

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

And

HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

Criminal Appeal.No.503 of 2013

JUDGMENT: *(per Hon'ble Sri Justice D.V.S.S.SOMAYAJULU)*

This appeal is filed questioning the order dated 13.05.2013 in SC.No.71 of 2012 passed by the VI Additional Sessions Judge, Siddipet, Medak District. By the said judgment, the learned Additional Sessions Judge found the accused guilty of the offence punishable under Section 302 and 404 IPC. He was convicted under Section 235 (2) Cr.P.C and sentenced to undergo life imprisonment and also to pay a fine of Rs.500/-, in default, simple imprisonment for one month for the offence under Section 302 IPC. The accused was also sentenced to undergo simple imprisonment for one year and also to pay a fine of Rs.500/-, in default, simple imprisonment for one month for the offence under Section 404 IPC. Both the substantive and the default sentences under the above heads were ordered to run concurrently. The accused was also entitled to set off of the remand period under Section 428 Cr.P.C.

This Court has heard the submissions of Sri V.Surendra Reddy, learned counsel for the appellant in legal aid and Sri R.Chandra Reddy, learned Additional Public Prosecutor appearing for the respondent.

We have perused the material available on record.

The learned Additional Sessions Judge framed the following charges against the accused:

- (1) That you on 09.08.2011 at 5.00 p.m. at the outskirts of Peddamasanpally Village committed murder intentionally causing the death of Smt. Kola Muthavva by strangulating her neck and thereby committed an offence punishable under section 302 IPC and within my cognizance.
- (2) That you on the above said date, time and place of accident mentioned supra dishonestly misappropriated one ear stud, knowing that such property was in the possession of Smt.Muthavva, a deceased person, at the time of death of Smt.Muthavva and had not since been in the possession of any person legally entitled to such possession and that you thereby committed an offence punishable under section 404 IPC and within my cognizance.

The accused denied the charges and pleaded not guilty. Hence, the matter went to trial. During the course of trial, PWs.1 to 9 were examined and Exs.P.1 to P.6 were marked on behalf of the prosecution. Only one material object was marked as MO.1. There was no evidence for the defence.

The case of the prosecution which led to the conviction is broadly detailed hereunder:

On the basis of a complaint lodged by PW.1, it transpires that on 09.08.2011 his mother K.Muthavva went

to the agricultural field and did not return home till the evening. Therefore, his wife sent the neighbours in search of his mother. While searching, they found his mother lying dead in the fields. On examination of the dead body, strangulation marks around the neck were found and one gold ear stud and nose stick were found missing. He stated that he had some suspicion about unknown persons and also stated that he had suspicion over the accused Thalla Bheemaiah.

PW.8 the Sub-Inspector of Police registered a case and conducted the initial investigation. He examined the complainant and handed over the case to the Circle Inspector of Police, Thoguta. PW.9-Circle Inspector of Police visited the scene of offence and after examining the scene of offence and the dead body of the deceased, sent messages to the clues team and a dog squad. The body was also sent for post-mortem and the Civil Assistant Surgeon-PW.7 conducted the post-mortem which was marked as Ex.P.5. The doctor, who conducted the post-mortem, came to a conclusion that the death is due to 'mechanical asphyxia due to the secondary throttling'. The cause of death is recorded as follows:

“I am of the opinion that the cause of the death is due to mechanical asphyxia due to secondary throttling.

The duration of the death is 12 to 24 hours prior to P.M.E. Ex.P.5 is the PME report.”

As per the case of the prosecution, during the course of investigation they had received the information that the suspect/accused was absconding ever since the body of the deceased was traced. On 16.08.2011 they got information that the accused was moving in Thukkapur Village of Thoguta Mandal. A police party was deputed and they arrested the accused. Thereafter, the presence of PW.6 and LW.13 were secured and in their presence an enquiry was conducted, wherein the accused confessed his involvement in the offence and at his instance MO.1 was recovered from his pocket. Therefore, the accused was arrested and remanded to Court. After the completion of the investigation and transmission of material objects, the post-mortem report was collected and the charge sheet was filed. This is the sum and substance of the case of the prosecution.

Amongst the witnesses examined, PW.1 is the complainant and is the son of the deceased. PW.2 is the wife of PW.1. The deceased was her mother-in-law. She initially sent the first group of people to search for the deceased. PW.3 is one of the people sent to search for the deceased and who found her body. PW.4 is one Manne Yellaiah, who states that he had heard a cry of woman on 09.08.011 and at about one hour later he saw the accused going on a cycle on the road. PW.5 is one of the panchayatdars of the offence panchanama, who states that he attested Ex.P.2 scene of offence panchanama. PW.6 is an agriculturist and a resident

of neighbouring village who states that he was summoned to the police station and in his presence the police recorded the confession and the seizure panchanama. PW.7 is the Civil Surgeon, who performed the post-mortem. P.W.8 is the Sub-Inspector of Police, who initiated the investigation and registered the FIR-Ex.P.6. PW.9 is the Investigating Officer, who investigated the crime.

Placing reliance on the evidence that is brought on record, the learned Additional Public Prosecutor clearly states that this is a clear case of crime with a motive plus gain and that the evidence brought on record proves the guilt of the accused beyond reasonable doubt. The identification of the accused by PW.4 clearly shows that the accused was last seen at the scene of the offence. In addition, the recovery of the ear stud made from the accused clearly shows that he confessed the crime and that the recovery along with the other evidence are enough to sustain the conviction that is ordered by the Court below.

In reply to this, learned counsel for the accused contended that there is absolutely no link between the death of the deceased and the accused. He points out that there is no eye witness to the incident. According to him, the theory of last seen together is also not proved at all in this case. Counsel for the accused submits that the recovery made is illegal and the so-called confession is inadmissible in evidence. It is his case that there is no evidence much less

incriminating evidence against the accused. Learned counsel argues that the accused is therefore, entitled to a clean acquittal and that even if the benefit of doubt is extended to him, the accused is entitled to an acquittal.

The first question that arises is, whether there is evidence to show that the deceased met with a homicidal death. This Court notices the defence is not disputing that the deceased met with a homicidal death. They are however, asserting that the accused is not responsible for the said death. The contents of the post-mortem report Ex.P.5 clearly show that the death is due to mechanical asphyxia or secondary throttling. The oral evidence of the doctor coupled with this report leads this Court to a conclusion that the death was a homicidal death.

The next question that arises is, whether the accused was responsible for the homicidal death of the deceased and if so, whether the accused committed the crime. An examination of the evidence is necessary to decide whether the guilt of the accused is established and he is responsible for the death of the deceased. If it is so established, the question that logically arises is whether the accused is liable for punishment with which he is charged. It is also necessary to decide in view of the contentions urged by the accused whether the accused is entitled to acquittal or alternatively for extension of the benefit of doubt and a consequential acquittal.

The first defence taken is that there is no eye witness for the murder and that there is no direct evidence for the incident of murder. The case rests on an extra judicial confession said to have been made by the accused and also the recovery of MO.1 from the accused. In addition, the prosecution relies upon the theory of “last seen” and asserts that PW.4 categorically deposed that the accused was seen near the scene of offence. The contention of the accused is that the evidence of record does not establish his presence at the scene of offence. The only link propounded by the prosecution is the recovery of MO.1, which supposedly links and connects the deceased to the murder. The case of the accused however is that there is no link between the accused and the murder. The counsel highlights the fact that the confession is not voluntary and the recovery cannot be considered at all as the accused was in police custody by then.

So the point that has to be considered is whether there is any link between the accused and the murder as per the evidence available on record. This Court notices that in the complaint that is given by PW.1 initially it is said that some person has killed his mother and that he suspects his neighbour T.Bheemaiah-the accused. Absolutely no reason is forthcoming for the suspicion. During the course of inquest report-Ex.P.3, it is mentioned that the suspicion is falling upon the accused and his wife due to the land disputes

between the family of the deceased and the family of the accused. In the course of evidence and the charge sheet filed, the alleged motive and the dispute of the land is further spelt out. In the charge sheet it is mentioned that the family of the deceased and the family of the accused developed a dispute about the land measuring Ac.2.00 which was purchased by the husband of the deceased from the local Sarpanch. The accused cultivated another small bit of land Ac.1.30 cents belonging to the Sarpanch by name Ram Reddy. Unable to digest this, the husband of the deceased tried to lure the Sarpanch Ram Reddy and purchased the land from him. Therefore, animosity developed between the accused family and the family of the deceased in the matter of development, use and sale of this land. On the other hand, PW.1 says that the owner of his agricultural land and the land of Bheemaiah is one and the same. He stated that there is no land dispute about the taking of the land on lease. In addition, he denies the statement/suggestion that there are land disputes between his family and the family of the T.Bheemaiah and to settle the same, this false case is foisted.

This Court also notices that neither PW.1 nor PW.2 who are the son and daughter-in-law of the deceased have spoken about this alleged land dispute which led to the so-called animosity. They are the family members of the deceased, who would have known of the same. Even the investigating Officer who was examined as PW.9 clearly admitted in his evidence

that he did not examine any person in connection with the land dispute that is mentioned by him. There is no record produced of the purchase of the land or the cultivation of the land which lead to the alleged dispute. Thus, it is clear that neither of the family members who deposed as PW1 and PW2 spoke of this animosity arising out of a land dispute nor did PW.9 investigate any one about this land dispute and animosity. No oral or documentary evidence is available of this animosity. Thus, the so-called 'animosity' is not borne out by record.

The second aspect of the matter is, whether this is a crime for gain and whether the accused killed the deceased for the sake of the gold ornaments that the deceased was wearing at the time of the death.

The first witness PW.1 states that he saw injuries on the neck and blood was oozing from the ears of the deceased. He stated that one gold nose stick and one gold ear stud were missing. Near the dead body, silver screws of the ear studs (2) were found. PW.2 gave her evidence to the similar effect and says that a gold nose stick and one gold ear stud were missing. She does not mention anything what was found on the ground. PW.3 on the other hand states that he found only one gold ear stud was missing. PW.5, who is a Panchayatdar and who signed the panchanama states that one ear stud and nose stick were missing. He also states that two ear screws were found on the ground and one gold ear

stud was found by the side of the body. The inquest report also reveals that apart from these ornaments, the deceased was also wearing four gold sticks of ears, one gold pusthelathadu and four brass bangles etc. The counsel for the accused submits that if theft was committed for gain by the accused, he would not have been left the gold pustelu etc., behind and would have taken all the gold ornaments that were found on the body of the deceased. The aspect of recovery and confession are discussed later but the available evidence suggest that the deceased was killed for gain as there was bleeding noticed from the ears of the deceased and one gold ear stud was missing.

The other important aspect is the recovery. Admittedly, as can be seen from the evidence, the offence took place on 09.08.2011. The accused was apprehended on 16.08.2011. It is the case of the prosecution that the accused was absconding and he was apprehended on 16.08.2011 and then MO.1 was recovered from his pocket. According to the prosecution, as the police were investigating the crime by bringing sniffer dogs etc., the accused was absconding from 10.08.2011 to 16.08.2011 with the fear that he may be apprehended by the police. Ultimately he was apprehended on 16-8-2011. This Court finds it hard to believe that till his arrest he was still carrying a gold ornament, which the prosecution says belongs to the accused and thus links him to the crime. Normal course of human conduct particularly in

the case of an absconding murder suspect would suggest that in this period of one week, the accused would have disposed off the gold ornament or at least hid it away in such a manner so that he cannot be linked to the crime. This suspicion itself is enough to show that the recovery is improbable and unbelievable. It appears to be a manipulation of the prosecution to link the accused with the offence.

In addition, this Court also notices that the so-called recovery made pursuant to a confession is also not believable. The accused was admittedly in police custody when the statement was made. Both according to the evidence of PW.6 and the Investigating Officer, the accused was first apprehended on 16.08.2011 and thereafter the so-called recovery was made from his pocket. PW.6 clearly admits that he went to the police station at Thoguta, where he saw the accused. The panchanama, which is marked as Ex.A.4 clearly shows that before the panchayatdars he made a confession and had taken out the ear stud from the pocket. In his cross-examination the witness clearly admits that he does not know since how long the accused was in the police station prior to the enquiry with the accused. Therefore, it is clear that the “confession” was made when the accused was in police custody. Such a statement is not admissible in evidence and the recovery made does not appear to be made on the basis of a voluntary confession. The result of this so-called confession is the recovery of an object (MO.1).

Recovery of an object is not a discovery of a fact making the statement admissible under Section 27 of the Indian Evidence Act, 1872. This is settled law and is reiterated in ***Bodhraj @ Bodha v. State of Jammu and Kashmir***¹ at para 18 which is relied on by the learned counsel for the accused.

In addition, as rightly pointed out by the learned counsel for the accused, there is absolutely no evidence available in this case to show that MO.1 that is seized pursuant to this confession actually belongs to the deceased. None of the witnesses who were examined on behalf of the accused have spoken of the fact that MO.1 is the missing gold ear stud that was actually worn by the deceased. In the cross-examination of the Investigation Officer (PW.9), it is very clearly elicited that PW.1 did not describe the ear stud design and stone particulars. It is further elicited in the cross-examination that the Investigating Officer did not conduct any panchanama to identify the property seized from the accused as one belonging to the deceased. Therefore, this Court is of the opinion that the mere fact that a gold stud is supposedly recovered from the accused cannot lead to a conclusion that the said ear stud belongs to the deceased and that this was the missing ear stud that was stolen from the body of the deceased. In the absence of any link establishing that MO.1 was last worn by the deceased or that it belongs to the deceased, this Court is of the opinion that the accused

¹ 2002 (8) SCC 45

cannot be convicted on this ground. This is apart from the fact that the confession statement Ex.P.4 is recorded in the police station itself after the accused was apprehended. The findings of the Hon'ble Supreme Court of India in ***Navneethakrishnan v. State by Inspector of Police***² are clearly applicable to the facts of the case. The Hon'ble Supreme Court while dealing with Section 27 of the Indian Evidence Act, 1872 held as follows:

“22. Section 27 of the Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance is limited as relates distinctly to the fact thereby discovered. In the case at hand, the Yashika Camera which was recovered at the instance of Accused No. 3 was not identified by the father as well as the mother of the deceased. In fact, the prosecution is unable to prove that the said camera actually belongs to the deceased-John Bosco.

In fact, none of the witnesses have identified the camera or stated the belongings of John Bosco. The said statements are inadmissible in spite of the mandate contained in Section 27 for the simple reason that it cannot be stated to have resulted in the discovery of some new fact. The material objects which the police is claimed to have recovered from the Accused may well have been planted by

² 2018 (2) ALT (CrI) 60 (SC)

the police. Hence, in the absence of any connecting link between the crime and the things recovered, there recovery on the behest of Accused will not have any material bearing on the facts of the case.”

The last point that survives for consideration is the evidence of PW.4 and the theory of last seen which is argued vehemently by the learned Public Prosecutor. A close examination of the chief and cross-examination of PW.4 in the opinion of this Court does not establish a clear link. As per PW.4, when he along with his brother were washing hands and legs on the Peddamasanapally road, he heard the cry of a woman, but he did not see anyone. One hour after the hearing of the said cries, he saw the accused going on cycle on the road. This evidence does not show that the accused was last seen in the presence of the deceased or in the company of the deceased let alone in the field where the deceased was actually murdered. As per this evidence also, the witness heard a cry of a woman but did not see the woman who cried out. One hour after hearing of the cry, the witness saw the accused going on a cycle. Neither the time nor the sequence are clearly established. The mere fact that after he heard the cry, the accused was going on a cycle is not enough in the opinion of this Court to hold that the accused was last seen in the company of the deceased. The theory of last seen together comes into play when the time gap between the point of time when the accused and deceased were last seen alive and the deceased is found dead is so

close that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It is important that the sequence of events should establish or should point the guilt of the accused with some certainty. The reported case law lays down these two tests as the tests for accepting the theory of last seen together. In this case the circumstances that are required to establish the presence of the accused and the deceased together are not established. PW.4 merely says he heard the cry of a woman and one hour later he found the accused going on a cycle on the road. In the opinion of this Court there is no link established between the accused and the deceased. If after hearing the cry the witness saw the body of the deceased and also the accused in the same field or if he saw the accused leaving the very same field where the body was found the theory may come into play. In the case on hand, the witness did not see the deceased and accused in the field before or after the murder. He did not identify with certainty that the cry he had heard came from the deceased alone. He merely says he heard a cry. In addition, the mere fact that the accused was found cycling on a road cannot lead to a conclusion that he was in the presence of the deceased. The accused was not found leaving the field where the body was found. Admittedly, the road leads from Thoguta to Duddeda. The accused who was a resident of that area was cycling on that road. This evidence, therefore, in the opinion

of this Court is not enough to hold that the accused was last seen in the presence of the deceased.

Therefore, after review of the entire evidence, this Court finds (a) that the initial motive namely animosity between the families with regard to land dispute is not proved. (b) the motive of theft and murder for gain is not proved. (c) the alleged recovery on the basis of the confessional statement is tainted as it was made while the accused was in custody (d) it is improbable to accept that the accused who is absconding for about 7 days would still be found with a material object which can link him to the murder (e) and lastly the MO.1 is not established as belonging to the deceased.

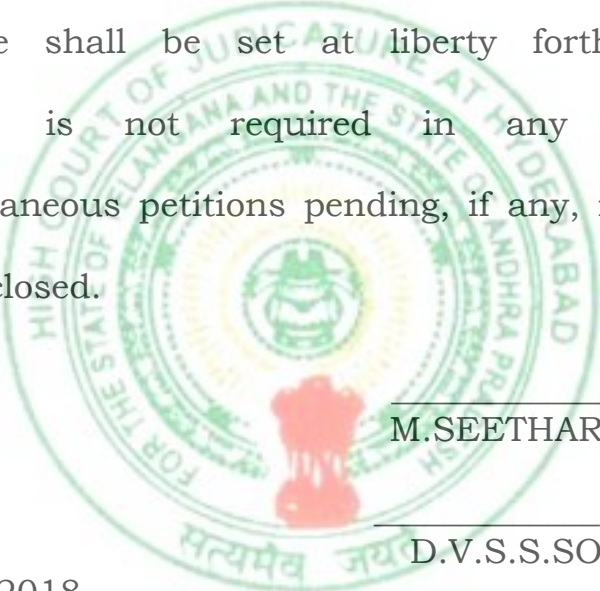
To sum it up, this Court is of the opinion that the prosecution failed to prove that the accused committed the murder in question. Therefore, the accused is entitled to an acquittal. The judgment and sentence passed by the Court below are set aside. The conviction is based upon unreliable and inadmissible evidence.

In addition, the learned counsel for the accused also want to rely upon a passage from an article on the Forensic Implications of Asphyxia. This Court is of the opinion that what is expressed in the article by John Fiske Brown Associates cannot be considered by this Court. It is neither produced in the lower Court nor is the expertise of the author established to enable this Court to go into the issues raised.

Therefore, for all these reasons, this Court is of the opinion that the guilt of the accused is not proved.

In the result, the Criminal Appeal is allowed and the judgment of the learned VI Additional Sessions Judge, Siddipet in SC.No.71 of 2012 holding the appellant/accused guilty of the offence punishable under Sections 302 and 404 of the IPC and further recording a conviction and imposing imprisonment for life and fine is hereby set aside. The appellant/accused is accordingly acquitted of the said charges. He shall be set at liberty forthwith, if his confinement is not required in any other case.

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



M.SEETHARAMA MURTI,J

D.V.S.S.SOMAYAJULU, J

Date: 24.12.2018
KLP