

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD**

CRIMINAL APPEAL NO.426 OF 2011

JUDGMENT: (per Hon'ble Sri Justice T.Amarnath Goud)

By judgment dated 06.04.2011 in S.C.No.365 of 2009, the learned III Additional District & Sessions Judge, Kakinada (for short, trial Court), found the sole accused guilty of the offences punishable under Sections 302 and 201 of the Indian Penal Code, 1860 and convicted him under Section 235(2) of the Criminal Procedure Code and sentenced him to suffer imprisonment for life and to pay a fine of Rs.500/-, in default, simple imprisonment for one month for the offence punishable under Section 302 IPC and further sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.1,000/-, in default, simple imprisonment for one month for the offence punishable under Section 201 IPC. Both the sentences were to run concurrently. Aggrieved by the convictions and sentences imposed upon him by the trial Court, the sole accused preferred this appeal under Section 374(2) Cr.P.C.

2. The case of the prosecution, in brief, is as under:-

(i) The deceased Palaparthi Ayyanna @ Babulu, P.W.5 and the accused (appellant herein) were having acquaintance with each other. The accused and P.W.5 used to spend most of their time at the house of the deceased and the accused used to move closely with the wife of the deceased. The deceased

misunderstood the closeness of the accused with his wife and openly threatened the accused to kill if he does not change his behaviour.

(ii) While so, on 01.09.2008 at about 10.00 pm., the accused along with P.W.5 went to the house of the deceased, took him to the field of makam of Saibaba and the accused was armed with an iron rod and small piece of crow bar. The accused and the deceased proceeded on one bicycle while P.W.5 followed them on his cycle. They parked their bicycles on the bank of channel, went to the makam shed on foot and the deceased and accused broke open the locks of the cocks den, picked up a cock and handed it over to P.W.5 with instructions to keep it at the house, and on the said pretext, the accused sent away P.W.5, thereby secluded the deceased solitarily. While the accused and the deceased were about to leave, P.W.6 questioned the accused about his presence at that time, for which, he replied that he has some work there. After proceeding some distance, the deceased picked up verbal altercation with the accused about his behaviour towards his wife. The accused stopped his cycle, asked the deceased to get down, parked his bicycle and dealt a hefty blow with an iron rod on the right temple of the deceased, and when the deceased dropped down prostrately in the flowing field channel No.12, the accused again beat with iron rod on the head of the deceased and also pressed him in the water of the channel with his legs. After confirming the death of the deceased, the accused threw the iron rod in the nearby bushes

of the channel, met P.W.5 and instructed him to leave the cock in the field makam of Saibaba and went away. When the deceased did not return to the house, P.W.2 made enquiry with the accused, but he pretended innocence. The Village Revenue Officer, A.V. Nagaram (P.W.1) submitted Ex.P.1 written complaint to the Police Station, Thondangi. Thereupon, P.W.11 registered a case in Crime No.96 of 2008 under Section 174 Cr.P.C. On 13.10.2008, P.W.8 lodged a compliant (Ex.P.4) with P.W.11 stating that the accused approached him and gave extra-judicial confession admitting that he murdered the deceased on the night of 1/2.9.2008. Basing on the said report, P.W.11 altered section of law to 302 and 201 IPC and issued FIR (Ex.P.25). Investigation was then taken up by P.W.12. He went to the scene of the offence and arrested the accused on 14.10.2008 at 1.00 am at Panchayat Office, Ravikampadu. He then seized M.O.3 under the cover of panchanama in the presence of panchas i.e., P.W.8 and 14 and drawn rough sketch of the scene. He then sent the dead body to the hospital for post-mortem examination. P.W.9 conducted autopsy over the dead body of the deceased and opined that the cause of death of the deceased was due to head injury and drowning. P.W.12 completed the investigation and laid the charge-sheet.

3. On committal, the trial Court framed charges under Sections 302 and 201 IPC and when the accused pleaded not guilty of the said charges and claimed to be tried, the trial Court examined P.Ws.1 to 12 and got marked Exs.P.1 to P.26 and

M.Os.1 to 6. After closure of the prosecution evidence, the accused was examined under Section 313 Cr.P.C. On consideration of the oral and documentary evidence, the trial Court convicted the accused and sentenced him to suffer punishment for the aforesaid offences. Aggrieved by the said judgment, the appellant-accused preferred the present appeal.

4. The salient points emerging from the evidence may now be noted:

(i) P.W.1 was the Village Revenue Officer, A.V.Nagaram Village. He deposed that on 02.09.2008 at about 10.00 am., village servant Atchayya came to him and informed that dead body of one person lying in the irrigation channel near the land of Merla Satyanarayana. On such information, he went there and found the dead body of the deceased. After verifying the identity of the deceased, he went to the Police Station and gave a report Ex.P.1.

(ii) P.W.2 is the wife of the deceased. She deposed that her husband, the accused and P.W.5 used to be friendly and used to move together. One day prior to the death of her husband, the accused and P.W.5 called the deceased for catching fish, but the deceased told them that he cannot join them as he was not feeling well. On 01.09.2008 at about 10.00 pm., the accused and P.W.5 came to her house and asked her husband to come along with them for catching fish, but the deceased refused to go with them. However, on the insistence of the accused and

P.W.5, the deceased accompanied them. Thereafter, the deceased did not return to the house. On the next day, P.W.4 informed her that the dead body of the deceased was in the irrigation channel. P.W.2 found injuries on the dead body of the deceased on the head, face, hands and chest. She expressed suspicion against the accused for the death of the deceased. She noticed a crow bar and one of the chappals of the deceased at the scene of offence.

(iii) P.W.3 is the neighbour of the deceased. He deposed that on 01.09.2008 at about 10.00 pm., when he went out for the purpose of nature calls, he saw the accused and P.W.5 in front of the house of the deceased. He heard the accused and P.W.5 asking the deceased to accompany them and the deceased was telling them that he was not well and he cannot accompany them. The accused and P.W.5 insisted the deceased and took him along with them. He saw all the three going away from the house of the deceased. One the next day, he was informed about the death of the deceased.

(iv) P.W.4 is the relative of the deceased. He deposed that when he went to the nature calls, he saw the dead body of the deceased in the irrigation channel and immediately informed the same to P.W.2.

(v) P.W.6 is the resident of A.V.Nagaram Village. He deposed that about two years back at about 9.30 pm., while he was going to his lands for closing supply of water to the fields, he saw the

accused and the deceased at the channel pipes, where cross bund is laid for supply of water to the fields. He asked the accused why he was there at that time, for which, the accused also put him the same question. When he replied to the accused that he came there to close the pipe lines for stopping supply of water to the fields, the accused told him the same answer. Then he questioned the accused that when he gave his land on lease, what was the necessity for him to come there. Later, the accused and the deceased went away on the bicycle. He saw the accused and the deceased in the focus of torch light which was with him. Later, he was going to his house, he saw P.W.5 coming on a bicycle with a plastic bag. On the next day morning, while he was in the fields, he came to know about the death of the deceased. At that time, the accused came and requested him not to disclose to anybody about his witnessing of them in the previous night.

(vi) P.W.8 is Village Revenue Officer, Ravikampadu Village. He deposed that on 02.09.2008 at about 11.00 am., Police came to the scene of offence. At about 2.30 pm., he went to the field channel No.12, and at that time, P.Ws.1 and 11 were present there. He found the dead body of the deceased there facing downwards the water i.e., inside the water in the said field channel. He noticed material objects there. He also found abrasions on elbow, left side of the face i.e., cheek, legs and foot. After the dead body was brought out, he found small injuries on the person of the said dead body. Scene observation report

(Ex.P3) was prepared in the presence of himself and PW.1 and they signed it. On 13.10.2008 at about 2.00 pm., while he was in Panchayat Office, the accused came and confessed about the offence.

(vii) P.W.9 is the doctor, who conducted the post mortem examination. He expressed his opinion that the cause of death was due to head injury and drowning.

5. Upon considering the above evidence, the trial Court basing on the last seen theory, cardinal principle governing the circumstantial evidence and also believing the evidence of P.W.8, has come to the conclusion that the offence was committed by the accused. On the strength thereof, the trial Court recorded convictions and sentences, leading to filing of this appeal.

6. Heard the learned counsel appearing for the appellant-accused and the learned Public Prosecutor appearing for the respondent-State.

7. The learned counsel appearing for the appellant would submit that the judgment of the trial Court is contrary to law, weight of evidence and probabilities of the case; that there were no eye witnesses to the incident and the case rests on circumstantial evidence; that the trial Court failed to see that the circumstances relied upon by the prosecution do not form a chain of events so as to connect him with the crime; that the learned trial Court should have seen that incident took place on

01.09.2008 and there was no reason for the accused to make extra judicial confession before P.W.8 on 13.10.2008; that the trial Court ought to have seen that even according to P.W.2, the wife of the accused, the deceased left the house alone with P.W.5 and accused; that the trial Court erred in placing reliance on the testimony of P.Ws.2, 3 and 7 which is highly interested and discrepant in material particulars and that trial Court failed to see that P.W.5 did not support the case of the prosecution and was treated hostile by the prosecution.

8. The learned Public Prosecutor appearing for the respondent-State would submit that the trial Court, after considering the oral and documentary evidence on record, rightly convicted the accused for the offence punishable under Sections 302 and 201 IPC., and there are no grounds warranting interference with the said judgment and therefore, the appeal is liable to be dismissed.

9. The learned counsel for the appellant relied on **Pannayar v. State of Tamilnadu by Inspector of Police**¹ and argued on the point of delay in recording the statement of the witness as well as the motive behind the murder. She argued that in the present case, the prosecution has not explained any convincing reason for delay in recording the statement of P.W.8 and also failed to prove the motive of the accused for the murder. She also relied on **Sahadevan v. State of T.N**² and argued on the

¹ AIR 2010 SC 85

² (2012) 6 SCC 403

point of extra-judicial confession, its admissibility and its evidentiary value for convicting the accused. She further argued that in the said judgment, it is held that extra judicial confession is a weak piece of evidence and the Court must ensure that same inspires confidence and is corroborated by other prosecution evidence. She also argued that in the present case, the extra judicial confession made by the accused before P.W.8 does not appear to be cogent and is not corroborated by other prosecution evidence and hence it cannot be taken into consideration for convicting the accused. She also relied on **Jaharlal Das v. State of Orissa**³ and **Babu v. State of Kerala**⁴ and argued upon the last seen theory and the circumstantial evidence. She argued that since there is no satisfactory proof to prove the guilt, the Court will have no other option, but to give the benefit of doubt to the accused.

10. We have perused the evidence of P.W.8. His evidence does not in any manner incriminate the accused. He deposed that the dead body of the deceased was found lying in a field channel and that the Police prepared scene observation report (P.W.3) in his presence and he signed it as a witness. Nothing more is stated by him. P.W.8 does not in any manner help the prosecution case so far as this circumstance is concerned. If really the body has been discovered at the instance of the accused, there should have been a panchanama and a mention about the same in the inquest report.

³ AIR 1991 SC 1388

⁴ 2010 (2) ALD (CrL.) 880 (SC)

11. It is too well settled in law that where the case rests squarely on circumstantial evidence the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. No doubt, it is true that conviction can be based solely on circumstantial evidence but it should be decided on the touchstone of law relating to circumstantial evidence, which has been well settled by law by the Hon'ble Supreme Court.

12. In **Sharad Birdhichand Sarda v. State of Maharashtra**⁵ in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated.

"Whenever the case is based on circumstantial evidence following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under:-

"(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(iii) The circumstances should be of a conclusive nature and tendency,

(iv) They should exclude every possible hypothesis except the one to be proved, and

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused".

⁵ 1984 (4) SCC 116

13. Having given our careful consideration, we are of the firm opinion that the prosecution has not established this circumstance conclusively. Therefore, the last seen theory is not established beyond reasonable doubt. However, when once it is held that the crucial circumstance namely the discovery of the body at the instance of the accused is not established, then the other circumstances are hardly sufficient to establish the guilt of the accused. Apart from the same, the prosecution did not send M.Os.1 and 3 to the fingerprint expert for comparing the fingerprints available on them with the fingerprints of the accused to prove the guilt of the accused.

14. On the above analysis, this Court finds that the prosecution's case was fraught with inconsistencies and weaknesses, the fundamental defect being its failure to present the origin and genesis of the occurrence in its full and true form. Benefit of doubt would therefore have to be extended to the accused as the prosecution failed to establish beyond reasonable doubt that he is responsible for the death of the deceased. Hence, the convictions and sentences passed by the trial Court are liable to be set aside.

15. The Criminal Appeal is accordingly allowed and the judgment dated 06.04.2011 in S.C.No.365 of 2009 on the file of the Court of III Additional District & Sessions Judge, Kakinada, is set aside. The appellant/accused shall report before the Superintendent, Central Jail, Rajahmundry, East Godavari

District, for completion of necessary formalities in accordance with the due procedure, if he has not been convicted in any other case, in the light of his acquittal. The bail bonds furnished at the time of his securing conditional bail shall stand discharged. The fine amounts, if any, paid by him shall be refunded.

SANJAY KUMAR, J

Date: 10-11-2017
TJMR

T.AMARNATH GOUD, J