

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE MRS. JUSTICE T.RAJANI

CRIMINAL APPEAL No.370 and 962 of 2012

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

A1 and A2 in Sessions Case No. 478 of 2011 on the file of the VIII Additional Sessions Judge (Fast Track Court), East Godavari district, Rajahmundry, are the appellants in both these appeals. They were tried for the offences punishable under Section 302 and 379 read with 34 IPC. Vide judgment dated 21.03.2012, the learned Sessions Judge convicted the accused for the offence punishable under Section 302 read with 34 IPC and sentenced them to suffer imprisonment for life and also to pay a fine of Rs.500/- each in default to undergo simple imprisonment for a period of three months. They were also convicted under Section 379 read with 34 IPC and sentenced to suffer rigorous imprisonment for three years and pay a fine of Rs.500/- each in default to suffer simple imprisonment for three months. Both the sentences were directed to run concurrently.

2. The gravamen of the charge against the accused is that on 09.12.2010, at 10 p.m., A2 went to the house of the deceased- Cheekaramilli Bullammai, and while she was alone in the house, A2 introduced herself as wife of A1 and kept her busy by chatting. Then, A2 got opened the back side door from inside the house of

the deceased, overpowered her by tying her hands and legs with clothes; gauged clothes into her mouth and caused her death. Therefore, the accused are said to have committed theft of gold chain, one gold ring, pair of ear studs and one Nokia Company cell phone with number 9010282095.

3. The case of the prosecution, as seen from the evidence of the witnesses, is as under:

The deceased is the mother of PW2, while one Veerraju is the elder brother of PW2. A1 who was residing opposite to the house of PW2 since his childhood, developed acquaintance with the deceased by calling her as "Mama". It is stated that the house of PW2 and A1 are separated by one house. The deceased was staying alone in one room and another room was leased on rent to a fair price shop dealer. On 10.12.2010, PW3 went to the house of the deceased, called her, but, did not receive any reply from inside the house. Later on, he pushed the door and found the body of the deceased tied to a sofa. She also noticed absence of ornaments on the body of the deceased, and that the back side door of the house was opened. The things in the house were in pelmel condition. PW1-the Village Revenue Officer of Alamuru village came to know about the death of the deceased, and accordingly, rushed to the house of the deceased and found the dead body of the deceased in the house. He noticed clothes gauged into the mouth of the deceased and her legs and hands tied to a sofa set. He proceeded to Alamuru police station and lodged a report (Ex.P1) before PW9-

the Sub Inspector of Police, which came to be registered as Crime No. 156 of 2010 under Sections 302 and 379 IPC. Ex.P9 is the original First Information Report.

4. On 10.12.2010, at about 11 a.m., PW10-the Inspector of Police received information from PW9 about the registration of the F.I.R. On that, he rushed to Alamuru Police station, received a copy of Ex.P1, perused the contents and then proceeded to the scene of offence along with PW9 and his staff. At the scene, he drafted a scene observation report under Ex.P3 in the presence of PW1. He also seized M.Os 1 to 2 under Ex.P2. In the meantime, the clues team, along with the dog squad arrived from Kakinada. PW10 found M.O.15 (mobile phone with number 9010282095) missing. Then, he sent a requisition to the Superintendent of Police, Kakinada for the call data of the said cell number and requested him to cause enquiry about the above cell phone. He also got prepared a rough sketch of the scene, which is marked as Ex.P2 and he also got the scene of offence photographed through PW4. At the scene of offence, PW10 conducted inquest over the dead body of the deceased, in the presence of PW1. Ex.P3 is the inquest report. During inquest, he examined PWs 1 to 3. After conducting inquest, he sent the dead body for post mortem examination.

5. PW8-the Civil Assistant Surgeon, Area Hospital, Ramachandrapuram conducted autopsy over the body of the deceased and issued Exhibit P8-the Post Mortem Report. According

to him, the death was 32 to 36 hours prior to the post mortem examination and the cause of death was due to asphyxia due to pressure on neck.

6. On 12.01.2011, PW10 received the call data information relating to mobile number 9010282095 with I.M.E.A.No.356811027773480, which was stolen from the deceased, and on perusal of the details, he found the mobile number 8978346401 being used with the said I.M.E.A. number. He started enquiries about the bearer of the said mobile. On 14.09.2011, he, along with PW1 and LW19 visited the house of A2, wife of A1, situated at Kothuru village of Alamaru Mandal. By the time they went there, they noticed A2 selling goods and on seeing PW10 and others, A2 tried to hide the cell phone. On that, she was questioned about her identity and as to why she hid her cell phone. She disclosed her identity and produced M.O.15 (cell phone) before PW10. PW10 observed it was a blue coloured Nokia cell phone. Then, he pressed start, 06 and hash buttons for I.M.E.A.Number of the cell phone. He found the I.M.E.A.No. as 356811027773480 and identified the same as stolen property. He seized the said cell phone for further investigation under Ex.P4. On interrogation, A2 confessed about the commission of the offence, and pursuant thereto, ear studs came to be recovered under Ex.P4. M.O.14 is the pair of ear studs. Basing on the information furnished by A2, the police party proceeded to the house of A1. At that time, A1, who was standing in front of his house, tried to run away on seeing the police. On that PW10, along with his staff, apprehended him.

When questioned as to why he was running away, he is said to have disclosed about the commission of the offence, which was reduced into writing under Ex.P5. His confession led to recovery of a gold mangalasutram (M.O.13). PW10 seized the same under Ex.P5. After sending both the accused to remand, PW10 sent a requisition to the Superintendent of Police for the call data of the cell numbers 9676674024 and 8978346401, which were used by A1 and A2 earlier to their arrest. On 13.04.2011, PW10 received the call data of the aforementioned two numbers, and on observation, it was found that there were number of calls between the two numbers. Thereafter, he conducted an identification parade for the properties near the Office of the Mandal Revenue Officer, in the presence of PW2, who identified M.Os 13 and 14 as belonging to the deceased.

7. After collecting all the necessary documents, a charge sheet came to be filed, which was taken on file as PRC No. 22 of 2011 on the file of the Judicial First Class Magistrate, Alamuru. On appearance, copies of the documents were furnished and after satisfying the requirements of Section 207 of Cr.P.C., the matter was committed to the Court of Sessions, wherein it came to be numbered as S.C.No. 478 of 2011 on the file of the VIII Additional Sessions Judge (Fast Track Court), East Godavari district, Rajahmundry. Basing on the material on record, charges for the offences punishable under Sections 302, 379 read with 34 of IPC came to be framed, read over and explained to the accused, to which they denied and claimed to be tried.

8. In support of its case, the prosecution examined PWs.1 to PW10 and got marked Exs.P1 to P15 and M.Os.1 to 15. After the closure of 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. No oral or documentary evidence was adduced by the accused in support of their defence.

9. Believing the recoveries made, more particularly, the cell phone containing I.M.E.A.No. 356811027773480, coupled with the gold ornaments, the learned Sessions Judge convicted the accused under Sections 302, 379 read with 34 IPC. Challenging the same, the present appeals came to be filed.

10. The learned counsel for the appellants mainly submits that there are no eye witnesses to the incident, and the circumstances relied upon by the prosecution do not form a chain of events to connect the accused with the crime. According to him, there is no material to show that the cell phone which is alleged to have been seized at the instance of A2, belongs to the deceased, and even if it is believed, it cannot be said that the conversation between A2 and A1 was such that, the only inference that could be drawn is about the murder of the deceased. Insofar as the recovery of gold ornaments is concerned, the counsel would submit that the same is contrary to Rule 230 of the Criminal Rules of Practice. Therefore, he contends that both the circumstances relied upon by the prosecution do not connect the accused with the crime.

11. On the other hand, the learned Public Prosecutor opposed the same, contending that the fact that the cell phone of the deceased was found with A2, and that the call data collected, basing on I.M.E.A. number of the said cell phone, shows that the said phone was used after it was stolen from A2, can be made the basis to convict the accused.

12. The point for consideration is whether the two circumstances relied upon by the prosecution, viz., (1) committing theft of the cell phone of the deceased and using the same by inserting another SIM and (2) the recovery of gold ornaments of the deceased from the accused, are proved, and if proved, whether they are sufficient to connect the accused with the crime.

13. It is to be noted here that there are no eye witnesses to the incident and the case rests on circumstantial evidence. The question would be whether these circumstances relied upon by the prosecution are sufficient to connect the accused with the crime. In *Dhan Raj @Dhand v. State of Haryana*<sup>1</sup> the Apex Court held as under:

“In case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence, and the circumstances so proved must form a complete chain without giving any chance of surmise or conjecture and must also be consistent with the guilt of the accused.”

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<sup>1</sup> (2014) 6 SCC 745

14. Keeping in view the principles laid down in the judgment referred to above, we shall now proceed to deal with the case on hand. Admittedly, the prosecution relied on the two circumstances, viz., (1) committing theft of the cell phone of the deceased and using the same by inserting another SIM and (2) the recovery of gold ornaments of the deceased from the accused. Insofar as the usage of cell phone alleged to have been stolen from the deceased, the prosecution is mainly relying upon the evidence of PWs 5, 6 and 10. It would be useful to refer to the evidence of PW10 in this case. According to him, after receiving the copy of the F.I.R., he proceeded to the scene of offence, conducted scene of offence panchanama, prepared a rough sketch of the scene, held inquest over the dead body and examined PW1 at the scene. His enquiries revealed that a Nokia cell phone bearing No. 9010282095 was missing. Strangely, he was able to get even the I.M.E.A. number of that cell phone at the scene itself, which fact was not spoken to by PW1, who was the mediator for the seizure of Nokia cell phone. Basing on the I.M.E.A. number, he claims to have requested the Superintendent of Police for the call data of the concerned number and requested him to cause enquiry about the usage of the cell, and whether any new SIM has been inserted in the said cell. Thereafter, he is stated to have received call data of the mobile number 9010282095 on 11.12.2010 and then got confirmed the I.M.E.A. number of the mobile.

15. It is to be noted here that none of the witnesses who were present at the scene deposed about disclosing the I.M.E.A number

of the cell phone to PW10. Even PW1, who acted as a panchanama witness to the alleged recovery, did not disclose the I.M.E.A. number to PW10. Hence, it is very strange as to how PW10 came to know the I.M.E.A number of the cell phone, when admittedly, no papers relating to the purchase of the cell phone were seized and the seller of the cell phone was also not present at the scene, more particularly, when the owner of the cell phone was no more by then.

16. Further, it is to be noted that though PW10 received call data of the I.M.E.A.No. 356811027773480 on 11.12.2010, a month later, i.e., on 22.01.2011 he received call data information about the very same I.M.E.A number with mobile No. 8978346401, meaning thereby that the cell phone belonging to the deceased was allegedly being used by the accused after committing the murder of the deceased, by inserting sim with phone number 8978346401. It will be useful to refer to the evidence of PW10 in this regard, which is as follows:

“I found M.O.15 missing and its mobile No.9010282095, its IMEA No.356811027773480. Then I sent requisition to the Superintendent of Police, Kakinada for the call data of the concerned number and requesting him to cause enquiry the above said cell and any new number is inserted in the said M.O.15. Then I received call data of the mobile number 9010282095 on 11.12.2010 and I confirmed the IMEA Number of the mobile (M.O.15).

On 3.1.2011 I received the Post Mortem Certificate of deceased (Ex.P-8) from Dr.K.Nagendra Prasad (P.W.8) and he opined that the deceased died due to axphisia due to pressure on the mouth. On 4.1.2011 I sent the material objects seized from the scene of offence to R.F.S.L. Vijayawada through the S.D.P.O. Ramachandrapuram. On 12.1.2011, I received call details information of the mobile with IMEA number 356811027773480, which was stolen from the deceased. On perusal of the details (call details) I found the mobile number 8978346401 was being used.”

17. However, in the cross-examination, PW10 stated as follows:

“I did not seize the record evidencing that the mobile number belongs to the deceased. It is true that prior to Ex.P-11 to P-12 we have no call data or particulars of the relevant cell nos. 9676674024 and 8978346401.”

18. It is to be noted here that PWs 5 and 6 were examined to speak to the cell phone number 9676674024 of Airtel company, alleged to have been used by A1. Their evidence in this regard reads as follows:

“PW5: We used to sell SIM cards, recharge coupons. LW.12 Sreeram is my Distributor. I do know A.1, who is my villager, is house is situated at back side of my shop. A.1 purchased SIM card from by shop by submitting his Voter Identity card and one passport size photograph. His Cell

Phone No. is 9676674024, which belongs to AIRTEL Company. I sent to the ID Proof and his photography to my HEAD Office, AIRTEL, Alamuru, then only his SIM was activated.

PW6: PW.5 forwarded the documents and the SIM Number, then we activated it and same was forwarded to them onwards transmission to the Super Stockist, Mandapeta and then he sent the same to the AIRTEL Company.

I can say, the number of A1, as 96766 74024. The above said SIM was activated on 20.12.2010.”

19. From the evidence referred to by us above, it is clear that the SIM card, which is said to have been sold by PWs 5 and 6 to A1 is not same SIM card which is said to have been used by any of the accused by inserting the same in the cell phone of the deceased. The link as to the usage of cell phone with a particular number and purchase of the SIM from PWs 5 and 6, with the same number is missing, as the SIM numbers mentioned by PW10 and PWs 5 and 6 are different. Even assuming, for the sake of argument, that 8978346401 is the mobile used by A2, there is no evidence on record to show the person from whom she is said to have purchased the SIM card with the said number. If the evidence of PWs 5 and 6 is considered, it would only connect the usage of the cell phone bearing SIM no. 9676674024 by A1, which, by itself is not an offence, unless it is being used through the cell phone of the

deceased, which, in our view, is not established. Therefore, the evidence of PW10 that there were number of calls between the two numbers, viz., 9676674024 and 8978346401, which are alleged to have been used by A1 and A2, even accepted to be true, does not, in any way, establish that these two accused committed the offence and that they were talking about the crime and the manner in which the dead body is to be disposed of after commission of the offence, or with regard to the crime itself. Things would have been different had the SMS messages from the two phones either side were placed on record.

20. Having regard to the above, it is clear from the findings given by us earlier, that on 10.12.2010, when PW10 visited the house of the deceased, he was able to secure the I.M.E.A number at the scene of offence itself, which fact was not spoken to by any of the witnesses, including the son of the deceased. Therefore, the call data, which is alleged to have been secured even before the recovery of the cell phone, which took place on 14.01.2011, in our view, has to be viewed with suspicion. Hence, the first circumstance, in our view, is not established, and even if the alleged recovery of the cell phone is to be believed, that by itself does not in any way connect the accused with the crime.

21. Coming to the recovery of gold ornaments, PW10, in his evidence, deposed that on 14.01.2011, at about 11 a.m., he, along with PW1, visited the house of A2 situated at Kothuru Village of Alamuru Mandal, where they noticed A2 selling goods. On seeing

PW10 and others, she tried to hide her cell phone. On interrogation, she is alleged to have disclosed about the commission of the offence and leading to recovery of a pair of ear studs, which are marked as M.O.14. Since her confession disclosed the role of A1 in the offence, the police went to the house of A1 and found him standing in front of his house. On seeing the police party, he tried to run away, but when the police apprehended him, he disclosed about the commission of the offence and his confession led to recovery of M.O.13, which is a gold mangalsutra. The said recovery of gold ornaments came to be supported by PW1- the Village Revenue Officer, who acted as a mediator of the scene. The gold ornaments under M.O.13 and M.O.14 were identified by PW2, who is the son of the deceased. It is also to be noted here that this identification proceedings was held in the Office of the Mandal Revenue Officer, in the presence of PW2.

22. As seen from the evidence of the witnesses, the incident in question took place on 10.12.2010 and the gold ornaments, i.e., M.Os 13, 14 and 15 are said to have been recovered at the instance of A1 and A2 on 14.01.2011, i.e., nearly a month later. Therefore, the period between the date of incident and the date of recovery made, being not proximate, a doubt arises as to whether the accused would have kept with them for more than a month after commission of the offence. If really, all these ornaments were taken away from the body of the deceased after the commission of the offence, neither A2 nor A1, would have kept these ornaments with them. Every effort would have been made by them either to

melt or sell the same. Therefore, the argument of the learned counsel for the appellants that without having knowledge about the incident in question, the accused must have purchased the property, cannot be brushed aside.

23. In the result, the Criminal Appeals are allowed in part. The conviction and sentence recorded against the appellants/ accused in the judgment dated 21.03.2012, in Sessions Case No.478 of 2011 on the file of the VIII Additional Sessions Judge (Fast Track Court), East Godavari district, Rajahmundry, for the offences punishable under Section 302, 379 read with 34 I.P.C. is altered to one under Section 411 IPC. For the altered conviction, the sentence of imprisonment of the appellants is reduced to that of the period already undergone by them, in view of the representation made by the learned counsel for the appellants that the appellants served the sentence of more than five years after conviction. The period of remand underwent by them during investigation, trial and after conviction shall be given set off, under Section 428 Cr.P.C. Consequently, the appellants shall be set at liberty forthwith, if not required in connection with any other case. Miscellaneous petitions pending, if any, stand closed.

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JUSTICE C. PRAVEEN KUMAR

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JUSTICE T. RAJANI

31.07.2018  
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