

HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CRIMINAL APPEAL No.304 OF 2013

JUDGMENT: (Per Hon'ble Sri Justice A. Shankar Narayana)

Both appellants are convicted for the charge under Section 302 read with 34 of Indian Penal Code, 1860 (IPC), and sentenced to undergo Imprisonment for Life on the ground that in furtherance of their common intention, murdered one Bhukya Krishna Naik, the deceased, who is no other than the husband of appellant No.2 - accused No.2, by strangulation when he objected their illicit intimacy. Questioning the said conviction recorded under Section 235 (2) of the Code of Criminal Procedure, 1973 (for short 'Code') by the learned Additional Sessions Judge, Anantapur District at Hindupur in Sessions Case No.12 of 2012, by his judgment, dated 08.03.2012, the present Criminal Appeal is preferred under Section 374 (2) of the Code.

2. Heard Sri Tata Singaiah Goud, learned Legal Aid Counsel appearing for the appellants, and the learned Public Prosecutor for the State of Andhra Pradesh.

3. The submissions made by the learned counsel and the learned Public Prosecutor for the State of Andhra Pradesh to justify the stand taken by them respectively, we would like to refer to them having adverted to certain relevant facts.

4. The factual matrix, as gleaned from the charge sheet and the evidence on record, is as under:

i) The complainant - Bukya Shankar Naik is the younger brother of the deceased - Bhukya Krishna Naik. The marriage of accused No.2 took place about five years prior to the date of incident with the deceased. Accused No.2 also belongs to the same village to which the deceased belonged, and his house situates nearby the house of the deceased.

ii) A few months prior to the date of incident, somehow, accused No.1 developed illicit intimacy with accused No.2, and the deceased whenever found both of them moving closely, he used to abuse accused No.2 and beat her. She, therefore, left his society and started living with her parents. However, sometime later, the deceased went to the parents of accused No.2 and brought her to his house. However, there was no change in the attitude of accused No.2. Since the deceased used to object their illegal intimacy, they bore grudge against the deceased and hatched a plan to kill him and waiting for an opportunity.

iii) By profession, they used to go to Forest Area and collect Fire-wood. On 10.09.2011, in the morning hours, accused No.2, along with the deceased was proceeding to the forest area to collect firewood, and since accused No.2 given information to accused No.1 about their movements earlier, he too followed them armed with a

stick. At 10.30 A.M., when the deceased and accused No.2 reached Morumuvanka, accused No.1 came from behind and hit him with stick on his neck resulting in the deceased falling on the ground. Accused No.2 then caught hold of the legs of the deceased tightly, whereas accused No.1 sat on him and held the neck with his both hands and applying force, pressed the neck with an intention to kill him and, thus, caused the death of deceased by strangulation.

iv) PW.4 - Korra Venkataramana Naik belonging to Pendligundu Thanda, a shepherd by profession, who was grazing sheep near Morumuvanka which was around 10.30 A.M. or 11.00 A.M., noticed the presence of both accused and deceased and even alleged to have found accused No.2 holding both the legs of her husband, whereas accused No.1 was sitting on the chest of the deceased and pressing his neck, and when they noticed his presence, they threatened him that he would also meet with the same fate in case he reveals their acts on the deceased to anyone. Thus, under fear of threat imposed by them, according to the prosecution, he did not inform the incident till he was examined by the police.

v) Subsequently, that was two days after the date of incident, when the complainant learnt about the murder of his brother and body was lying in Morumuvanka, he went there and having found dead body of the deceased, lodged a report with PW.8 - Sub- Inspector of Police, Tanakal Police Station, who registered a case for the offence punishable under Section 302 read with 34 IPC and handed over the

case diary file to PW.9- Inspector of Police. Then, PW.9 took up the investigation, recorded the statements of relevant witnesses, got conducted the scene of occurrence *mahazarnama*.

vi) While the things stood thus, on 15.09.2011 at 3.00 P.M., both the accused alleged to have gone to Thavalam Panchayat Office and approached PW.6 - Village Revenue Officer and sought his assistance to produce them before PW.9 for making a confession of the commission of offence, which the prosecution terms as 'extra judicial confession' and the learned Sessions Judge also accepted the same and took it as one of the grounds to record conviction as corroborative piece of evidence corroborating the evidence of PW.4.

vii) On completion of investigation, charge sheet was laid alleging the offence punishable under Section 302 read with 34 IPC against both the accused.

5. When the learned Sessions Judge examined both the accused for the said charge, since they pleaded not guilty, proceeded with trial.

6. During trial, prosecution examined PWs.1 to 9 and marked Exs.P-1 to P-10, besides exhibiting the stick alleged to have used by accused No.1 in hitting the deceased from backside of the deceased, as MO.1. On behalf of the accused, no witnesses were examined, but, however, the contradiction in the statement of PW.4 recorded under Section 161 of the Code was marked as Ex.D.1.

7. The learned Sessions Judge having believed the evidence of PW.1, extra judicial confession of both the accused, relying on the evidence of PW.6 and the doctor's evidence also corroborating that it was homicidal death, arrived at the conclusion that the prosecution could prove the charge against both the accused beyond all reasonable doubt, and thereby recorded conviction and inflicted the sentence of Imprisonment for Life.

8. The learned counsel made certain submissions:

i) That the testimony of PW.1 is absolutely untenable for the reason though, he alleged to have noticed or witnessed the incident including the overt acts of accused Nos.1 and 2 and their participation in killing the deceased on 10.09.2011 at about 10.30 A.M. near Morumuvanka, but the silence maintained by him till 12.09.2011, makes his testimony untrustworthy, and the learned Sessions Judge, somehow, overlooked this fact and swayed away by the fact of alleged threat invented by PW.1 and, thus, the plantation of PW.4 in order to secure conviction by the Investigating Agency was totally overlooked.

ii) Though, the complaint was said to have lodged on 12.09.2011 by PW.1, brother of the deceased, the efforts made by the police or the Investigating Agency is not forthcoming in apprehending Accused Nos.1 and 2 till PW.6 alleged to have brought both accused and produced before PW.9. It is his submission that it is not the case of prosecution that both accused left the village and concealed

themselves avoiding arrest by the police. It is also according to him that extra judicial confession on which reliance was placed by the learned Sessions Judge is wholly unnatural and artificial and *ex facie* shows that it was invented by the prosecution and, therefore, would submit that it is a case where enormous doubt arises, to which benefit, both the accused are entitled.

9. The learned Special Public Prosecutor, per contra, would strongly resist the submissions made by the learned counsel contending that the testimony of PW.4 cannot at all be brushed aside when the prosecution could prove the threat imposed on him by accused Nos.1 and 2 that he would also meet the same fate in case he reveals to anyone and that, that was the reason why he could not come out till the dead body was found by PW.1 and, therefore, the testimony of PW.1 cannot be viewed as unnatural and artificial and it cannot be said that the Investigating Agency planted this witness.

i) Turning to the extra judicial confession said to have made by accused before PW.6, the learned Special Public Prosecutor would submit that the extra judicial confession though, a weak piece of evidence, but cannot lightly be brushed aside as the prosecution is not just relying or basing on it alone and, in fact, the evidence of PW.4 would clinchingly establish the overt acts of each accused and, therefore, it is a case where the prosecution could prove the charge alleged against accused beyond all reasonable doubt, and the learned

Sessions Judge did not deviate in appreciating the evidence on record on correct perspective, hence, sought to dismiss the appeal.

10. We have gone through the evidence let in by the prosecution. Amongst the witnesses examined, PW.1 is the brother of the deceased and is not an eye-witness to the occurrence, nor circumstantial witness. But, however, his evidence becomes relevant in the context of lodging the report on tracing out the body of the deceased and also would become material at what point of time PW.4 has come out as to his witnessing the incident and the overt acts of accused Nos.1 and 2 in attacking the deceased.

i) PW.2 is father of deceased, and his evidence stands on the same lines as that of PW.1. But, however, somehow, he turned hostile deviating from a part of statement he made before the police recorded under Section 161 of the Code, omitting to state the factum of illegal intimacy between accused No.1 and 2 though, he made the same before the police and the deceased chastising accused No.2. Thus, to that extent, he was treated hostile, and with the permission of the Court, he was cross-examined, but, however, he denied the suggestion that he made such a statement to the police, and that part of his statement recorded under Section 161 of the Code is marked as Ex.P.2.

ii) PW.3 is intended to prove the illicit intimacy between both the accused and, thus, the prosecution intended to establish motive for

both the accused to conspire together and kill the deceased. He supported the prosecution case.

iii) PW.4, an eye-witness, whose testimony was already referred to hereinbefore.

iv) PW.5 is one of the *panchayaatdars* for inquest held over the body of the deceased in the presence of blood relations and other *panchayatdar* by the Inspector of Police between 9.15 A.M. and 12.00 noon as in Ex.P3, and the Investigating Officer seizing the wearing apparel of the deceased.

v) PW.6 is the Village Revenue Officer, Thavalam Panchayat and In-charge of Jamla Naik thanda, Tanakal Mandal, who asserts in his evidence that accused Nos.1 and 2 approached him and made extra judicial confession, having killed the deceased because of illicit intimacy between them and referred to the details as projected by the prosecution having been stated by accused Nos.1 and 2 voluntarily. He is also a witness to the confessional *panchanama* and the recovery of stick alleged to have used by accused No.1 in attacking the deceased from behind on the neck and the said *panchanama* is Ex.P6, whereas the scene of occurrence is Ex.P5 and the extra judicial confession made by accused Nos.1 and 2 is Ex.P4.

vi) PW.7 is the Medical Officer, who conducted autopsy over the body of the deceased and found the following:

“Swelling present all over the body swollen of eyes, protruding tongue, skin all over the body is shiny, Abdomen intact foul smell present. Maggots present all over the body.

Internal examination:- Fracture of Hyoid bone, Thyroid cartilage normal, Thoracic: Bone cage fractures of both left and right Anterior side of the ribs, Fracture of left clavicle both lungs are shrunk, liquefied, black discoloration present, heart shrunk, Abdomen:- Stomach Shrunken, On cut section normal, Both Kidneys are shrunk cut section congestion, Liver normal in size, Spleen Shrunken on cut section normal, Intestines on cut section congestion. Rectum, bladder full Hyoid bone present for expert opinion.

Skull: Bone cage Normal, Meninges are white liquefied, with card lize Spinal vertebrae colour: Normal.

Time of death: 74-78 hours prior to P.M. examination.”

Ex.P-7 is Post-mortem examination report and Ex.P-9 is Final Opinion as to the cause of death, opining that the death occurred due to strangulation.

vii) PW.8 is Sub-Inspector of Police, who registered the crime on receipt of Ex.P-1 and issued Ex.P-9 express FIR and recorded the statement of PW.1.

viii) PW.9 is the main Investigating Officer. He conducted the entire investigation and laid charge sheet having arrested accused Nos.1 and 2 when produced before him by PW.6 pursuant to the extra judicial confession made by them before PW.6 as in Ex.P.4.

11. This has been the sum and substance of evidence on record basing on which, the learned Sessions Judge arrived at the conclusion

that the prosecution could prove the charge alleged against both the accused beyond all reasonable doubt.

12. In the backdrop of submissions made by the learned counsel for the appellants and the learned Public Prosecutor and the evidence on record, the following two points emerge for consideration:

- i) Whether PW.4's testimony inspires confidence and implicit reliance can be placed or whether he is a planted witness requires a thorough examination.
- ii) Whether the extra judicial confession alleged to have made by accused Nos.1 and 2 to PW.6 is convincing and can be accepted and acted upon though, it constitutes a weak piece of evidence, but to use it for corroboration is the question that also requires an answer.

Point Nos.(i) and (ii)

13. In assessing whether the learned Sessions Judge was correct in his approach in recording the conviction, as could be seen from the case of the prosecution, PW.4, stamped by the prosecution as sole eye-witness did not immediately come out revealing the incident which he alleged to have seen near Morumuvanka and he kept silent for two days. The reason he assigned is that he was threatened by both the accused that in case he reveals what all seen by him as to the participation of both accused in killing the deceased, he would also meet the same fate. Whether such a threat was really imposed by accused Nos.1 and 2 on PW.4 and put him under instant fear in not

disclosing to anybody would be the moot question that arises for consideration.

14. When looked at the conduct in which the sequence of events that followed in lodging the FIR by PW.1, the testimony of PW.1 would show that he searched for two days in nearby places without reporting to the police as to missing of his brother, and then on 12.09.2011, PW.4 approached him and tells him that the accused killed his brother near Morumuvanka and he had witnessed the same. This particular assertion made by PW.1 in his chief-examination would, in fact, condemn the case of prosecution, in our view. The reason being, when the entire case of prosecution is that when accused imposed threat on PW.4 not to reveal the incident, it is highly strange and un-understandable as to how and why PW.4 approaches PW.1 two days later and informs the incident as projected by the prosecution to PW.1. The prosecution does not explain as to what prompted PW.4 to approach PW.1 and inform it, though, he did not immediately react and inform PW.1 as to what all alleged to have seen by him. If really there was threat to his life in the hands of accused Nos.1 and 2, as imposed by them, PW.4 would not have come out and would not have dared to tell PW.1 at all. This particular circumstance creates any amount of doubt as to PW.4 witnessing the alleged incident to which he had spoken.

15. Turning to the evidence of PW.2, father of the deceased, he also asserts that PW.4 informed him that the accused killed the

deceased near Morumuvanka. It is not clear whether PW.4 alleged to have informed the said incident to both of them while they were together.

16. Turning to the evidence of PW.4, what all he states is, that on noticing his presence, accused Nos.1 and 2 threatened him if he reveals the same, he will also face the same consequence and due to fear of the accused, he did not inform the incident till he was examined by the police. That assertion indicates that he did not come out and did not inform either PW.1 or PW.2 as asserted by them and that for the first time, he came out when the police asked him revealing the fact of his witnessing the incident. When he was pursued in his cross-examination, he comes out with the answers that their Thanda people used to take their sheep to Morumuvanka for grazing purpose; along with him some other shepherds took their sheep for grazing purpose as the Morumuvanka is a big forest; he was having 30 sheep; there was a land of Kammana Naik to the north of Morumuvanka; Avula Narayanappa's fields are situated to the south of Morumuvanka; he did not state before the police as in Ex.D-1 to the effect that the accused and deceased were quarreling with each other; he did not try to rescue the deceased when he noticed the accused; he did not raise any cries to save the life of the deceased; he did not rush either to his Thanda or deceased Thanda to bring the persons to the scene; he did not notice whether the accused was armed with sickle or Axe in their hands; he noticed the *galata* from 18 feet

away and he did not inform the incident to PW.1 or other relations of the deceased.

i) In his chief-examination, he asserts that there was illegal intimacy between accused Nos.1 and 2, and accused No.2 is the wife of the deceased and, therefore, accused killed the deceased, husband of accused No.2. In the presence of such assertion being made by him, when assessed his conduct from the answers he has given in his cross-examination referred to in the above, certainly, it makes anyone to opine that he did not react that in the manner a prudent man reacts in a situation, like the one occurring in the instant case. There was no reason for him to keep silent when he knew already that there was illicit intimacy between accused Nos.1 and 2 and that the deceased was husband of the accused No.2, and would have invariably raised shouts or cries to call the shepherds from his Thanda, who were grazing their sheep, which he did not do. Thus, the course of conduct he maintained in not raising any cries in rescuing the deceased from the clutches of accused Nos.1 and 2, not informing to anyone nearby and maintaining meaningful silence for a couple of days and then coming out that too asserting that he did not inform the incident till he was examined by the police, contradicting the version of PW.1, PW.2 and PW.6 drives us to view that he was not speaking true facts. As already mentioned in the above, PW.1 and PW.2 would state that PW.4 came and informed them that the deceased was killed by both the accused in Morrumuvanka, and that he had witnessed the incident.

PW.6 also states that accused Nos.1 and 2 when they made extra judicial confession, they alleged to have stated that PW.4 also witnessed the incident and they threatened PW.4. However, the testimony of this witness also requires an in-depth analysis, in the presence of contents of Ex.P4 and further, when viewed the circumstance as to how the Investigating Agency remained inactive till accused Nos.1 and 2 alleged to have approached PW.6 and made extra judicial confession requiring his assistance to surrender before the Investigating Officer. To explain away the said circumstance, which gives rise to any amount of doubt in regard to the very extra judicial confession said to have made by accused Nos.1 and 2, PW.8 and PW.9 did not whisper anything in their evidence. We would like to touch this aspect a little later after referring to what has been alleged to have stated in extra judicial confession by accused Nos.1 and 2 as to the nature of threat imposed on PW.4. It shows that when accused No.1 alleged to have sat on the chest of the deceased in Morumuvanka and held the neck of the deceased tightly, he found PW.4 coming over there with his sheep and witnessing his acts, he (accused No.1) threatened him (PW.4) asking him to leave that place, and in case he does not leave he would see his (PW.4) end, on which he got frightened and left that place. This recital occurring in Ex.P4 would completely contradict the version of PW.4 in his evidence. What all PW.4 asserts is that both the accused threatened him if he reveals the same he will also face the same consequence. For better

appreciation, we would like to extract his assertion occurring in his chief examination thus:

“On noticing my presence A1 and A2 threatened me if I would reveal the same I will also face same consequence. Due to fear of the accused I did not inform the incident till I was examined the police. “

This was not the version finding place in Ex.P4. What all confessed by accused Nos.1 and 2 in their extra judicial confession in vernacular language is to the effect that the accused No.1 only alleged to have threatened PW.4 to leave that place, lest he would see the end of PW.4. So, the version of PW.4 is an improved one. As per Ex.P4, the accused never threatened him that he would meet the same fate or with the same consequence if he reveals what he had seen to anyone-else. When this contradictory versions occur on record, which has got the effect of cutting at the root of the case of the prosecution in a case of this nature, certainly, it cannot be said that implicit reliance can be placed on the testimony of PW.4 and Ex.P4 contents and the testimony of PW.6. Therefore, an enormous doubt arises touching the basic version of the prosecution case.

17. Turning to the evidence of PW.8 and PW.9, the Investigating Officers, more particularly, evidence of PW.9 as he was the main Investigating Officer, he does not whisper the efforts they made to apprehend both the accused. What all he asserts in his evidence is, that on 15.09.2011 around 4.00 P.M., while he was in Tanakallu Police Station, to apprehend the accused, PW.6 produced

accused Nos.1 and 2 along with Ex.P4 report drafted by PW.6. This witness had taken over the investigation on 12.09.2011 itself, and did observe the procedures as required, but the endeavor should be to apprehend both the accused immediately. Nothing is forthcoming in his testimony as to the steps he pursued to trace out the accused or to know their whereabouts. His evidence would show that on 15.09.2011 around 4.00 P.M., while he was in Tanakallu police station, to apprehend the accused, PW.6 produced both the accused along with Ex.P4 report. Thus, it is difficult to view that the prosecution has come out with true version before the Court.

18. Thus, summing up the evidence let in by the prosecution, in our view, is not convincing to conclude that the prosecution could prove the pre-concerted plan to kill the deceased and the overt acts of the accused as the testimony of PW.4 does not inspire confidence in view of the contradictory versions in relation to two main aspects. The first being, his version that till he was examined by the police, he did not disclose the incident to anyone, whereas, the evidence of PWs.1 and 2 contradicts that version as they assert that PW.4 approached them and revealed the incident of killing the deceased by accused Nos.1 and 2. Second, the version occurring in Ex.P4 as recorded by PW.6, completely contradicts the version of PW.4 in regard to the alleged threat of both the accused as detailed by us in the above. Therefore, we are not inclined to accept the evidence of PW.4 and act upon. The learned Sessions Judge, somehow, overlooked

these intricacies while appreciating the evidence of PWs.1, 2, 4 and 6, and the Investigating Officer (PW.9) on basic facts of the prosecution case.

19. This apart, as already observed in the above, even the failure to apprehend the accused Nos.1 and 2 is not properly explained at all and the extra judicial confession through PW.6 comes into vogue, which, in our view, appears to be unnatural and artificial. Therefore, we are of the view in view of the contradictory versions referred to in the above and the inaction of the police without there-being sufficient explanation and conduct of PW.4 in maintaining complete silence though, Ex.P4 reflects, even taken to be true that he was not threatened not to reveal, but he was only threatened to leave the place of incident, would all create an enormous doubt going to the root of the prosecution case, to which benefit, the accused are entitled. Therefore, we hold that the prosecution failed to prove the charge against both the accused beyond all reasonable doubt. The finding recorded by the learned Sessions Judge is legally infirm as the contradictory versions projected by us in the above were not at all considered, nor comprehended by the learned Sessions Judge warranting our invariable interference. Therefore, the conviction recorded and sentence of Imprisonment for Life inflicted on both the accused are liable to be set aside.

20. In the result, the Criminal Appeal is allowed. The conviction recorded, under Section 235 (2) of the Code for the charge

under Section 302 read with 34 IPC and the sentence of Imprisonment for Life inflicted on the appellants/accused Nos.1 and 2 by the judgment, dated 08.03.2012, in Sessions Case No.12 of 2012 on the file of the Additional Sessions Judge, Hindupur, are hereby set aside. Consequently, the appellants/accused Nos.1 and 2 are acquitted for the said charge. The appellants/accused Nos.1 and 2 shall be set at liberty forthwith, if they are not required in any other case or crime. The bail bonds shall stand cancelled.

A. RAMALINGESWARA RAO, J

A. SHANKAR NARAYANA, J

March 24, 2018.
MD/YVL/Mgr

