

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI

CRIMINAL APPEAL No.1299 of 2012

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

1) The sole accused in S.C.No. 189 of 2011 on the file of the Special Judge for Economic Offences-cum-VIII Additional Metropolitan Sessions Judge, Hyderabad, is the appellant herein. He was tried for the offence punishable under Section 302 and 379 IPC, for causing the death of one Ashok by hitting him with a big stone on his head and also committing theft of a cell phone on the intervening night of 30/31.07.2010 at about 1.30 a.m. By its judgment, dated 27.08.2012, the learned Sessions Judge convicted and sentenced the appellant to suffer "imprisonment for life" and to pay a fine of Rs.500/-, in default to suffer simple imprisonment for one month, for the offence punishable under Section 302 IPC and further convicted and sentenced the accused to suffer simple imprisonment for a period of six months for the offence under Section 379 IPC. Both the sentences were directed to run concurrently. .

2) The facts as narrated by the prosecution witnesses are as under:

i) PWs.1, 2, 6 and the deceased are rag pickers. The deceased was residing near the house of PW.1 with his family members. On the night of 30.07.2010, PW.1 along with other rag

pickers slept in the vegetable market at Ameerpet. PW.2, who was the watchman in the vegetable market, was also sleeping in the vegetable market. In the middle of night, PWs.1 and 2 woke up on hearing the cries and found the deceased, Raju and others crying. One person, who is in black complexion, tall and aged about 50 years, wearing black rain coat, came towards PWs.1 to 6 and kicked PW.6. When PW.6 woke up, he questioned him as to who permitted them to sleep in the market yard. The said person, who was in drunken condition asked all the persons to pay amount, but none paid any amount. Due to threat to their life, all of them left the said place and shifted to another place in the market yard, for sleeping. Even after shifting to the new place, they noticed the stranger roaming in the market yard. On the next day morning, when they woke up, found the deceased Ashok covered with a gunny bag. They removed the gunny bag and observed blood oozing from the ears and also observed both the legs having burn injuries. They tried to wake up the deceased, but found him dead. Then they went to the house of the deceased and informed about the same. Again they came back to the place of offence and found the cell phone of the deceased missing. They suspected that the person, who asked them to pay money, might have killed the deceased.

ii) On 31.07.2010 at about 7.00 a.m., PW.9-the Inspector of Police, received a report from PW.6, which is placed on record as Ex.P6. Basing on which, PW.9 registered a case in Crime No.628 of 2010 for the offences punishable under Sections 302 and 379 IPC.

Ex.P9 is the first information report. After registering the crime, he proceeded to the scene of offence and prepared a panchanama of the scene in the presence of PW.4 and another. Ex.P1 is the scene of offence panchanama. He also got prepared a rough sketch of the scene, which is placed on record as Ex.P2. During the said process, PW.9 seized blood stained stone and partly burnt gunny bag. Thereafter, he conducted inquest over the dead body of the deceased in the presence of PW.4 and another. During inquest he seized the cloths worn by the deceased. Ex.P3 is the inquest report. Thereafter, he forwarded the dead body of the deceased to Gandhi Medical College, Secunderabad, for postmortem examination. PW.5-the Assistant Professor, Department of Forensic Medicine, Gandhi Medical College, Secunderabad, conducted autopsy over the dead body of the deceased and issued Ex.P5-the postmortem examination Certificate. According to the doctor, the cause of death was due to head injury.

iii) PW.9, the Inspector of Police, examined PWs.1,2, 6, 8 and others and thereafter on 31.07.2010 at about 9.45 p.m. he claims to have arrested the accused near a wine shop at Ameerpet. Pursuant to the confession made by the accused, PW.9 seized a cell phone and a rain coat, from the house of the accused. After completing the investigation, he filed the charge sheet which was taken on file as P.R.C.No.40 of 2010 on the file of the VII Additional Chief Metropolitan Magistrate, Hyderabad. On

committal of the case to the Sessions Division under Section 209 Cr.P.C., the same came to be numbered as S.C.No.189 of 2011.

3) Basing on the material on record, charges under Sections 302 and 379 IPC were framed, read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.

4) In support of their case, the prosecution examined PWs.1 to 9 and got marked Exs.P1 to P11 and M.Os.1 to 7. After the closure of 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.

5) Relying upon the recovery of cell phone of the deceased at the instance of the accused and as the accused was last seen in the company of the deceased, the learned Sessions Judge convicted the accused in the manner referred to above. Challenging the same, the present appeal came to be filed.

6) The learned counsel for the appellant mainly submits that there are no eye witnesses to the incident and the case rests on the circumstantial evidence. According to him, the circumstances relied upon by the prosecution do not form a chain of events so as to connect the accused with the crime. He would further contended that the prosecution ought to have atleast conducted test identification parade of the accused and failure on their part in holding the test identification parade of the accused and also

the property immediately after the arrest and recovery, is fatal to the prosecution case, as the accused is a stranger and their identification for the first time in the Court cannot be accepted.

7) On the other hand, learned Public Prosecutor would contend that in view of the recovery of the cell phone from the accused which came to be identified as that of the accused, the conviction and sentence imposed by the trial Court warrants no interference, more so, in view of the presumption under Section 114 of the Evidence Act.

8) The point that arises for consideration is whether the accused is responsible for the incident in question?

9) As seen from the record, there are no eye witnesses to the incident and the case rests on circumstantial evidence. In order to convict the accused, each of the circumstances relied upon by the prosecution should be established by legal evidence and the said circumstances should form a chain of events to connect the accused with the crime.

10) Keeping in view the principles laid down by the Apex Court, we shall now proceed to deal with the matter.

11) The incident in question is said to have taken place on the intervening night of 30/31.07.2010. On that day, the deceased, PWs.1, 2, 6 and others were sleeping in the vegetable market. In the midnight, on hearing the cries, PWs.1 and 6 woke up and noticed a person, black in complexion, wearing black rain coat,

questioning PW.6 as to who permitted him and others to sleep in the market yard. Apprehending threat, they shifted the place in the market yard, but noticed the said person roaming in the vegetable market. The evidence on record also discloses that the said person, who is tall and wearing a black rain coat, chasing the deceased and others. On the next day morning at about 7.00 a.m., they found the deceased lying dead. Admittedly, the incident in question did not happen in a closed room, it was an open place which was accessible to all. Admittedly, accused was stranger to PWs.1,2, 6 and others. None of them have seen the accused earlier.

12) The first information report which was given by PW.6 does not contain the physical features/distinguishing features of the accused so as to make them identifying him at a later point of time. The first information report which was given on 31.07.2010, only states that the said person was tall, dark in complexion and was wearing a rain coat. No special features found on the face of the accused or on the body were mentioned in the first information report. Further, the prosecution has not taken any steps to conduct the test identification parade for fixing the culpability of the accused. The accused was said to have been identified by them for the first time in the Court ie. nearly two years after the incident. Even the trial Court found fault with the prosecution for non-conducting the test identification parade of the accused. Therefore, the circumstances of PWs.1 and 6 identifying the accused as the person, responsible for the death of the deceased,

is not supported by any other material except they identifying the accused for the first time in the Court, we feel that as the incident happened in the night time and when the accused was wearing a rain coat, it would be very difficult for the witnesses to see him clearly enabling them to identify the culprit in the Court after two years, more so, in the absence of test identification parade and descriptive particulars.

13) At this stage, it is also to be noted here that the incident in question took place in the intervening night of 30/ 31.07.2010 and in the absence of any special features to identify strangely the prosecution arrest the accused on the next day and recover the cell phone belonging to the deceased from the house of the accused.

14) As stated earlier, the entire case revolves around the alleged confession made and the recovery of cell phone of the deceased pursuant to the said confession. Admittedly, the confession was made before the police officer, while he was in police custody, which is not admissible, except to the extent of discovering a fact.

15) Then the only circumstance relied upon by the prosecution is the recovery of cell phone. Admittedly, the argument of the learned counsel for the appellant appears that the mere recovery of stolen article belonging to the deceased from the house of the accused, does not lead to the conclusion that the accused has committed the murder.

16) In *Baiju @Bharosa vs. State of Madhya Pradesh*¹ the Apex Court held that “the recovery, if found to him un-explained and recent can be made the basis to convict the accused.”

17) In the instant case, situation is some what different. The mother or any of the family members of the deceased does not identify the cell phone, which was recovered from the house of the accused, as that of the deceased. Only PW.6, who was sleeping in the market yard along with the deceased, claims to have identified the cell phone as that of the deceased.

18) Dealing with the said issue, the Apex Court in *State of Rajasthan vs. Talevar and another*² states that “where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily from hand to hand. Suspicion should not take the place of proof.”

19) In *Hatti Singh vs. State of Haryana*³ the Apex Court while dealing with the recovery of Articles vis-à-vis presumption under Section 114 of the Indian Evidence Act, held that “a presumption may be in respect of commission of theft or receipt of stolen

¹ AIR 1978 (SC) 522

² AIR 2011 SC 2271

³ (2007) 12 SCC 471

property; if a person is found to be in possession of the property belonging to the deceased, but on such presumption alone, the appellant could not have been convicted for commission of murder, particularly when on the same evidence other persons had been given benefit of doubt.”

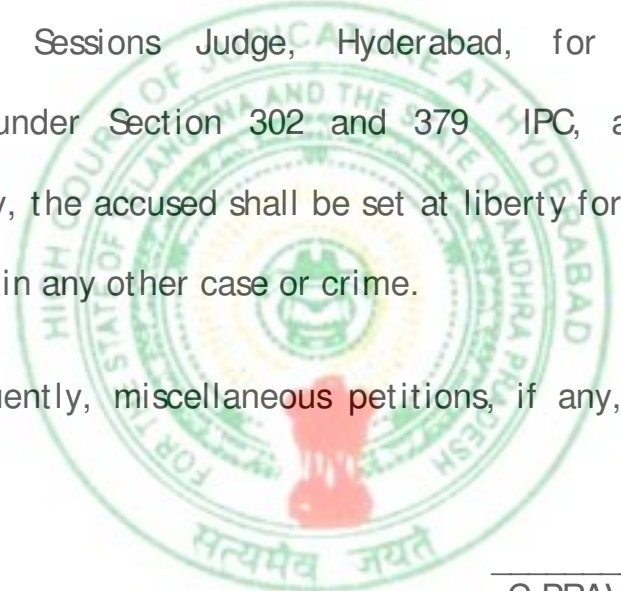
20) In the instant case, the accused was said to have been arrested on 31.07.2010 at about 9.45 p.m. in front of a wine shop at Ameerpet. He is alleged to have made a confession which lead to recovery of the cell phone from the house of the accused, where as PW.3, who was a cashier in Sai Lakshmi Wine Shop, deposes that the accused was arrested in the morning hours when he was present near their shop. The said witness was neither treated hostile nor was he cross-examined by the Public Prosecutor with the permission of the Court. There arises a doubt as to when the accused was arrested. As stated earlier, on one hand PW.3 in his evidence deposed about arrest being made in the morning of 31.07.2010, whereas the investigating officer in his evidence deposed that he effected the arrest of the accused on 31.07.2010 at 9.45 p.m.

21) Having regard to the judgments of the Apex Court referred to above and taking into consideration the discrepancy with regard to the arrest of the accused, we feel that even the recovery made pursuant to the arrest and confession becomes doubtful, more so, when the said article was not identified by any of the family members of the deceased. In fact, neither PW.6 nor any of the

witnesses gave any specific features which made them to identify the cell phone. In the absence of any other evidence and the circumstances relied upon by the prosecution are not established conclusively, we intend to extend the benefit of doubt to the accused.

22) In the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant/accused in the judgment, dated 27.08.2012 passed in S.C.No.189 of 2011 on the file of the Special Judge for Economic Offences-cum-VIII Additional Metropolitan Sessions Judge, Hyderabad, for the offences punishable under Section 302 and 379 IPC, are set aside. Consequently, the accused shall be set at liberty forthwith, if he is not required in any other case or crime.

23) Consequently, miscellaneous petitions, if any, pending shall stand closed.



C.PRAVEEN KUMAR, J

KONGARA VIJAYA LAKSHMI, J

03.01.2018
gkv

