

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

HON' BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI

CRIMINAL APPEAL No.955 of 2013

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

1) Assailing the judgment dated 13.08.2013, passed in S.C.No.473 of 2012, on the file of First Additional Sessions Judge, Chittoor, wherein the sole accused was found guilty for the offences punishable under Sections 302 and 380 IPC, and sentenced him to suffer imprisonment for life for an offence punishable under Section 302 IPC and to pay a fine of Rs.5000/- and simple imprisonment for one year for the offence punishable under Section 380 IPC., the present Criminal Appeal came to be filed through legal aid.

2) The gravamen of the charge against the accused is that on 30.04.2012 at about 04.30 p.m., at Uttara Bramhanapalli bus stop, Thavanampalli mandal, the accused is alleged to have caused the death of one Sumathi, by strangulating her neck and also committed theft of gold bangles, neck chain and cellular phone of the deceased.

3) The case of the prosecution as culled out from the evidence adduced by the prosecution witnesses is as under:

(i) PW1 is the brother of the deceased. PW2 is the son-in-law of the deceased. PWs.3 and 5 are the residents of the same village. PW3 is co-brother-in-law to PW4.

(ii) The deceased used to reside in a house situated in Uthara Brahmanapalle village of Thavanampalli mandal. On 02.05.2012, at about 07.30 p.m., PW2 received information from PW3 that some foul smell was coming out from the house of his sister (deceased) and went there. At that time, he noticed the iron grill of the house locked from inside the house. They broke open the lock of the gate, went inside the house and found the dead body of the deceased lying on the cot. Suspecting that it was a murder for gain, they lodged a report before PW16 the S.I. of police. Ex.P1 is the report. Basing on Ex.P1, the SI of police registered a case in Crime No.36 of 2012, for the offences punishable under Sections 302 and 380 IPC and issued express FIR. Ex.P16 is the original express FIR. On the same day night, PW16 visited the scene of offence, situated in the house of the deceased and handed over a copy of FIR to PW17 the CI of police. Thereafter, PW17 observed the scene of offence and noticed the dead body of Sumathi lying in the upstairs portion of the house. Ex.P5 is the scene observation mahazar. PW13 the Finger Print Inspector came to the scene of offence and collected chance prints at the scene of offence. PW17 posted a guard at the scene of offence. On the next day i.e., on 03.05.2012, at about 06.15 a.m., PW17 visited the scene of offence and prepared a rough sketch of the scene which is marked as Ex.P17. At about 08.00 a.m., PW17 conducted inquest over the body of the deceased and Ex.P6 is the inquest report. During inquest, TATA Docomo SIM Card, Kathipeeta, Blood stained cloth and lock (MOs.14, 15, 16 and 17 respectively) were seized. During inquest, it was opined that the deceased was murdered by some unknown persons and also committed theft of gold jewellery.

On the same day, the dead body was sent for post mortem examination. PW12 the Civil Assistant Surgeon, District Head Quarters Hospital, Chittoor, conducted autopsy over the body and issued Ex.P7, the post mortem report. According to him, the cause of death was due to asphyxia due to strangulation. On 04.05.2012, PW17 gave a requisition to PW6 (Inspector of Police) to furnish particulars of IMEI number of stolen Nokia Cell Phone having SIM Card No.8019293723, which was used by the deceased so as to get the call details and also to furnish particulars of the name and address given at the time of taking the SIM card. PW6 is said to have collected all the details as sought for by PW17 and sent him the same. On 10.05.2012, PW17 received a report from finger prints expert saying that he could get two chance finger prints. On 13.05.2012, PW17 received IMEI number of the Nokia instrument belonging to the deceased, which was used by SIM No.8019293723 of TATA Docomo company from 21.04.2012 upto 15.03 hours on 30.04.2012. Exs.P2 to P4 are the call details submitted by PW6. On verifying the above documents, it was ascertained that the SIM card No.8019293723 and the Nokia instrument with IMEI No.353937019584510, which was stolen, were used by the deceased. The information received by the investigating officer would show that after the incident, the cell phone was used with SIM number 8297530166 of Vodafone company, which was obtained in the name of one D.Chandraiah. On 17.05.2012 at about 07.50 a.m., while PW17 was at Thavanampalle police station, received credible information about the accused and accordingly proceeded to the spot and arrested the accused. On search of the body of the accused, he found four gold bangles (MO3) and one Nokia Cell Phone (MO11),

which was recovered under a panchanama. The accused is said to have confessed not only about killing of the deceased, but also about killing another lady at Yerravaripalem. Basing on the confession made by the accused, PW17 along with the staff proceeded to his grandmother's house at Chinnaswamyreddipalle village from where he seized MOs.1 and 2, 4 to 10, under the cover of mahazarnama marked as Ex.P14. On 19.05.2012, PW17 got the identification parade conducted through PW15 for MOs.1 to 11, in which PWs.1 and 10 identified the articles. Later, PW17 got examined PW10 and recorded his statement under Section 161 Cr.P.C.

(iii) After collecting all the material documents including reports from the Forensic Science Lab, a charge sheet came to be filed which was taken on the file of IV Additional Judicial Magistrate of First Class, Chittoor, as PRC No.45 of 2012. On appearance of the accused, necessary documents were furnished to him. Since the offence is one under Section 302 of IPC, which is triable by Sessions Court, the matter was committed to the Sessions Court, wherein the case came to be numbered as S.C.No.473 of 2012. Upon appearance of the accused, charges under Sections 302 and 380 of IPC came to be framed, read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.

(iv) In support of its case, the prosecution examined PWs.1 to 17 and got marked Exs.P1 to P20 and M.Os.1 to 17.

(v) After the closure of prosecution evidence, the accused was examined under Section 313 Cr.P.C., with reference to the incriminating

circumstances appearing against him in the evidence of the prosecution witnesses, to which he denied. No oral or documentary evidence was adduced on behalf of the accused in support of his defence.

(vi) Basing on the evidence available on record, the trial Court convicted the accused. Challenging the same, the present appeal came to be filed.

5) Sri B.Parameswara Rao, learned counsel for the appellant would contend that there is no evidence on record to implicate the accused in the crime. According to him, the circumstances relied upon by the prosecution do not form a chain of events to connect the accused with the crime. It is his plea that the circumstances relied upon namely, recovery of cell phone from the accused, comparing the chance prints with the finger prints taken during the course of investigation are contrary to law. Insofar as the recovery of cell phone, which is collected by the accused and its usage, he states that the same is not true and even if true, it is not sufficient to show that it was the accused alone who was responsible for the incident.

6) On the other hand, learned public prosecutor would contend that even if the circumstances of identifying the property and comparing of chance prints and the admitted prints are contrary to the law, but the recovery of the cell phone by itself is sufficient to connect the accused with the crime, moreso, when there is no explanation from the accused as to how he came into possession of the cell phone of the deceased.

7) The first circumstance sought to be relied upon by the prosecution is with regard to evidence of the expert to establish that the chance prints which are found at the scene of offence, when compared with the finger prints of the accused, taken during the course of examination, tallied with each other. It is no doubt true that the chance prints which are found at the scene tally with the finger prints of the accused which are taken for comparison during the course of investigation by the investigating agency. But, the issue as to whether such process can be adopted, came up for consideration before the Division Bench of this Court in *Manepalli Anjaneyulu Vs. State of A.P.*¹, wherein this Court held that when the finger prints of the accused were not taken before the Magistrate, no sanctity can be attached to the evidence of finger print expert. It would be appropriate to extract relevant portion which reads as under:

“The prosecution relies on the evidence of finger print expert PW17. According to him, some chance prints were found at the scene of offence, which were developed and photographed. Five finger prints were found suitable for comparison and when they were compared with the finger prints of the accused, it was found that print 'A' tallied with the finger print of the left ring finger of the fourth accused and prints 'B' and 'D' tallied with the thumb impression of the 6th accused and chance print 'R' tallied with the left index finger impression of the 3rd accused and the photo of chance print 'T' tallied with the left middle finger print impression of A3. Exs.P35 to P39 are the comparative charts relating to the chance finger prints with the identical finger prints of the suspects. The learned trial Judge found that this evidence corroborates the other evidence of the prosecution to establish the participation of A3, A4 and A6 in the incident of dacoity. It may be mentioned that the photographer who took the chance finger prints has not been examined and the finger prints photographs taken have not been filed. There is nothing to show that the finger prints of the accused have been taken before the Magistrate. PW17 in his evidence merely stated that the finger print slips of five accused persons were received by him from the Inspector of Police, Tanuku on

¹ (1999 Cri.L.J.4375)

15-10-1989 with which he compared the chance finger prints. His evidence does not reveal as to who took the finger prints of the accused and where they were taken. The concerned Inspector PW37 has nowhere stated in his evidence whether he has taken finger prints of the accused and if so whether he has taken them on his own or he has taken them in the presence of the Magistrate, though he speaks of having taken the specimen handwriting of A1. In the absence of such evidence, no sanctity can be attached to the evidence of finger print expert inasmuch as there is no evidence to show that the finger prints with which the chance finger prints were compared were those of the accused.”

8) From the above, it is clear that no sanctity can be attached to the evidence of the finger print expert as there is nothing to show that the finger prints of the accused were taken before the Magistrate.

9) Coming to the recovery of the articles belonging to the deceased from the accused, it is no doubt true that some of the gold articles were recovered from the possession of the accused and few from the house of the accused. The evidence of the investigating officer show that the accused was arrested on 17.05.2012 and pursuant to the confession made, gold articles were recovered. There is no evidence on record as to what the investigating officer did with gold ornaments which were seized on 17.05.2012. Three days later i.e., on 19.05.2012, PW15 conducted test identification parade of the property wherein PWs.1 and 10 are alleged to have identified the property. These proceedings which are conducted by PW15 – Village Revenue Officer, T.Puttur of Thavanampalle mandal is contrary to Rule 35 of Criminal Rules of Practice, which reads as under:

“ 35. Identification of property:

(1) Identification parades of properties shall be held in the Court the Magistrate where the properties are lodged;

- (2) Each item of property shall be put up separately for the parade. It shall be mixed up with four or similar objects.
- (3) Before calling upon the witnesses to identify the property, he shall be asked to state the identification marks of his property. Witnesses shall be called in one after the other and on leaving shall not be allowed to communicate with the witness not yet called".

10) From a reading of the said provision, it is clear that the identification of the property is required to be conducted before the Magistrate by mixing the articles seized with four or similar objects. Even assuming for the sake of argument that it would be difficult to get four articles of such nature, but at least police ought to have conducted test identification parade of the property before the Magistrate, as required under law. But for the reasons best known, identification of the properties came to be conducted before PW15, the VRO, which is contrary to the provisions of law.

11) The issue as to whether the test identification of property is required to be conducted before the Court is no more *res integra* in view of the judgment of this Court in *Jarapala Deepala @ Babu Rao and others Vs. State of A.P.*², wherein the procedure adopted by the police in getting the articles identified as that of the deceased was held to be contrary to the procedure established by law. Therefore, we feel that no reliance can be placed on the said identification.

12) Even otherwise, we feel that both PWs.1 and 2 though closely related to the deceased, and staying away from the deceased could not have identified the minute details of the articles to say that they belong

² {(2005(2)ALD(GrI.) 818(AP)}

to the deceased. Moreover, the test identification parade proceedings which are placed on record would show that these two witnesses did not give descriptive particulars of the articles which were there with the deceased and which were stolen prior to holding of the test identification parade. In the absence of any descriptive particulars being given either before the test identification parade or atleast in the FIR, a doubt arises with regard to identification of the same. Viewed from any angle, no credence can be given to the said proceedings. Therefore, the two circumstances namely identifying gold articles which are seized from the accused as that of the deceased and chance prints which were found at the scene being that of the accused are not established.

13) The only other circumstance which now requires to be considered is the recovery of cell phone of the deceased from the accused.

14) As seen from the record, the incident in question is said to have taken place on 30.04.2012. Though scene of offence panchanama was prepared on the next day morning by PW17, he did not notice the SIM card at the scene of offence. Only during the course of inquest, he was able to seize the SIM card bearing No.8019293723. Basing on the same, he wrote a letter to PW6, requesting him to obtain call data records from Tata Docomo company in respect of the said cell phone number from 23.04.2012 to 30.04.2012. PW6 received the call data at about 01.00 p.m. and sent it to the Circle Inspector, Chittoor Rural West. Again at 02.00 p.m., PW6 received another letter from the C.I., Chittoor Rural West regarding IMEI No.353937019584510 and sent the same to all

nodal officers in A.P., with a request to send the SIM number which was being used by offender. On 06.05.2012, he received a SIM No.8297530166 belonging to Vodafone company, which was being from IMEI No.353937019584510. The said information was sent to C.I. on 06.05.2012. From the date on which said phone was stolen till 06.05.2012, the cell phone was being used with number 8297530166. The SIM bearing No.8297530166, was registered in the name of one T.Chandraiah, S/o.Ramachandraiah, H.No.10-7, Chinnaswamyreddipalle H.Wada, Chittoor –517 130. The evidence of PW7, who was examined to speak about the sale of the cell phone, would show that on 22.04.2012, at about 09.00 a.m., PW8 came to his shop and took two Vodafone SIM cards, one in his name and other one in the name of one D.Chandraiah and accordingly he submitted two applications, along with I.D. proofs for the same. Since PW7 informed PW8 that it will take atleast one hour for activation of the SIM card, he informed that his brother P.Balakrishna would come and collect the same. Accordingly, in the afternoon, PW9 is said to have gone to the shop of PW7 and collected the SIM. The evidence of PWs.8 and 9 would establish that this SIM card was taken in the name of D.Chandraiah. For a period of ten days, PW9 is said to have used both the SIM cards. It would be appropriate to extract the evidence of PW9, which is as under:

“On 22.04.2012, PW8 informed me that he had applied for Vodafone SIM cards for himself and Chandraiah with PW7 and they were under activation. He asked me to go there and collect the SIM cards from PW7. Chandraiah is friend of my brother PW8. Accordingly, I went to the shop of PW7 in afternoon and collected the two Vodafone SIM cards. My brother's SIM card Number is 82975340174 and Chandraiah number is 8297530166. I used both the SIM cards for about ten days.”

15) While deposing that he (PW9) used both the SIM cards, i.e., SIM card Numbers 82975340174 and SIM card in the name of Chandraiah (not examined) bearing No. 8297530166, tried to get over the situation by saying that on 01.05.2012, the accused came to him and asked him to give one SIM card and accordingly handed over the SIM of one Chandraiah (not examined) bearing No.8297530166 to him. It is the case of the prosecution that the accused is the maternal uncle of PW9. There is no relationship between Chandraiah and PW9 or Chandraiah and the accused. That being the position, doubt arises as to how and why PW9 will give the SIM card of Chandraiah to the accused. In normal course, he would have given his SIM card to the accused. Apart from that it was not to the knowledge of the accused that PW9 was having two SIM cards. Ten days later i.e., on 17.05.2012, the accused was arrested with the SIM card and then the cell phone of the deceased along with the SIM card was seized from him.

16) From the evidence referred to above, it is clear that from the time of death of the deceased, cell phone of the deceased was used with the SIM card which is in the name of Chandraiah. The said Chandraiah is not examined. The evidence of PW6 shows that from 01.05.2012 to 06.05.2012, the cell phone bearing No.8297530166 with IMEI No.353937019584510 was used by somebody. Thereafter, it appears that from 06.05.2012 no one used the SIM. On 17.05.2012, the cell phone came to be seized. The evidence on record nowhere establishes that at the time of seizure of cell phone, the accused was using the cell phone with cell No.8297530166. Neither the investigating officer nor

the panch witnesses were present and examined to speak to the alleged seizure and usage of the said SIM by the accused at that time.

17) Having regard to the above, we feel that mere recovery of the cell phone, nearly 15 days after the incident coupled with the fact that there is no evidence on record to show that it was being used by the accused from 01.05.2012 to 06.05.2012, we feel that this circumstance of recovery, 15 days after the incident by itself may not be sufficient to connect the accused with the crime.

18) In view of the above circumstances, we are inclined to extend the benefit of doubt to the accused and acquit him for the offences punishable under Sections 302 and 380 of IPC.

19) In the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant/ accused in the judgment dated 13.08.2013 in Sessions Case No.473 of 2012 on the file of the Court of the I Additional Sessions Judge, Chittoor, for the offences punishable under Sections 302 and 380 IPC are set aside and he is acquitted for the said offences. Consequently, the appellant/ accused shall be set at liberty forthwith, if not required in any other case.

20) Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C.PRAVEEN KUMAR

JUSTICE KONGARA VIJAYA LAKSHMI

03.11.2018
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