

**In the High Court of Judicature at Hyderabad
for the State of Telangana and the State of Andhra Pradesh**

Criminal Appeal No.615 of 2011

Between:

Dudekula Rasool

... Appellant

and

The State of Andhra Pradesh,
Rep. by its Public Prosecutor,
High Court of Judicature at Hyderabad

...Respondent

Date of Judgment Pronounced: 14-02-2018

Submitted for Approval:

The Hon'ble Sri Justice C.V.Nagarjuna Reddy

and

The Hon'ble Sri Justice Gudiseva Shyam Prasad

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

(C.V.Nagarjuna Reddy, J)

(Gudiseva Shyam Prasad, J)

*** The Hon'ble Sri Justice C.V.Nagarjuna Reddy**
and
The Hon'ble Sri Justice Gudiseva Shyam Prasad
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! Counsel for the Appellant: Mrs.A.Gayathri Reddy

^ Counsel for the respondent: Public Prosecutor (AP)

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? Cases cited:

1994 (2) ALT 172 (D.B.)

(2005) 5 SCC 272 = 2005 SCC (Crl) 1050

(2005) 5 SCC 258 = 2005 SCC (Crl) 1037

(2010) 3 SCC 538

(1995) Supp. (4) SCC 259

The Hon'ble Sri Justice C.V.Nagarjuna Reddy

and

The Hon'ble Sri Justice Gudiseva Shyam Prasad

Criminal Appeal No.615 of 2011

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Between:

Dudekula Rasool

..Appellant/Accused

and

The State of Andhra Pradesh,
represented by its Public Prosecutor,
High Court of Judicature at Hyderabad

..Respondent

Counsel for the appellant/accused: Mrs.A.Gayathri Reddy

Counsel for the respondent: Public Prosecutor (A.P.)

The Court made the following:

Judgment: (Per the Hon'ble Sri Justice C.V.Nagarjuna Reddy)

The sole accused in Sessions Case No.218 of 2010 on the file of the learned VI Additional District and Sessions Judge, (Fast Track Court) Markapur, filed this Appeal against Judgment, dated 11.04.2011, convicting him for the offence punishable under Section 302 I.P.C. and sentencing him to undergo imprisonment for life and also to pay fine of Rs.1,000/-, and in default, to undergo Simple Imprisonment for a period of three months.

For convenience, the appellant shall be hereinafter referred to as 'the accused'.

The case of the prosecution as set out in the charge sheet is as follows:

The accused and the deceased were the husband and wife. The father of the deceased died when she was aged about 10 years. After the death of the father of the deceased, her mother left the house leaving the deceased and her sister- L.W.3 (Moghal Hussainbi). Since then the deceased and L.W.3 were being looked after by their grandmother – P.W.2. Both the sisters *i.e.*, the deceased

and L.W.3 were studying at Markapur. Four months prior to the incident, the deceased was given in marriage to the accused. Three years prior to the marriage with the deceased, the accused was stated to have married a woman and given divorce to her by suspecting her fidelity. Likewise, prior to the incident, the accused noticed the deceased coming on the motorcycle of one teacher and developed suspicion over her character and pregnancy. Thereafter, the accused started harassing the deceased and hatched a plan to do away with her life. For that purpose, one week prior to the incident, the accused shifted his family to Church Road, Ekalavya Nagar, by taking a portion of the house of P.W.4 for rent. Prior to the incident, the deceased informed about the hatredness of the accused towards her to her sister – L.W.3 and his mother- PW.6.

On 25.04.2008, the deceased went somewhere and returned home at 10.00 a.m. On that day, as per his pre-plan, the accused had taken meals along with the deceased at about 2.00 p.m. and went to bed. When the deceased was in sound sleep, the accused tied her hands and legs

with a plastic wire and throttled her to death. Later, he removed the plastic wire and the broken pieces of bangles and kept them in a steel tin. On hearing the screams of the deceased, P.W.2 knocked at the door of the house. Then the accused fled away from the house.

Some persons informed about the incident to P.W.1, the Village Revenue Officer, Markapur, who, in turn, informed the same to P.W.12– Sub-Inspector of Police, Markapur Police Station, through a report. P.W.12 registered the same as Crime No.45 of 2008 and sent the original F.I.R along with the complainant's report to the Additional Judicial First Class Magistrate, Markapur, and the copies of F.I.R. to the higher officials. As P.W.13– Inspector of Police, Markapur, was engaged in some other duties, P.W.12 proceeded to the scene of offence at Church Road, Ekalavya Nagar, and recorded the statements of P.Ws.1, 2, 4 and 5. On 26.04.2008, P.W.12 examined L.W.3 and P.W.3 and also gave a requisition to P.W.11 to hold inquest. P.W.11 held inquest over the dead body of the deceased in the presence of panchayatdars– P.W.1, L.W.8– Shaik Kareemulla and

L.W.9- Thippanaboina Koteswara Rao and sent the dead body to the Government Hospital, Markapur for post-mortem examination. During the investigation, P.W.12 observed the scene of offence in the presence of P.W.1 and L.W.8, got it photographed through P.W.8, prepared a rough sketch of the scene of offence and seized a plastic wire on the cot under a mediator's report. On 28.04.2008, P.W.13 took up the further investigation, verified the investigation of P.W.12, examined P.W.6 and found the investigation of P.W.12 on correct lines. On 05.05.2008, the accused went to P.W.1 and confessed the crime before him. Then, P.W.1 recorded the statement of the accused and produced him before P.W.13, who in turn, arrested the accused in the presence of P.W.7 and L.W.11 – Kalangi Santhaiah under a mahazar and recorded his confessional statement. Later, the accused took P.W.13 to his house and showed 15 broken bangle pieces. P.W.13 seized the same under the seizurenama. On 06.05.2008, the accused was produced before the jurisdictional Magistrate for remand.

During the course of investigation, P.Ws.9 and 10, who conducted postmortem examination, sent the viscera, hyoid bone and other parts of the body to RFSL, Guntur, for getting the expert's opinion. L.W.16 – B.Rama Krishna, forensic expert, sent RFSL report to P.W.13. The skin around the neck was sent to the Pathology Department, Guntur Medical College, Guntur, for report of L.W.17. – Dr.G.Saila Bala.

Based on the charge sheet, the lower Court framed the following charge:

“On 25-04-2008 at about 2-00 P.M. at your residential house at church road Ekalavya colony Markapur town you have committed the murder of your wife byname Dudekula Mabunni to wit while she was sleeping you have tried her legs and hands with plastic wire and throttled her neck and you thereby committed the offence punishable U/Sec. 302 IPC within my cognizance and I direct that you all be tried by this court on the said charge.”

As the plea of the accused is one of denial, he was subjected to trial. In support of its case, the prosecution examined P.Ws.1 to 13 and got Exs.P-1 to P-18 marked,

apart from marking MOs.1 and 2. On behalf of the defence, no evidence was marked.

On appreciation of the oral and documentary evidence, the Court below has convicted the accused and sentenced him in the manner as noted hereinbefore.

P.W.1 is the Village Revenue Officer, Markapur. P.W.2 is the paternal grandmother of the deceased. P.W.3 is one of the grandchildren of P.W.2. P.W.4 is the owner of the portion of the house, which was let out to the accused and the deceased. P.W.5 is the fruit vendor. P.W.6 is the mother of the accused. P.W.7 is the mediator, who, allegedly, drafted the panchanama incorporating the alleged confession of the accused. P.W.8 is the photographer, who took photographs of the scene of offence and the dead body of the deceased. P.Ws.9 and 10 are the Civil Assistant Surgeons, who conducted autopsy over the dead body of the deceased. P.W.11 is the Tahsildar, who conducted inquest over the dead body of the deceased. P.W.12 was the Sub-Inspector at the relevant time, who received written report

from P.W.1 and registered the same as Crime No.45 of 2008 apart from conducting preliminary investigation. P.W.13 is the Investigating Officer.

Ex.P-1 is the report given by P.W.1. Ex.P-2 is the observation report. Ex.P-3 is the Inquest report. Ex.P-4 is the alleged confessional statement of the accused. Ex.P-5 is the statement of P.W.5 under Section 161 Cr.P.C. Exs.P-6 and P-7 are the mediator namas. Exs.P-8 to P-11 are the photographs. Ex.P-12 is the extra judicial confession of the accused recorded by P.W.1. Ex.P-13 is the postmortem report. Ex.P-14 is the final opinion on the postmortem certificate. Ex.P-15 is the RFSL report. Ex.P-16 is the F.I.R. Ex.P-17 is the rough sketch. Ex.P-18 is the pathology report.

Among all the witnesses, P.W.2 alone was the alleged eyewitness. The Court below has based the conviction of the accused on the evidence of P.W.2 and Ex.P-12 – the extra judicial confession of the accused recorded by P.W.1. Therefore, both these pieces of

evidence assume significance and we shall scrutinize the same carefully.

Let us first consider the deposition of P.W.2. In her Chief-Examination, she stated that she is the resident of Poola Subbaiah Colony, Markapur; that she had three sons and two daughters, out of whom, one son and one daughter are alive; that the deceased was her son's daughter; that P.W.3 is her grandson being the son of her daughter; that she does not know P.Ws.4 and 5; that she knows P.W.6; that the marriage of the deceased was performed with the accused two and a half years ago; that the deceased had no children; that as her daughter-in-law *i.e.*, the mother of the deceased left the house leaving her two children with her, she was looking after their welfare; that the deceased and the accused used to live at estate and that she used to stay in Poola Subbaiah Colony, Markapur. She further deposed that four months after the marriage of her grand daughter *i.e.*, the deceased, on the date of the incident at about 1.00 p.m., she had gone to estate, where the deceased was living along with the accused; that after taking lunch, while she was taking rest

outside the house, the deceased alone was inside the house; that at about 3.00 p.m., the accused came from outside and went inside the house; and that at about 4.30 p.m., she heard the cries of the deceased from inside of the house and when she tried to open the door, she found that the same was bolted from inside. When she knocked at the door, the accused unbolted the door, came out and went away in no time; that when she rushed inside, she found that the deceased was tied to a cot with nawaar and that when she tried to wake her up, her efforts went in vain. When the deceased did not respond, the witness raised hue and cry. On hearing the same, the neighbours gathered and with their help, she brought the deceased out and put her on a cot; that they sprinkled water but the deceased did not respond and that ultimately, they concluded that the deceased was dead. As the learned counsel for the accused was not present, the Cross-Examination of P.W.2 was deferred on 11.10.2010. Three months thereafter, the case was posted for Cross-Examination of P.W.2 and she was, accordingly, cross

examined. The Cross-Examination was very brief and we find it relevant to reproduce the same hereunder:

“On the date of death of deceased I was at my house situated at Poola Subbaiah Colony. Deceased and accused were cordial. By the time of death of deceased I strongly suspected the accused in the death of deceased. Now I came to know that the accused had no role in the death of deceased. I was not examined by the Police.”

Undoubtedly, P.W.2, who supported the case of the prosecution in her Chief-Examination, took a complete volteface in her Cross-Examination. As submitted by the learned Public Prosecutor (A.P.), P.W.2 was evidently managed by the defence to come out with a totally contradictory stand. However, the Prosecution failed to declare her as hostile and put questions to her under Section 154 of the Indian Evidence Act, 1872 (for short ‘the Act’). But, the Court below purporting to rely upon the judgment of a Division Bench of this Court in **Pubi Satyanarayana @ Satteyya vs. State of A.P.**¹ and based on the evidence of P.W.2, held the accused guilty of the murder. The question, therefore, is whether the conviction can be based on the testimony of P.W.2 ?

¹ 1994 (2) ALT 172 (D.B.)

In **Pubi Satyanarayana** (1 supra), this Court came down heavily on the practice of the defence seeking deferment of cross-examination with a view to manage the Prosecution Witnesses and make them turn hostile during the Cross-Examination. In Paragraph 6 of the said Judgment, the Division Bench observed as under:

“6. The hostile attitude of the witnesses has become the order of the day. It appears that the Courts below are taking a lenient view on the resiling events that take place during the course of the trial. This is a matter of concern because where the witnesses state on oath in the Court in the first instance and after taking adjournment on some pretext, the witnesses turn hostile, which is nothing but blatant manipulation of evidence. It is the duty of the Court in such cases to proceed for perjury against the persons concerned. When the statements have been made in the Court during the trial and subsequently the witnesses resile, the Court is competent to take steps to initiate proceedings for perjury and, in the instant case, the Court below is perfectly justified in taking steps to proceed for perjury. We appreciate the stand taken by the learned Additional Sessions Judge and believe that the same trend will be followed by other Sessions Judges too in similar situations so that the manipulation can be curbed at the initial stage itself.”

We have no hesitation to be entirely in agreement with the sentiments expressed by this Court on the undesirability of the Courts granting long adjournments to facilitate the defence to win over the witnesses. Equally, we wholly concur with the judgment deprecating this practice. However, what we have noticed from the judgment of the Division Bench is that there was no discussion as to whether the Prosecution declared its Witnesses as hostile or not.

Under Section 137 of the Act, the examination-in-chief, Cross-Examination and re-examination are envisaged. Section 138 of the Act prescribed the order of examination. Under Sub-Section (1) of Section 154 of the Act, the Court may, in its discretion, permit the person, who calls a witness, to put any question to him, which might be put in Cross-Examination by the adverse party. As per Sub-Section (2) of Section 154 of the Act, nothing in Section 154 (1) of the Act shall disentitle the person so permitted thereunder to rely on any part of the evidence of such witness.

The effect of the Prosecution not declaring its witness hostile was considered by the Supreme Court in the following judgments:

In **Rajaram vs. State of Rajasthan**², the evidence of the Doctor, who was examined as a Prosecution Witness, showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The Doctor was not declared hostile. The High Court convicted the accused. The Supreme Court, however, held that it was open to the defence to rely on the evidence of the Doctor and it was binding on the prosecution.

In **Mukhtiar Ahmed Ansari vs. State (NCT of Delhi)**³, the evidence of P.W.1- Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to the Police in which the latter had gone to Bahai Temple and apprehended the accused. The Supreme Court held that when Goel did not support the prosecution case, the accused can rely on that evidence.

² (2005) 5 SCC 272 = 2005 SCC (Cri) 1050

³ (2005) 5 SCC 258 = 2005 SCC (Cri) 1037

In **Javed Masood vs. State of Rajasthan**⁴, the Supreme Court held as follows:

“In the present case, the prosecution never declared PWs.6, 18, 29 and 30 “hostile”. Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence.”

We are constrained to place on record our sense of disappointment that the Prosecution has not discharged its duty properly by not declaring PW.2, the only material witness, hostile, as a result of which, it has disabled the Court to rely upon her deposition given in Chief-Examination because whatever she has stated therein was completely negated by her in her Cross-Examination. In the Chief-Examination, she has categorically stated that she used to stay in Poola Subbaiah Colony, Markapur; that on the fateful day, she visited the place where the accused and the deceased lived; that after their taking lunch, when she was taking rest outside the house and the deceased was alone inside the house, the accused came at around 3.00 p.m., from outside and went inside the house; that at

⁴ (2010) 3 SCC 538

about 4.30 p.m., she heard the cries of the deceased from inside; that when she tried to approach the deceased, she found the door bolted from inside and that when she knocked at the door, the accused opened the same, came out and went away in no time. But, in her Cross-Examination, she has stated that on the date of death of the deceased, she was at her house situated at Poola Subbbaiah Colony; that the deceased and the accused were cordial; that at the time of the death of the deceased, she strongly suspected the involvement of the accused in the death of the deceased, but now she came to know that the accused had no role as such. She also stated that she will not cross-examine him. Had the Prosecution cross-examined PW.2 by availing its right under Section 154 of the Act, it would have suggested to her that she was won over by the defence and deposing falsely. As a result, the Prosecution failed to impeach the credibility of the statement made by PW.2 in her Cross-Examination.

When the evidence of a witness, who was not declared hostile, was found mutually contradictory, the accused is entitled to take the benefit of the portion of

evidence of the witness, which goes in his favour. Therefore, the deposition of PW.2 in the Cross-Examination, which has nullified what she has stated in her Chief-Examination, cannot be ignored. The Court below, in our opinion, committed a patent error in relying upon the Chief- Examination portion of PW.2 without considering her testimony in Cross-Examination. As the evidence of PW.2 considered as a whole is self-contradictory, the same cannot be given any credence at all. Once the evidence of PW.2 is eschewed, there is no other evidence, except Ex.P.12- the alleged confessional statement of the deceased and recovery of broken bangles to connect the accused with the death of the deceased.

We shall first consider whether the conviction can be based on Ex.P.12- extra judicial confession of the accused allegedly recorded by PW.1. In his Chief-Examination, PW.1, to whom the accused has allegedly confessed, deposed that at the relevant time, he was working as the Village Revenue Officer, Markapur. He further deposed that on 21-05-2008 at about 4.00 p.m., he received information about the absconding of the

accused; that at the relevant time, he was working as the Village Revenue Officer, Markapur; that on 21-05-2008, he received information about absconding of the accused after killing his wife by throttling her neck; that he then proceeded to Erukala Colony of Markapur; and that by the time he reached there, he noticed the corpse of the deceased lying on a cot in the front yard. He has further stated that at the time of occurrence, except the deceased, her grand mother and the accused, nobody was present (He, however, added that the owner of the house *viz.*, Khasim Bee was also present); that he is a witness to the scene observation report and inquest report; and that he scribed and also attested Ex.P.3- Inquest report. He further deposed that the accused approached him apprehending danger in the hands of Police and confessed before him that suspecting the fidelity of the deceased, he killed her by throttling her neck.

In his Cross-Examination, PW.1 has admitted that he had no personal knowledge about the accused killing the deceased and that he does not have prior acquaintance with the accused. However, the suggestions put to PW.1

that the accused has not made any extrajudicial confession admitting his guilt; that Ex.P.12 was manipulated by the Inspector in connivance with PW.1 by forcibly obtaining the signature of the accused; and that they obtained the signature of the accused on white paper and manipulated Ex.P.12, due to which, there is a tick mark on the second page of Ex.P.12, were denied by him.

A perusal of Ex.P.12- the alleged confessional statement prepared in the hand writing of PW.1 shows the time at which the accused approached PW.1 and Ex.P.12 was prepared was not mentioned. PW.13- Inspector of Police, in his evidence, stated that on 05-05-2008, PW.1 produced the accused before him along with the confessional statement and that he has examined and recorded the statement of PW.1 and arrested the accused at 5.00 p.m. In Ex.P.12, PW.13 endorsed that he has seized the confessional statement of the accused on 05.05.2008 at 15-15 hours at Markapur Circle Office for the purpose of investigation. Failure of PW.1 to mention the time of recording Ex.P.12 and the time at which he took the accused to the Police Station for surrendering

him to the Police, raise any amount of suspicion about his recording the statement of the accused at the NGO Home, more so, when it was specifically suggested to PW.1 that Ex.P.12 was brought into existence by the Police in connivance with PW.1. The fact that PW.1 has admitted that he did not have any past acquaintance with the accused also adds further doubt to the credibility of Ex.P.12.

The law is well settled that an extra judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. The Courts generally look for independent reliable corroboration before placing any reliance upon an extra judicial confession. (**Balwinder Singh vs. State of Punjab**⁵)

Coming to seizure of broken bangles, P.W.7, one of the mediators to Ex.P.6 – mediators' report under which

⁵ (1995) Supp. (4) SCC 259

15 broken pieces of earthen bangles allegedly worn by the deceased were seized from the house of the appellant at his instance, spoke to the fact of the seizure. In his cross-examination the witness admitted that he has not remembered the contents of Ex.P.7 report drafted by him and that he has prepared the same on the instructions of the Inspector of Police and others present at the place on 05-05-2008. He further stated that at the time of giving evidence he was not keeping good health and his memory power was poor and that he was not in a position to recollect what had happened on the day when Ex.P.7 was prepared. He, however, affirmed the correctness of the contents of Exs.P.6 and P.7. P.W.7 also denied the suggestion that they were prepared at the Police Station on the instructions of the Inspector of Police. P.W.13, the Investigation Officer who filed the charge sheet, also deposed about the seizure of 15 broken pieces of red bangles.

If we closely examine the case of the prosecution, the seizure episode appears very artificial. It is the specific case of the prosecution, as reflected from the charge sheet

and also the chief examination of P.W.2, the only alleged eyewitness, that when he heard the cries of the deceased, who was allegedly inside the room along with the appellant, the former has knocked the door by accosting the appellant and thereupon the appellant unbolted the doors, came out and fled away from the house within no time. In the charge sheet it was clearly alleged that after the body of the deceased was sent to hospital for post-mortem, and during the investigation P.W.12 observed the scene of offence in the presence of mediators, got it photographed through P.W.8, prepared a rough sketch of the scene of offence and seized the plastic wire on the cot under a mediators' report. It is stated in Ex.P.6 that on being led by the appellant, the Police and the mediators went to the house of the appellant, who went inside the house and took out broken bangle pieces from a steel tin which was at the south-east corner. It is thus clearly evident from the case of the prosecution that the appellant has not hidden the steel tin in places such as almirah, trunk, suitcase etc. If the steel tin was lying on the south-east corner of the house of the appellant, which

also happens to be the scene of offence, the Police during their investigation would not have failed to notice its presence. It is not the case of the prosecution that the appellant has returned to his house after he fled away from the scene on 25-04-2008 immediately after the occurrence. Further, if the prosecution account is correct, the appellant might have hurried himself to escape on hearing the knocks of the door allegedly made by P.W.2 and he would not have had the time to plan collection of all the bangle pieces, put them in the steel tin and keep them in one corner of the room.

If the bangles were broken into pieces in the struggle, they would have caused scratch injuries to the hands of the deceased. Ex.P.13 – post-mortem report does not reveal any such scratch marks, except a contusion of 1 cm. x 1 cm. over the wrist joint. Considering all these aspects, we are of the opinion that the prosecution version on the alleged seizure of bangle pieces eludes naturality, apart from not being supported by proper evidence, except the self-serving evidence adduced by it in the form of the mediators' report and the

oral evidence of P.Ws.7 and 13. Hence, it is not possible to accept the theory put forth by the prosecution regarding the seizure of bangle pieces as true and correct.

In the above facts and circumstances of the case, the trial Court has failed to properly appreciate the evidence as well as the legal position as discussed above. In the absence of proper evidence proving the guilt of the accused, his conviction and sentence are not sustainable. Accordingly, the accused is liable to be acquitted of the charge under Section 302 IPC by extending the benefit of doubt.

In the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant/accused for the offence punishable under Section 302 IPC in the Judgment, dated 11.04.2011, in Sessions Case No.218 of 2010, on the file of the learned VI Additional District & Sessions Judge (Fast Track Court), Markapur, are set aside. Consequently, the appellant/accused shall be set at liberty forthwith, if he is

not required in any other case or crime and the fine amount, if any, paid by him shall be refunded to him.

(C.V.Nagarjuna Reddy, J)

(Gudiseva Shyam Prasad, J)

Dt: 14th February, 2018

Note:
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