentionally caused the death of your wife-Bhagyam and thereby, committed an offence punishable under Section-302 IPC and within my cognizance.”

During trial, the prosecution has examined P.Ws.1 to 12, marked Exs.P-1 to P-15 and produced M.O-1. On behalf of the defence, no evidence has been adduced.

On appreciation of the oral and documentary evidence, the Court below has disposed of the Sessions Case in the manner as observed above.

At the hearing, Mrs. A.Gayathri Reddy, learned counsel for the appellant, advanced the following submissions:

- (1) That the motive alleged by the prosecution not only suffers from contradictions but also does not stand to truth;
- (2) That the long delay in registration of F.I.R. seriously affects the case of the prosecution;
- (3) That the prosecution has failed to produce and mark the statement of P.W-7 purported to have been recorded under Section-164 Cr.P.C., due to which, his evidence is liable to be eschewed; and
- (4) That the evidence of the remaining witnesses is not sufficient to connect the appellant to the alleged occurrence.

Opposing the above submissions, the learned Public Prosecutor for the State of Andhra Pradesh submitted that the evidence of P.Ws.1, 2, 4 and 7 is sufficient to hold the appellant

guilty of the charge of murder; that mere delay in registration of the F.I.R. does not affect the case of the prosecution unless the defence pleaded any prejudice because of the delay; and that non-marking of Section-164 Cr.P.C. statement of P.W-7 would not affect the credibility of his evidence, who, though turned hostile, has admitted that the appellant has confessed before him that the former has killed the deceased.

We have carefully considered the respective submissions of the learned counsel for the parties with reference to the record.

This is a case based on circumstantial evidence, where the prosecution has to establish every link in the chain of circumstances to prove the guilt of the appellant beyond reasonable doubts. In the absence of direct evidence, motive plays an important role.

In Ex.P-1-report, based on which Ex.P-14-F.I.R was registered, P.W-1 has stated about the harassment of the deceased by the appellant by attributing that the appellant was suspecting the fidelity of the deceased. In his evidence before the Court, P.W-1 has deposed that the appellant had extra-marital relationship with one woman of Palasa Village, whose name he does not know, and in that connection, the appellant used to ill-treat the deceased. No where in his evidence, P.W-1 has deposed

that suspicion of fidelity of the deceased by the appellant is the motive for the commission of offence by the latter. Thus, there is a material contradiction on the aspect of motive between Ex.P-1-report and the deposition of P.W-1.

When it comes to the evidence of P.W-2, the son of the appellant and the deceased, he spoke about his father suspecting the fidelity of his mother and interestingly, he did not say a word about his father having illicit intimacy with another woman. Thus, we find mutual contradictory versions coming forth from P.Ws.1 and 2. In the light of these vacillating stands of P.Ws.1 and 2, the case of the prosecution regarding the motive alleged falls to ground. Consequently, the alleged harassment of the deceased by the appellant, for which he has been charged for the offence under Section-498-A IPC., also stands disproved. Thus, one of the most crucial links in the chain of circumstances, *namely*, motive, could not be proved by the prosecution. In the absence of proof of motive, the prosecution has to place before the Court such strong circumstances which show that they are incompatible with the innocence of the deceased.

To sum up, the case of the prosecution is that on the fateful day, P.W-2-the son of the appellant and the deceased and his brother were asked by the appellant to go to quarry for

doing work at around 6 am, informing that he along with his mother will come to the work place by 10 am and bring them back home; that P.W-2 and his brother worked till 11 am and as their parents did not turn up, they started returning to their home at around 11.30 am., and saw the appellant, coming in opposite direction, who enquired as to whether their mother came to the work place; that when they informed the appellant in the negative, all of them went back to the work place; and that, when they were enquiring with other workers attending to stone chipping work in the quarry, they were informed by the appellant that their mother must be somewhere around in the surroundings and asked them to search for her along with him. It is the further case of the prosecution that when P.W-2, his brother, the appellant and L.W-11-Suseela were searching, after some discussion between the appellant and L.W-11, the appellant informed that their mother would be found near culvert in that area and accordingly, they found the dead body of the deceased near the culvert.

It is the further case of the prosecution that after the occurrence, at about 2.30 or 3 pm. on 06.4.2007, the appellant came to P.W-7 and made an extra-judicial confession before him that he has killed the deceased and about 10 days later,

P.W-7 was taken to the Judicial First Class Magistrate, Tekkali, for recording his statement under Section-164 Cr.P.C.

It has come out in the evidence of P.W-1 that at about 5 or 6 pm on 06.4.2007, P.W-12-Inspector of Police reached the place where the dead body of the deceased was found. It is evident from Ex.P-14-F.I.R. that the distance between the place of occurrence and Saravakota Police Station is 12 kms and the F.I.R. was registered at 10 pm. On this admitted set of facts, we feel that there was no need for the Police to delay the registration of the F.I.R. till 10 pm.

In *Gajanan Dashrath Kharate Vs. State of Maharashtra*¹, the Supreme Court held that the delay in setting the law into motion by lodging the compliant and registration of the First Information Report is normally viewed by the Courts with suspicion because there is a possibility of concoctions and embellishments of the occurrence and that, therefore, it becomes necessary for the prosecution to satisfactorily explain the delay. It was further held that the object of insisting on prompt reaching of the report is to obtain early information not only regarding the assailants but also about the part played by them, the nature of the incident and the names of the witnesses. This view is taken by the Supreme Court consistently.

¹ (2016) 4 SCC 604

In *Brahm Swaroop V. State of U.P.*², the Supreme Court has considered a catena of decisions and held that the purpose of prompt registration of F.I.R. is to avoid false implications, embellishments, etc.

Learned Public Prosecutor submitted that if a question on the delay in registration of F.I.R. is not put by the defence to the Investigating Officer, the prosecution is under no obligation to give an explanation. In support of his submission, he has placed reliance on the judgment of the Supreme Court in *State of Rajasthan Vs. Daud Kahn*³ in para-26. It is instructive to reproduce this paragraph hereunder:

“The interpretation of Section-157 of the CrPC is no longer *res integra*. A detailed discussion on the subject is to be found in *Brahm Swaroop V. State of U.P.*, which considered a large number of cases on the subject. The purpose of the “forthwith” communication of a copy of the FIR to the Magistrate is to check the possibility of its manipulation. Therefore, a delay in transmitting the special report to the Magistrate is linked to the lodging of the FIR. If there is no delay in lodging an FIR, then any delay in communicating the special report to the Magistrate would really be of little consequence, since manipulation of the FIR would then get ruled out. Nevertheless, the prosecution should explain the delay in transmitting the special report to the Magistrate. However, if no question is

² (2011)6 SCC 288

³ (2016) 2 SCC 607

put to the investigating officer concerning the delay, the prosecution is under no obligation to give an explanation. There is no universal rule that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable. In other words, the facts and circumstances of a case are important for a decision in this regard.

On a careful reading of the above reproduced paragraph, it is evident that if there is prompt registration of the F.I.R., its delayed transmission to the Magistrate would be of little consequence as, credence of the F.I.R. cannot be doubted in such cases and even then, the prosecution should explain the delay in transmitting the F.I.R. to the Magistrate. The observation of the Supreme Court that if no question is put to the Investigating Officer regarding the delay, in our opinion, is referable to the delay in transmitting the F.I.R. to the Magistrate and it does not relate to the delay in registration of the F.I.R. As the delay in registration of F.I.R. gives rise to a reasonable doubt about manipulation or false implications, the burden is on the prosecution to explain the said delay. Even in the absence of any question being put by the defence to the prosecution witnesses, this burden on the prosecution, in our opinion, is absolute and the prosecution cannot be heard to say that in the absence of any question having been put by the defence in this regard, it is

not liable to discharge such burden. Even according to P.W-1, after finding the dead body of the deceased, he has reached Saravakota Police Station by about 2 pm. However, P.W-11-Sub-Inspector of Police in his evidence deposed that at about 10 pm., on 06.4.2007, P.W-1 came to the Police Station and presented Ex.P-1-report. Obviously, P.W-11 was trying to cover the long delay in registration of the F.I.R. As we have no reason to doubt the veracity of the statement of P.W-1 regarding the time of his reaching Saravakota Police Station and lodging the report, we have no hesitation to hold that the Police had received the information about the death of the deceased at about 2 pm. When we, thus, reckon the time gap, there is about 8 hours delay in the registration of F.I.R. which, in our opinion, is substantial giving scope for embellishments and false implications.

Coming to the evidence of the prosecution witnesses, P.W-1 is a hearsay witness. All that P.W-2-the son of the appellant and the deceased, deposed is that on being told by his father initially, that his mother would be in the surroundings and later, that she could be found near culvert, they searched and found the dead body of his mother near the culvert. In addition to this, P.W-4, who was running a tea stall at Pedda Sariyapally junction, deposed that he knows the appellant and

that about 2 years back, at about 9 am., the appellant and his wife came to his tea stall and took tea. The evidence of this witness is, obviously, sought to be relied upon by the prosecution to put forth the last seen theory. The testimony of this witness, in our opinion, cannot be relied upon for two reasons, *viz.*, (1) that he has stated that he does not know the wife of the appellant. Therefore, his statement that he saw the appellant and his wife at 9 am about two years back cannot be given credence to, for, when he had no acquaintance with the wife of the appellant, he would not have known whether the woman along with the appellant was in fact the deceased or not; and (2) that he has made a vague statement that about two years back, he saw the appellant along with his wife. In our opinion, it would have been possible for the appellant and his wife to go to the tea stall on any day prior to the date of occurrence also. In the absence of the specific date on which the appellant and the deceased had tea in the stall of P.W-4, the last seen theory propounded by the prosecution through P.W-4 has no basis at all.

The only other evidence available on record is the alleged extra-judicial confession of the appellant before P.W-7. This witness was treated hostile. In his chief-examination, P.W-7 has stated that on 06.4.2007 at about 2.30 or 3 pm, the appellant

came to him and informed that his wife died; that when he questioned the appellant as to how she died, the latter pleaded ignorance; that the news spread in the entire village that the appellant has killed his wife; and that as the appellant was in a fully drunken condition, he advised the appellant to go and surrender before the Police. In his cross-examination by the learned Additional Public Prosecutor, P.W-7 has, however, deposed that the appellant told him that he committed a mistake by killing his wife and that he kept her body near a culvert at Asarla Sagar tank. P.W-7 has also deposed that the Police have taken him to the Judicial First Class Magistrate, Tekkali, who recorded his statement. For reasons not known, the prosecution has not got Section-164 Cr.P.C. statement of P.W-7 marked.

Learned counsel for the appellant submitted that the non-marking of Section-164 Cr.P.C. statement of P.W-7 is fatal to the case of the prosecution. In support of her submission, the learned counsel has placed reliance on the judgment of a Division Bench of this Court in *Sivakoti Daveedu and another Vs. State of A.P.*⁴.

Learned Public Prosecutor submitted that non-marking of the Section-164 Cr.P.C. statement of P.W-7 does not affect the

⁴ 2005(2)ALT(CrI.)(AP) 240 DB

credibility of his evidence, as he admitted that his statement was recorded by the Magistrate.

In *Sivakoti Daveedu* (3 supra), the Division Bench has dealt with a similar situation, where statements of two witnesses were recorded by the Magistrate under Section-164 Cr.P.C. However, those statements were not produced and also not supplied to the appellant. The Division Bench relying upon the judgments in *Kota Peda Nagesh Vs. State of A.P.*⁵ and *Harijana Mulinti Bhushanna Vs. State of A.P.*⁶, held that by non-marking of Section-164 Cr.P.C. statements of the witnesses, an adverse inference can be drawn against the prosecution.

In the light of the above legal position, we are of the opinion that the evidence of P.W-7 has no probative value as his statement recorded under Section-164 Cr.P.C. was neither supplied to the appellant nor marked as a piece of evidence. Even otherwise, the prevaricative evidence of P.W-7 between his chief-examination and cross-examination renders him a wholly unreliable witness and therefore, it is wholly unsafe to rely upon such evidence.

The law is well settled that the extra-judicial confession is a weak form of evidence which, in the absence of proper corroboration by the other evidence, cannot be considered as a

⁵ 1999 (1) ALT APP 364

⁶ 2004 (2) ALT (Crl.) (AP) 571

substantive piece of evidence to convict the accused. (See *Gura Singh Vs. State of Rajasthan*⁷ and *Sahadevan Vs. State of Tamilnadu*⁸)

On a holistic consideration of the entire case, we are of the opinion that the prosecution failed to drive home the guilt of the appellant beyond all reasonable doubt and hence, the Court below has committed a serious error in convicting him for the offences under Sections-302 and 498-A I.P.C.

Accordingly, the Criminal Appeal is allowed and the impugned judgment of the Court below is set aside. The appellant, who is on bail, must surrender himself before the Jail Superintendent for his formal release from the custody, after completion of the required formalities.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE J.UMA DEVI

24th July 2017

Note:

LR copies to be marked.

B/o

DR

⁷ (2001) 2 SCC 205

⁸ (2012) 6 SCC 403