

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

AND

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL No.468 OF 2012

JUDGMENT: (*Per Hon'ble Sri Justice T.Sunil Chowdary*)

1 The sole accused in S.C.No.369 of 2011 on the file of the Court of the VI Additional District & Sessions Judge (FTC), Narsapur, West Godavari District, who was found guilty for the offence punishable under Section 302 of IPC and incarcerated for life and also to pay a fine of Rs.2,000/-, in default, to suffer simple imprisonment for two months, by judgment dated 14.10.2011, filed this Criminal Appeal under Section 374(2) Cr.P.C.

2 The case of the prosecution, in nutshell, is that on 19.01.2011 at about 11.30 AM Gogulamanda Pullayya-P.W.1 lodged a complaint-Ex.P.1 before the S.I. of Police, Palakol Rural Police Station-P.W.15, basing on which, P.W.15 registered a case in Cr.No.7 of 2011 under Section 302 IPC and issued FIR-Ex.P.19. Thereafter, the Inspector of Police-P.W.16 conducted investigation.

3 During the course of investigation it is revealed that the marriage of Challa Rathnam (hereinafter referred to as 'the deceased') was performed with the accused 19 years back and out of lawful wedlock, they were blessed with one son and two daughters. They lived together happily for 11 years. While so, the deceased developed extra marital relationship with one

Sahadevudu. After some period, Sahadevudu left the village to Machilipatnam. The deceased went to Muscat and stayed there for three years. Three months after return of the deceased from abroad, Sahadevudu also came back to the village. The accused was suspecting that the deceased is continuing the illicit intimacy with Sahadevudu. On 19.01.2011 the accused hacked the deceased with a sickle on vital parts of her body, causing her instantaneous death, which was witnessed by his younger daughter-P.W.3.

4 The Inspector of Police P.W.16 visited the scene of offence and prepared scene of offence observation report-Ex.P.15 in the presence of V.Srinivasa Rao-P.W.14 and seized M.Os.1 to 6. P.W.16 conducted inquest over the dead body of the deceased in the presence of P.W.14 and others and prepared inquest panchanama-Ex.P.16. Dr.K.Rama Rao-P.W.13 conducted autopsy over the dead body of the deceased and issued Ex.P.14 post mortem certificate. On 22.01.2011 at about 9.00 PM P.W.16 apprehended the accused in the presence of P.W.14 whereupon the accused led them to railway station where M.O.7 shirt, M.O.8 pant and M.O.9 sickle were seized under the cover of panchanama-Ex.P.18. After completion of investigation, PW.16 laid charge sheet against the accused for the offences punishable under Section 302 of IPC.

5 The Judicial Magistrate of I Class, Palakol has taken cognizance of the offence under Section 302 IPC and numbered the charge sheet as PRC No.12 of 2011 and after furnishing the copies of all documents to the accused, committed the case to the District and Sessions Division, West Godavari under Section 209 Cr.P.C as the offence punishable under Section 302 IPC is exclusively triable by the Court of Session. The learned District and Sessions Judge, West Godavari at Eluru has numbered the case as S.C.No.369 of 2011 and made over the same to the VI Additional District and Sessions Judge (FTC) at Narsapur. The learned VI Additional District and Sessions Judge (FTC) at Narsapur, on appearance of the accused, framed charge against the accused for the offences punishable under Section 302 of IPC, read over and explained the same to the accused in Telugu, for which the accused pleaded not guilty and claimed to be tried.

6 During the course of trial, on behalf of the prosecution P.Ws.1 to 16 were examined and Exs.P.1 to P.21 and M.Os.1 to 9 were marked. After completion of recording of evidence, the accused was examined under Section 313 Cr.P.C with reference to the incriminating material deposed against him by the prosecution witnesses for which he denied. No oral or documentary evidence was adduced on behalf of the accused.

7 Basing on the oral and documentary evidence available on record, the trial Court found the accused guilty of the offence punishable under Section 302 IPC, convicted and sentenced him to imprisonment for life and also to pay a fine of Rs.2,000/- in default, to suffer simple imprisonment for a period of two months. Hence the present appeal.

8 The learned counsel for the appellant-accused strenuously submitted that the trial Court failed to appreciate that mere admitting of signature on Section 164 Cr.P.C., statement by P.W.3 does not amount to proof of contents of the same. She further submitted that the recovery as alleged by the prosecution will not fall within the ambit of Section 27 of the Indian Evidence Act. She further submitted that the trial Court failed to appreciate that M.O.9 does not contain the signature slips; in such circumstances, the possibility of planting M.O.9 cannot be ruled out. She lastly submitted that the conviction and sentence imposed by the trial Court on the accused are based on assumptions and presumptions, which is not permissible under law.

9 *Pe contra*, the learned Additional Public Prosecutor submitted that by examining P.Ws.14 and 16 and marking M.Os.7 to 9, the prosecution has clearly established the recovery of the material objects in pursuance of the information given by the accused, which distinctly related to the commission of the offence. He further submitted that

there are no grounds much less valid grounds to interfere with the conviction and sentence imposed against the accused by the trial Court.

10 Now the points for consideration in this appeal are,

1. Whether the prosecution has proved the guilt of the accused for the offence punishable under Section 302 IPC beyond all reasonable doubt?
2. Whether the conviction and sentence imposed against the accused is not sustainable either on facts or in law?

11 Both the points are intertwined with each other and hence we are inclined to answer both these points simultaneously in order to avoid recapitulation of facts and evidence.

12 As seen from the testimony of P.W.1 on 19.01.2011, he submitted a complaint-Ex.P.1 to the Station House Officer, Palakol Rural Police Station. The testimony of P.W.15, the S.I. of police, reveals that on 19.01.2011 P.W.1 came to the Police Station and submitted Ex.P.1 complaint, basing on which he registered a case in Cr.No.7 of 2011 under Section 302 IPC and issued Ex.P.19 FIR. In the cross-examination of P.Ws.1 and 15, nothing was elicited to disbelieve their testimony so far as lodging of the complaint and registration of the case is concerned.

13 The next question that falls for consideration is whether the prosecution has established the scene of offence. A perusal of the testimony of PW.14 reveals that on 19.01.2011 he visited the house bearing D.No.3-77 along with other

witnesses. His testimony further reveals that the Inspector of Police P.W.16 seized blood stained earth M.O.5, and controlled earth M.O.6 at the scene of offence. His testimony further reveals that the Investigating Officer prepared the scene of offence observation report Ex.P.15 and obtained his signature on it. M.O.1 is the bed sheet and M.Os.2 and 3 are saree and blouse of the deceased. The testimony of P.Ws.14 and 16 is corroborating with each other. As per the testimony of P.W.4, they found the dead body of the deceased in the house bearing D.No.3-77 which belongs to the accused and deceased. The prosecution clearly established the scene of offence.

14 As per the testimony of P.Ws.1 to 4, they found injuries on the body of the deceased. As per the testimony of P.W.16, the Inspector of Police conducted inquest over the dead body of the deceased and prepared Ex.P.10 inquest panchanama. His testimony further reveals that the panchayatdars opined that the deceased died of injuries. A perusal of Ex.P.12 photo also reveals the injuries on the body of the deceased. The testimony of P.W.13 reveals that on 09.01.2011 he conducted autopsy over the dead body of the deceased and found as many as 18 injuries of different nature on the body of the deceased. He opined that the deceased died due to ischemic shock due to loss of blood from the injuries. Ex.P.14 is the post mortem examination certificate. By examining P.Ws.1 to 4, 13, 14 and 16 and marking Exs.P.12, P.14, P.16 and

M.Os.1 to 3, the prosecution clearly established that the deceased died due to multiple injuries. Having regard to the facts and circumstances of the case, we have no hesitation to hold that the death of the deceased is homicide.

15 The trial Court convicted the appellant-accused basing on the following two findings: (i) the deceased while alive was last seen in the company of the appellant-accused; (ii) M.Os.7 to 9 were recovered in pursuance of the information given by the accused in the presence of P.W.6.

16 P.W.1 is the brother, P.W.4 is mother of the deceased. Admittedly, both were not eyewitnesses to the incident. P.W.2 is the son of the deceased and accused and he is also not an eyewitness to the incident. As per the prosecution version, PW.3 has last seen the deceased alive in the company of the accused. In the chief examination P.W.3 deposed that her father came to the house at about 7.00 AM. The trial Court while placing reliance on the testimony of P.W.3 made an observation that the accused has not given any explanation in 313 Cr.P.C., examination with regard to his presence at the time of the incident.

17 We have carefully perused the entire evidence of PW.3, who turned hostile to the case of the prosecution. It is a settled principle of law that simply because a witness turned hostile to the case of the prosecution, that itself is not a legally valid ground to brush away the entire testimony of

such witness. The court can place reliance on the testimony of hostile witness to the extent they supported the prosecution case. It is needless to say that the Court shall not place reliance on a stray sentence in the testimony of the witness. Suffice it to say, the Court has to consider the entire evidence of the witness in order to arrive at a just and reasonable conclusion. It is also not in dispute that P.W.3 is not an eye witness to the incident. We have carefully scanned the testimony of P.W.3 in order to appreciate the rival contentions. In the cross-examination, P.W.3 in unequivocal terms deposed that she is not in a position to identify the place where she stood and deposed. P.W.3 has given one version in the chief examination and different version in the cross-examination. More over, P.W.3 is a child witness. In such circumstances, the Court has to scrutinize the testimony of P.W.3 meticulously so as to ascertain whether she is capable of understanding the questions thereby to give rational answers. If a witness gives different versions at different stage, the Court has to take utmost precaution while placing reliance on it. The Court shall not place reliance on a stray sentence of the witness. Appreciation of evidence means the Court has to take into consideration the chief-examination as well as the cross-examination of the witness in order to ascertain the evidentiary value of such witness. The trial Court proceeded basing on a stray sentence of P.W.3 in her chief-examination without taking into consideration

her cross-examination. Therefore, we have no hesitation to hold that the trial Court committed error while placing reliance on the stray sentence in the chief-examination of P.W.3 in order to come to a conclusion that the presence of the appellant was proved at the time of the incident.

18 It is a settled principle of law that no one can be convicted without putting incriminating material if any deposed by the prosecution witnesses to the accused in Section 313 Cr.P.C., examination. The trial Court convicted the accused as if he failed to offer proper explanation, as to his presence at the scene of offence, in Section 313 Cr.P.C., examination. Very interestingly, the trial Court has not put any question to the accused basing on alleged the incriminating material deposed by P.W.3. When no question was put to the accused about his presence at the time of the incident, the question of giving explanation does not arise. The trial Court proceeded on a wrong premise as if Section 313 Cr.P.C., examination contains the chief-examination of P.W.3 and the accused failed to offer his explanation. Convicting a person basing on assumptions and presumptions is not sustainable under law. The trial Court has not considered the testimony of P.W.3 in touchstone with the provisions of the Indian Evidence Act. The trial Court has not considered all these aspects and simply placed the reliance on the testimony of P.W.3, which is not sustainable

either on facts or in law. Viewed from any angle, the testimony of P.W.3 is no way helpful to the prosecution.

19 The other strong circumstance on which the prosecution placed reliance is recovery of bloodstained pant and shirt-M.Os.7 and 8 from the possession of the accused. As seen from the testimony of P.W.14 V.R.O., the Inspector of Police-P.W.16 seized M.Os.7 and 8 bloodstained pant and shirt from the possession of the accused under the cover of Ex.P17-panchanama. P.W.16 also deposed in the same lines of P.W.14. The learned counsel for the appellant submitted that non-identification of the blood group on M.Os.7 and 8 is fatal to the prosecution. To substantiate the same, she has drawn the attention of this Court to the following decisions:

Parsineni Venkateswarlu vs. State of Andhra Pradesh¹

wherein this Court held at Para No.14 as follows:

14. No doubt human blood was noticed by serologist on M.O.4 but it is not shown to be the same blood of deceased. M.Os.5 and 6 were subjected to DNA finger printing test but they were not suitable for analysis. Recovery of M.O.7 cannot be said to be incriminating against the accused, because, at times like M.O.7 would be available with agriculturists. Insofar as Ex.P28-DNA report is concerned, the learned senior counsel contended that as per Section 293 Cr.P.C, the said report cannot be considered as the author of the report is not examined in Court to prove the contents. The said contention appears to be correct, because, the person who gave Ex.P.28 cannot come under purview of Section 293(4) Cr.P.C. Even assuming Ex.P28 is taken as evidence, the same cannot be incriminating circumstance. It is the case of the prosecution that there was an illicit intimacy between the deceased and the accused and they were meeting now and then.

¹ 2009 (1) ALD (CrL.) 438 (AP)

Mustkeem Alias Sirjudeen vs. State of Rajasthan²

wherein the Hon'ble apex Court held at Para No.19 as follows:

23. The AB blood group which was found on the clothes of the deceased does not by itself establish the guilt of the Appellant unless the same was connected with the murder of deceased by the Appellants. None of the witnesses examined by the prosecution could establish that fact. The blood found on the sword recovered at the instance of the Mustkeem was not sufficient for test as the same had already disintegrated. At any rate, due to the reasons elaborated in the following paragraphs, the fact that the traces of blood found on the deceased matched those found on the recovered weapons cannot ipso facto enable us to arrive at the conclusion that the latter were used for the murder.

20 Let me consider the facts of the case on hand in the light of the above legal principles. As per RFSL report, human blood was detected on M.Os.7 and 8. Admittedly, blood group was not identified. As per the testimony of P.W.14, M.Os.7 and 8 were seized from the possession of the accused on 22.01.2011. The alleged incident took place on 19.01.2011. If the testimony of P.Ws.14 and 16 is taken into consideration, the accused was with the same dress from 19.01.2011 till 22.01.2011. At this juncture, the learned counsel for the accused has drawn the attention of this Court to the following decision:

Khalil Khan vs. State of M.P.³ wherein the Hon'ble apex

Court held at Para No.7 as follows:

If this part of the evidence of the prosecution is to be excluded then, in our opinion, there is no sufficient material to hold the appellant guilty. Be that as it may, we may refer to the recovery part relied upon by the courts below. We notice that one of the witnesses to the recovery has not supported the prosecution case. That apart the incident in question had taken place on 6th April, 1986 and the accused was arrested only on 11th April, 1986, nearly four days thereafter. We find

² (2011) 11 SCC 724

³ (2003) 11 SCC 19

it extremely difficult to believe that a person who is involved in such a serious crime like murder would still be wearing clothes which are blood stained even four days after the murder which fact we find is opposed to normal human conduct. In this background, the evidence of the hostile witness that the recoveries were made at the police station assumes importance. We think it is not safe to place reliance on this part of the prosecution case also.

21 The facts of the case on hand are almost identical to the facts of the case cited supra. Having regard to the facts of the case and also the principle enunciated in the case cited supra, we are of the considered view that the alleged seizure of M.Os.7 and 8 from the possession of the accused is highly improbable and unbelievable. Hence, recovery of M.Os.7 and 8 are no way helpful to the prosecution, to establish the guilt of the accused.

22 The next question that falls for consideration is whether the trial court is justified in placing reliance on Ex.P.17 and M.O.9. As per the testimony of P.W.14, on 22.1.2011, the accused led them to railway track of Ballipadugaruvu and brought M.O.9 sickle from bushes. His testimony further reveals that the Inspector of Police prepared seizure panchanama Ex.P.18. His testimony further reveals that he is one of the attestors of Ex.P.18. In the cross examination P.W.14, in unequivocal terms deposed that no slips were affixed on M.O.9. Mere non-affixing of slips on the sickle itself is not a valid ground to discard the version of the prosecution. Even assuming but not admitting that M.O.9 was seized in pursuance of the information given by the accused, whether the same is sufficient to convict the

accused. To resolve this issue, this Court is placing reliance on the following decisions.

Dinkar Bandhu Deshmukh vs. State⁴ wherein the Hon'ble apex Court held at para No.19 as follows:

19. The next piece of corroborative evidence which has been relied upon by the prosecution is the recovery of the iron bar from the house of accused Nos. 1 and 2 on a search of that house, which iron bar has been found, on chemical analysis, to be stained with human blood. I have no hesitation in rejecting Mr. Jethmalani's contention that if the iron bar was struck on the nape of the neck, there would be no blood on it, in view of my finding on the evidence that the actual impact was at a place slightly higher than the nape of the neck, and in view of the fact that the base of the skull of Madhav Buwa had been found to be fractured. The blood that is found on the iron bar is human blood, and, therefore, though the iron bar may be regarded as an agricultural implement which the accused could be expected to possess for innocent use, the finding of human blood on it changes the entire complexion and lends considerable corroborative value to the evidence in support of prosecution case. It is true that discovery evidence, by itself, is subsidiary and cannot sustain a conviction, but that is not the position in the present case in which there is plenty of other evidence to sustain the prosecution case. Both the panchas to the recovery of the iron bar have turned hostile, but it appears to be fairly clear that they have been won over by the defence, and I hold that the iron bar was recovered in the manner alleged by the prosecution.

Inspector of Police, Tamil Nadu vs. Balaprasanna⁵

wherein the Hon'ble apex Court held at Para Nos.19 and 21 as follows:

19. Law is well settled that the prosecution while relying upon the confessional statement leading to discovery of articles under Section 27 of the Evidence Act, has to prove through cogent evidence that the statement has been made voluntarily and leads to discovery of the relevant facts. The scope and ambit of Section 27 of the Evidence Act had been stated and restated in several decisions of this Court. However, in almost all such decisions reference is made to the observation of the Privy Council in Pudukuri Kotayya v. Emperor MANU/PR/0046/1947 MANU/PR/0046/1947. It is worthwhile to extract such quoted observation:

It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history, of

⁴ AIR 1970 Bom 438

⁵ 2009 (1) ALD (CrI.) 113 (SC)

the object produced is not related to his discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of the knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which stabbed A', these words are inadmissible since they do not related to the discovery of the knife in the house of the informant (p.77).

21. The various requirements of the section can be summed up as follows:

- (1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
- (2) The fact must have been discovered.
- (3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.
- (4) The person giving the information must be accused of any offence.
- (5) He must be in the custody of a police officer.
- (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
- (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

Brijesh Mavi vs. State of NCT of Delhi⁶ wherein the

Hon'ble apex Court held at para Nos.15 and 19 as follows:

15. The principles of law governing proof of a criminal charge by circumstantial evidence need hardly any reiteration. From the several decisions of this Court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime.

19. ... in *Abdulwahab Abdulmajid Baloch v. State of Gujarat* (2011) 13 SCC 621, would be a particular significance. Though the observations contained in Paragraphs 37 and 38 of the judgment have to be understood to have been rendered in the context of the facts of the case we find that the said observations would squarely apply to the present case. Consequently the aforesaid two paragraphs may be usefully extracted hereinbelow:

37. Be that as it may, we feel that only because the recovery of a weapon was made and the expert opined that the bullet found in the body of the deceased was fired from one of the

⁶2012 (2) ALD (CrI.) 865 (SC)

weapons seized, by itself cannot be the sole premise on which a judgment of conviction under Section 302 could be recorded. There was no direct evidence. The accused, as noticed hereinbefore, was charged not only under Section 302 read with Section 34 of the Penal Code but also under Section 302 read with Section 120-B thereof. The murder of the deceased was said to have been committed by all the accused persons upon hatching a conspiracy. This charge has not been proved.

38. The learned trial Judge himself opined that the recovery having been made after nine months, the weapon might have changed in many hands. In absence of any other evidence, connecting the accused with commission of crime of murder of the deceased, in our opinion, it is not possible to hold that the Appellant on the basis of such slander evidence could have been found guilty for commission of offence punishable under Section 302 of the Penal Code.

23 As per the principle enunciated in the cases cited supra, recovery will not be a substantive piece of evidence. Recovery of a weapon is only a corroborative piece of evidence. In the instant case, except the recovery, there is no other convincing evidence to prove the guilt of the accused. The trial Court has not considered the scope of Section 27 of the Indian Evidence Act. If the findings recorded by the court below are allowed to stand, certainly, it would amount to miscarriage of justice. Mere recovery itself is not a substantive piece of evidence. An accused cannot be convicted without any substantive piece of evidence. The trial Court lost sight of this aspect and convicted the accused. The findings recorded by the court below are contrary and opposed to the settled principles of law.

24 Having regard to the facts and circumstances of the case, we are of the considered view that the prosecution failed to prove the guilt of the accused for the offence punishable under section 302 of IPC beyond all reasonable doubt and accordingly the accused is entitled to be acquitted.

25 In the result, the appeal is allowed, setting aside the conviction and sentence imposed against the appellant-accused in S.C.No.369 of 2011 on the file of the Court of the VI Additional District & Sessions Judge (FTC), Narsapur, West Godavari District and the accused is acquitted of the offence punishable under Section 302 IPC.

26 A perusal of the record reveals that the accused was granted bail by this Court on 14.6.2017. It appears that the accused is on bail. Therefore, the accused is directed to report before the Superintendent, Central Prison, Rajahmundry within one month from today. On such report, the jail authorities are hereby directed to release the accused forthwith, if his presence is not required in any other crime. Bail bonds of the accused shall stand cancelled automatically.

27 Miscellaneous petitions if any pending in this appeal shall stand closed.

JUSTICE CHALLA KODANDA RAM

JUSTICE T.SUNIL CHOWDARY

Date: 06.01.2018

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