

HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CRIMINAL APPEAL No.1140 of 2011

Date: 24th July, 2018

Between:

Nirmala Prakash

... Appellant/Accused

And

State of A.P., rep. by Public Prosecutor,
High Court, Hyderabad.

... Respondent/Complainant

COUNSEL FOR APPELLANT: Sri P. Prabhakar Reddy

COUNSEL FOR RESPONDENT: Public Prosecutor

THE COURT MADE THE FOLLOWING:

JUDGMENT: (per the Hon' ble Sri Justice Gudiseva Shyam Prasad)

This appeal arises out of the judgment dated 15.09.2011 passed in SC/ST Sessions Case No.281 of 2010 on the file of the Special Judge for Trial of Cases under SCs/STs (POA) Act, Nizamabad (for short, 'the trial Court').

The brief contents of the charge sheet are that, the deceased is son of PW.7. The deceased was studying VII class in New Priyadarshini High School, Yellammagutta, Nizamabad, where the accused was working as Correspondent of the said School. PW.7 was a widow, working as Ayah in the said School, and the Correspondent had an evil eye over her, but she refused to fulfill his evil desire, as such he threatened her to remove from her job, as she was forced, she had unwillingly accepted to yield to his evil desires. On the intervening night of 08/09.09.2008, while the accused and PW.7 were in the 10th Class, Class room in the first floor, preparing to have intercourse, they heard a noise and noticed that the deceased was watching them, and then PW.7 went down; the accused in order to protect the reputation of the School and himself had decided to do away with the life of the deceased. He asked PW.7 to get a matchbox and she gave it to him and went to sleep. Then the accused went to the kitchen and brought a kerosene bottle and a plastic bucket to the 10th class, class room and called the deceased there, closed his mouth and nose, with his kerchief, due to which the deceased became unconscious. The accused immediately poured kerosene on the deceased and lit fire with matchbox, resulting in his death. In the wee hours, PW.7, having heard a noise, woke up and came to know

that the deceased died with burn injuries and having seen the preparation of the accused, she had revealed that it was the handiwork of the accused. PW.1, the father of the deceased, on coming to know about the incident over telephone, along with his family members rushed to the school and found the body of his son in burnt condition. Having suspected the school management in the death of his son, PW.1 lodged a complaint with the police. The Station House Officer - PW.11 registered a case in Crime No.140 of 2008 under Sections 302, 201 IPC, and as per the instructions of Superintendent of Police, Nizamabad, PW.12 took up further investigation, and examined PW.1 and his wife and daughter, recorded their statements in the presence of panch witnesses, PW.5 and another. He conducted the scene of offence panchanama, and drafted rough sketch of scene of offence and summoned the clues team. PW.9 came there and took photographs. He also video-graphed the scene of offence, and collected burnt cloth pieces, one empty matchbox, one kinley water bottle, from the scene of offence, in the presence of the mediators. He forwarded the material objects to FSL for analysis. There was a lot of commotion at the scene of offence and so PW.12 sent the body of the deceased to the Headquarters Hospital, Nizamabad. He secured the presence of panch witnesses PW.6 and others, and held inquest over the body of the deceased. PW.10 – Medical Officer along with another doctor conducted postmortem over the dead body of the deceased and handed over the body to the parents of the deceased to perform his last rites. PW.12 – Investigation Officer recorded the statements of PWs.2, 3, 4 and 7. On 16.09.2008, the accused was apprehended at 17.00 hrs near Ramalayam Temple at Subhash Nagar, and a notice under Section 50 Cr.P.C. was

served on his relative. In the meanwhile, DWs.1 and 2, the two Advocate Commissioners came to the police station with a Search Warrant, vide Crl.MP.No.2567 of 2008 in FIR No.140 of 2008. The police handed over the accused to the Advocate Commissioners and the accused was produced in the Court. The police have taken the accused into custody on 24.09.2008. Vide order dated 22.09.2008 in Crl.MP.No.2660 of 2008, on 24.09.2008 at 3:00 PM, in the presence of Panch witnesses, PW.8 and another, the police interrogated the accused thoroughly and the accused voluntarily confessed to having committed the offence. He also confessed that the kerchief used to kill the deceased is with him. In pursuance of a detailed confessional panchanama conducted in the presence of the panch witnesses, the kerchief was recovered from the accused. The learned Magistrate had recorded Section 164 Cr.P.C. statement of PW.7. The doctors, who conducted postmortem over the body of the deceased, opined that the death of the deceased was due to burns.

The prosecution examined PWs.1 to 13, and got marked the documents Exs.P1 to P22 and material objects MOs.1 to 7. On behalf of the accused, DWs.1 to 3 were examined and Exs.D1 and D2 were marked.

The trial Court, on consideration of the oral and documentary evidence available on record, found the accused guilty of the offence under Section 302 and 201 IPC, and accordingly convicted and sentenced him to suffer imprisonment for life and also to pay fine of Rs.1,000/-, and in default of payment of fine, the accused shall undergo Simple Imprisonment for three months for the offence under Section 302 IPC. The accused was further sentenced to undergo rigorous imprisonment for seven years and

also to pay fine of Rs.1,000/- for the offence under Section 201 IPC, in default of payment of fine, he shall undergo simple imprisonment for three months.

Aggrieved by the judgment of the trial Court, the appellant has preferred this appeal.

The appellant is the sole accused in S.C.No.281 of 2010. He is the Correspondent of New Priyadarshini High School, Yellammagutta, Nizamabad District. The allegation against him is that he killed the deceased boy, who was a student studying 7th Standard in the said school. The motive attributed to the appellant was that the said boy saw the accused while he was preparing to have sex with PW.7 – Ayah of the school. The accused thought that if the deceased boy reveals their affair, the reputation of the school would be at stake and so he has decided to kill the deceased. In pursuance of his design, he asked PW.7 to get a match box and accordingly she gave match box and went away. Thereafter the accused brought kerosene tin and a bucket and called the deceased boy to 10th Class, Class room and tied his mouth with a hand-kerchief, poured kerosene on him and set fire. The deceased was burnt to death. The prosecution has placed reliance on the testimony of PW.7, who did not support the case of the prosecution, including denying the recording of her statement under Section 161 Cr.P.C. by the jurisdictional Magistrate. The evidence relied on by the trial Court was the statement of PW.7 recorded under Section 164 Cr.P.C. by the learned Magistrate and the recovery of the

material objects and also the subsequent conduct of the accused, who has absconded from the scene of offence after the incident.

The point for determination in this appeal is –

- (1) Whether the prosecution proved the guilt of the accused beyond reasonable doubt and whether the trial Court erred in convicting the accused?

This is a case of homicide. The case is based on circumstantial evidence. The prosecution relied on the circumstances, which are as follows:

The accused is a Correspondent of the school where the alleged incident had occurred. The accused has absconded from the scene of offence and so his subsequent conduct gives rise to suspicion about his involvement in the commission of offence. PW.7 – Ayah of the school gave her statement recorded by the Magistrate under Section 164 Cr.P.C., though did not support the version of the prosecution. Reliance was placed on it due to the other circumstances of recovery of the material object MO.7 - hand-kerchief used in the commission of offence by the accused. Another circumstance is that, the accused has not explained any reason for the death of the deceased, though he was a Correspondent of the School and that there was recovery of MO.7 - hand-kerchief, at his instance, which was alleged to have been used in the commission of offence and his absconding from the scene of offence. The prosecution also relied on the motive for the commission of offence by the accused as the deceased boy found him in compromising position with PW.7. The trial Court relying on

these circumstances, convicted the accused for the offence punishable under Section 302 IPC.

Learned Public Prosecutor argued that though, PW.7 did not support the version of prosecution, in her statement under Section 164 Cr.P.C., she has stated about the entire incident, which proves the motive of the accused. It is further submitted that the accused made a confession before PW.8, and in pursuance of his confession, the handkerchief used in the commission of the offence by the accused was seized from the accused. The handkerchief was used for gagging the mouth of the deceased while burning him alive by pouring kerosene on him. As the handkerchief belongs to the accused, since it was recovered at the instance of the accused in pursuance of his confession under Section 27 of the Evidence Act, the conduct of the accused in absconding from the scene of offence till the date of his arrest on 16.09.2008, proves his guilty conscious, and would throw any amount of suspicion about his subsequent conduct, under Section 8 of the Evidence Act.

Before adverting further it is appropriate to look into the findings of the learned Sessions Judge. A reading of the judgment of the learned Sessions Judge, in Paragraphs 22 and 23 of the judgment, would reveal that the trial court placed much reliance on the circumstance of accused absconding from the date of commission of the offence, i.e., on the intervening night of 8/9 September 2008 till 16/9/2008. The trial Court suspected the conduct of the accused subsequent to the commission of the

offence, as he was not available immediately after occurrence of the incident.

The trial Court has cast burden on the accused to prove his conduct, that he was available at the school immediately after the occurrence, to prove his innocence. In this regard, the accused examined DWs.1 to 3 to prove his innocence.

DW.1 is a practicing Advocate in Nizamabad. He was appointed as a Court Commissioner by the I Additional District Munsif, Nizamabad, on the petition filed by the daughter of the accused to search the Police Stations where the accused and his wife were kept in illegal detention. DW.1 stated that he had taken his warrant and went along with Sri D. Nageswara Rao, who was also an Advocate appointed as a Commissioner, to III Town Police Station. They found the accused – Prakash in the room of Police Station. The A.S.I. and other Constables were also present. He stated that the S.I. of the Police Station came one hour after they went there. The S.I. telephoned to the D.S.P. and then the D.S.P. came to the Police Station after half an hour and the Remand Report was not prepared and arrest card was also not prepared. Then the Advocate Commissioners have produced the accused along with the Search Report before the I Additional District Munsif, Nizamabad, and Ex.D.1 is the Commissioners' Report.

DW.2 is another Advocate Commissioner, who accompanied DW.1, corroborated the facts spoken to by DW.1.

DW.3, who is the wife of the accused, is working as Correspondent of Priyadarshini High School, Nizamabad, for the past 20 years. The accused was working in the said School as Principal. She deposed that she was detained in Town IV Police Station for 4 days. Then she was shifted to Town I Police Station, Nizamabad. She was detained illegally till 15.09.2008 in Town I Police Station, Nizamabad.

The accused examined the witnesses DWs.1 to 3 to prove that himself and his wife were illegally detained in the Police Station till 15.09.2008 without preparing the arrest card and Remand Report. The alleged incident occurred on 09.09.2008, while the arrest of the accused was shown to have been made on 16.09.2008 at 17.00 hours by PW.12, SDPO of Nizamabad Police Station. This clearly reveals that by the time of visit of DWs.1 and 2, the accused was in the Police Station. As per the testimony of DW.3, the wife of the accused, she has been in the Police Station 4 days prior to the arrest of her husband on 16.09.2008. The illegal detention of the accused and his wife in the Police Station raises any amount of doubt with regard to the alleged recovery of MO.7 – hand-kerchief made from the accused. Therefore, the alleged recovery of the hand-kerchief from the accused is not an incriminating material to connect the accused with the crime, as per Section 27 of the Indian Evidence Act. The alleged recovery was made while the accused was the custody of police and the wife of the accused was also in the Police Station. Therefore, the recovery does not appear to be voluntary. When the very recovery of MO.7 – handkerchief alleged to have been used in the commission of offence is not proved,

there is no corroboration to the statement of PW.7 recorded under Section 164 Cr.P.C. by the learned Magistrate.

The other circumstance was recovery of M.O.7, handkerchief, alleged to have been seized from the accused, in pursuance of his confession made before PW.8, a Deputy Tahsildar. The trial Court assumed that as he was an official and there was no necessity for him to falsely implicate the accused in this case.

The other circumstances were spoken by PW.12 - Investigation officer with regard to the investigation done by him in respect of recovery of material objects.

At the outset, this is a case based on circumstantial evidence. The motive plays a pivotal role to prove the genesis of the incident. The prosecution relied on Section 164 Cr.P.C statement of PW.7 to prove the motive.

The entire case of prosecution is based on Ex.P.5, the confessional statement of PW.7 under Section 164 Cr.P.C. recorded by the learned Magistrate, and the recovery of MO.7-handkerchief.

In **Deep Chand v. State of Rajasthan**¹, it was held that a statement of a witness recorded under Section 164 Cr.P.C. is a public document. Statement of a person recorded by magistrate under Section 164 Cr.P.C. is a public document and it does not require any formal proof by summoning

¹ 1961 (2) Cr.LJ. 705

the Magistrate. Therefore, in this case, there is no need to summon the Magistrate to prove Section 164 Cr.P.C. statement recorded by him, as it is a public document.

It is the settled position of law that the statement recorded under Section 164 Cr.P.C can never be used as substantive evidence of truth of the facts, but it may be used for contradiction or corroboration of the statement of a witness, who made it. The statement made under Section 164 Cr.P.C can be used to cross examine the maker of it, and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness. It is for the defence to invite the 1st information report and statement made under Section 164 Cr.P.C. for the purposes of bringing out the contradictions in the evidence. In the absence of eliciting any contradiction, the Court cannot take recourse to Section 164 Cr.P.C. statement; to compare the same with the evidence of the witness. In the same way, the prosecution has to bring corroborative evidence to prove its case.

In fact, in the instant case, PW.7 did not even support the case of prosecution. The prosecution has also failed to elicit anything in her cross examination, either for corroboration of her testimony with that of her Section 161 Cr.P.C. statement. Therefore, the statement under Section 164 Cr.P.C. cannot be straight away accepted as a substantive piece of evidence.

Further, in the statement recorded under Section 164 Cr.P.C., PW.7 stated that the accused was the Correspondent and Principal of the school

and that he threatened PW.7 that he would remove her from her job, unless she gives her consent to have sex with him and that due to the pressure she succumbed to his demand. It is also her statement that, while she was preparing to have sex with him the deceased boy saw them. Thereafter, the accused asked for a matchbox, and that after some time, there was a commotion in the hostel. Even if the contents of Section 164 Cr.P.C. statement are taken into consideration, at the most it may show that PW.7 suspected that the accused might have killed the boy setting fire to him as he had asked for a match box. It is also her assumption that as the boy witnessed them preparing to have sex, and thinking that it effects the reputation of the College, the accused might have killed the boy. Even if the said statement is taken into consideration, *ex facie*, it is only the suspicion of the witness about the motive for commission of the offence.

A prudent man cannot think that the accused can burn a boy with kerosene and kill him in the very class room of the school for which he was incharge. No person, who commits offence would do so deliberately in the school. At every stage, every authority has suspected the commission of the offence by the accused. The investigation has started with suspicion against the accused, as he happened to be the Correspondent of the School. The investigation proceeded basing on suspicion against him, placing reliance on Section 164 Cr.P.C. statement of PW.7. In fact, she did not support the case of prosecution. The learned Sessions Judge has based on such suspicion had convicted the accused. Everyone has suspected the accused as he was the Correspondent and Principal of the School, and as he absconded after the incident. There is absolutely no scientific evidence in

this case, like finger print, DNA testing etc. The investigating agency made hectic efforts to connect the accused with the crime without any scientific evidence, and in that process, they have even gone to the extent of planting a handkerchief as a crime object. Therefore, it is obvious that this case is solely based on suspicion. The sea of suspicion has no shore and any amount of suspicion can never take the place of proof. On this ground also, the accused is entitled for benefit of doubt.

It is pertinent to note that when there are two views possible, the view in favour of accused has to be taken into consideration. The circumstance in favour of the accused is that PW.7 did not support the case of the prosecution, and her statement under Section 164 Cr.P.C. The alleged absconding of accused after commission of offence itself is not sufficient to prove the case of the prosecution beyond reasonable doubt.

There is certain duty cast on the magistrate while recording confessions. It is hardly necessary to emphasise that the act of recording confession under Section 164 Cr.P.C., is a very solemn act and in discharging his duties under the said section the Magistrate has to take care to see that the requirements of sub-section 3 of Section 164 Cr.P.C., are carefully satisfied.

Now, we will consider the evidentiary value of Section 164 Cr.P.C. statement to place reliance on the version of the prosecution. Section 164 Cr.P.C. reads as under:

Recording of confessions and statements:

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial: Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-" I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed)
A. B. Magistrate".

In the instant case, the allegation of the defence is that PW.7 was kept in Police Station for 10 days and tortured and thereafter her

confessional statement was recorded by the learned Magistrate. Therefore, it is obvious that the confession made by the witness is not voluntary. When the statement under Section 164 Cr.P.C. is not a voluntary statement, it cannot be relied upon.

The statement made under Section 164 Cr.P.C. cannot be admitted as a substantive evidence against the accused. It can only be used for contradicting or corroborating the maker of it. See :-

- (1) AIR 1949 PC 257 - Bhuboni Sahu vs. The King
- (2) AIR 1950 KUTCH 88 – Devaraj Daya vs. Joshi Vishanji Bhanji and another
- (3) AIR 1957 ASSAM 168 – Birendra Chandra vs. The State
- (4) AIR 1963 KERALA 152 – Ahmed Kutty vs. State of Kerala
- (5) AIR 1960 SC 490 – State of Delhi vs. Ram Lohia
- (6) AIR 1974 SC 778 – Sawal Das vs. State of Bihar
- (7) AIR 1972 SC 468 - Ram Kishan Singh vs. Harmit Kaur and Ors.

In the light of the above decisions, it is obvious that the statement recorded under Section 164 Cr.P.C. is not a substantive piece of evidence. The statement shall have corroboration to prove the guilt of the accused.

In the instant case, there is no corroboration to the statement of PW.7 recorded under Section 164 Cr.P.C. by the learned Magistrate under Ex.P.5. On the other hand, PW.7 stated in her evidence that due to the pressure of the police, she was compelled to give statement to the Magistrate. Therefore, the statement of PW.7 recorded under Section 164

Cr.P.C. is not a voluntary statement. This fact is in favour of the accused, which is going against the case of the prosecution.

In view of the facts and circumstance of this case, we are of the considered view that there are absolutely no merits in the submissions made by the learned public prosecutor in support of the conviction recorded by the trial court. It is obvious that the prosecution relied on the testimony of PW.7, who did not support the version of prosecution. No doubt, Section 164 Cr.P.C. statement of PW.7 was recorded by the Magistrate, but however, she did not support the case of prosecution. There is no other testimony of prosecution witnesses to corroborate Section 164 Cr.P.C. statement of PW.7 and no other witness has spoken against the accused to connect him with the crime. Admittedly, no inmates of the hostel were present at the time of incident. Therefore, merely because the accused was Correspondent of the School and he absconded is not sufficient to connect him with the crime. The trial Court went wrong in convicting the accused basing on suspicion. The trial Court has not considered the fact that when there are two views possible, the view in favour of the accused has to be taken into consideration.

When two views are possible, the accused is entitled for the benefit of doubt as held in SHARAD BIRDHICHAND SARDA V. STATE OF MAHARASHTRA².

² AIR 1984 SC 1622

In the instant case, there are two views available, one in favour of the accused and the other in favour of the prosecution in respect of recording of Section 164 Cr.P.C. statement of PW.7. The entire case of the prosecution revolves around the said statement. Basing on the said statement, the prosecution had tried to make out its case against the accused. The very maker of the said statement i.e., PW.7 denied that she made her Section 164 Cr.P.C. statement voluntarily to the Magistrate. She has even denied her Section 161 Cr.P.C. statement, which is marked as Ex.P.4. Turning of this witness, hostile to the prosecution, is the view that can be taken in favour of the accused. Therefore, the accused is entitled for the benefit of doubt in this case, as the prosecution is not coming out with true version. The contents of the statement of PW.7 recorded under Section 164 Cr.P.C. by the learned Magistrate throw only suspicion about the conduct of the accused, but not anything more about the commission of offence by the accused.

The suspicion, however strong, cannot take the place of proof. The said proposition of law is laid down in the following decisions:

- (1) AIR 1979 SC 1236 - Arjan Singh and Ors. vs. Hazara Singh
- (2) AIR 1977 Cri.LJ 566 SC – Krishnanand vs. The State of Madhya Pradesh
- (3) AIR 1956 SC 54 – Sanwat Khan and Ors. Vs. State of Rajasthan
- (4) AIR 1995 SC 135 – Jagga Singh vs. State of Punjab

In KALI RAM v. STATE OF HIMACHAL PRADESH³, it was held as under:

“Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the, guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable : it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. As mentioned by us recently in the case of [State of Punjab v. Jagir Singh](#), a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the, court has to judge, the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy, on grounds which are fanciful or in the nature of conjectures.”

In view of the foregoing reasons, the appellant is entitled for benefit of doubt. The testimony of PW.7 recorded under Section 164 Cr.P.C. was

³ AIR 1973 SC 2773

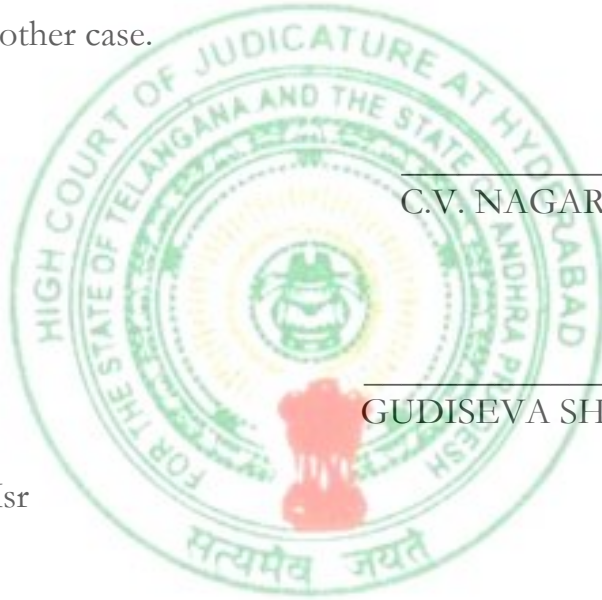
not brought to the notice of the accused in his Section 313 Cr.P.C. examination. This clearly vitiates the rights of accused of his defence in this case.

IN THE RESULT, the appeal is allowed, setting aside the judgment of the trial court in SC/ST Sessions Case No.281 of 2010, and the appellant-accused is acquitted. As the appellant is on bail, he is directed to surrender himself before the Superintendent, Central Prison, Cherlapally, R.R. District, for completing the formalities for his release, if he is not required in any other case.

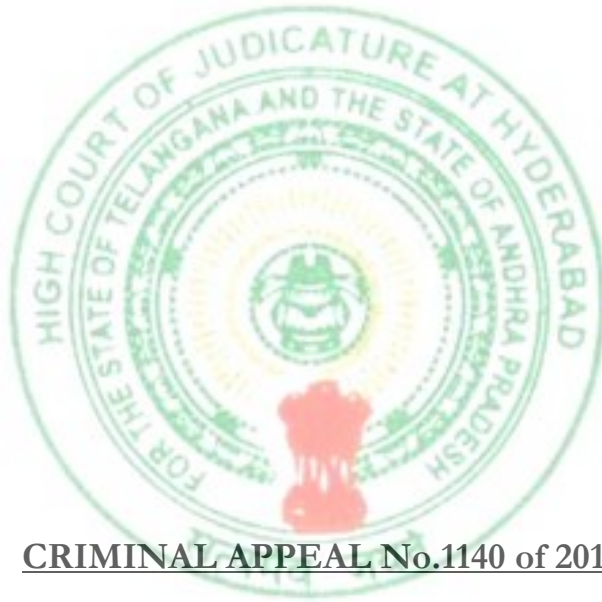
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CRIMINAL APPEAL No.1140 of 2011

24th July, 2018

MSB / Ksm