

**THE HON'BLE SRI JUSTICE RAGHVENDRA SINGH CHAUHAN
AND**

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Criminal Appeal No.1133 of 2013

JUDGMENT: (Per Hon'ble Sri Justice M.Satyanarayana Murthy)

Mr.Begari Gangaiah, the accused in Sessions Case No.389 of 2012 on the file of III Additional District and Sessions Judge (Fast Track Court), Medak, has preferred this Criminal Appeal under Section 374(2) Cr.P.C, challenging the conviction and sentence passed in calendar and judgment, dated 29.11.2013, wherein he was found guilty for the offence under Section 302 of the Indian Penal Code (for short, "IPC") and sentenced him to under go Life Imprisonment and to pay a fine of Rs.5,000/-.

The case of the prosecution, in brief, is that, the marriage of Putta Mogulamma (the deceased) was performed with Putta Galaiah (PW.1) and blessed with four children and they lived happily for some time and thereafter, the deceased-Mogulamma was necked out by her husband-P.Galaiah (PW.1) on the ground that she developed illicit intimacy with the accused-appellant. Then a panchayat was held on 05.05.2011 at the Panchayat Office and in the said panchayat, the accused and the deceased hurled abusive language against each other. After that the accused and the deceased left the panchayat office and in the meanwhile Mr.B.Niranjan (PW.8) came and informed on the same day at 13.00 hours to Putta Galaiah (PW.1) that the deceased- Mogulamma was killed by the accused with an axe. Immediately, Putta Galaiah (PW.1), the husband of the deceased, went to the scene of offence

and found her deadbody in a pool of blood. Immediately, Putta Galaiah (PW.1) lodged a report (Ex.P1) with the Pulkal Police Station, which was registered as a case in Crime No.42 of 2011 for the offence under Section 302 IPC and issued FIR (Ex.P12).

During investigation, the police examined nineteen witnesses and recorded their statements under Section 161 Cr.P.C. and visited the scene of offence, held inquest on the deadbody, recovered the bloodstained earth and controlled earth and the deadbody was sent for post-mortem examination. After conducting the post-mortem examination by the doctor, and after collecting the entire material including, post-mortem examination report-Ex.P-11, FSL Report-Ex.P-13, apprehended the accused on 09.05.2011, recovered MO.4-axe under the cover of Ex.P10-seizure panchanama based on confession leading to discovery and having concluded that there is prima-facie material against the accused for the offence under Section 302 IPC, Mr.D.Krishna, the Circle Inspector of Police, Jogipet Circle (PW.15), filed the charge-sheet against the appellant-accused and the case was taken on file for the offence under Section 302 IPC by the Judicial Magistrate of First Class, Jogipet, and registered the same as PRC No.6 of 2012. The Judicial Magistrate of First Class committed the case to the Sessions Division, Medak, as the offence under Section 302 IPC is exclusively triable by Court of Session. The Principal District and Sessions Judge, Medak, registered the same as Sessions Case No.389 of 2012 and later made over the same to the III Additional District and Sessions Judge (Fast Track Court), Medak.

After securing the presence of the accused, and upon hearing, the learned Additional Public Prosecutor and the Defence Counsel, the Sessions Court framed sole charge against the appellant-accused for the offence punishable under Section 302 IPC, read over and explained to him in Telugu, he pleaded not guilty and claimed to be tried.

During trial, the prosecution has examined PWs. 1 to 15 and got marked Exs.P-1 to P-14 and M.Os.1 to 7 to substantiate its case. After closure of prosecution evidence, the accused was examined under Section 313 Cr.P.C, explained the incriminating material that appeared against him in testimonies of the prosecution witnesses and he denied the same.

Upon hearing argument of learned Additional Public Prosecutor and Defence Counsel, the Court below found the appellant-accused guilty for the offence punishable under Section 302 IPC, convicted and sentenced him to undergo imprisonment for life and to fine of Rs.5,000/-.

Aggrieved by the conviction and sentence imposed upon the appellant-accused for the offence under Section 302 of IPC, in Sessions Case No.389 of 2012, the present Criminal Appeal is filed on various grounds. The main grounds urged before this Court are that, the prosecution failed to establish the links in the chain of circumstances, more particularly, when the prosecution case is depending on the circumstantial evidence, apart from that, the recovery of the MO.4-Axe itself may not establish the root cause of the prosecution case and it is not a substantive piece of evidence

and the prosecution miserably failed to establish the chain of circumstances, which unerringly pointing the guilt of the accused without any doubt. Therefore, in the absence of evidence completing the links in the chain of circumstances, the conviction and sentence imposed upon the appellant-accused by the impugned calendar and judgment is illegal and requested to set aside the same by allowing this Criminal Appeal.

During hearing, the learned counsel for the appellant-accused reiterated the grounds urged in the memorandum of appeal and whereas, the learned Public Prosecutor supported the conviction and sentence imposed upon the appellant-accused.

Considering rival contentions, perusing the material available on record, the points that arise for consideration are:

- 1) Whether the appellant-accused caused the death of the deceased-Mogulamma? If so, whether the appellant-accused is liable for punishment for the offence punishable under Section 302 of IPC?
- 2) Whether the conviction and sentence recorded by the III Additional District and Sessions Judge (Fast Track Court), Medak, in Sessions Case No.389 of 2012, be sustained?

POINT Nos.1 & 2:

As narrated above, it is the case of a murder of a lady by her paramour on account of referring the dispute to the elders at the panchayat office and in the said panchayat, they hurled abusive language against each other. Due to that they allegedly left the panchayat office and went away by leaving PWs.1 and 2 viz., P.Galaiah and P.Raju, at the panchayat office. Therefore, PWs.1

and 2 are not eye-witnesses to the incident or occurrence, but they spoke about the panchayat held at the panchayat office for settling the dispute with regard to the illicit intimacy of the appellant-accused with the deceased-Mogulamma.

The circumstances, on which the prosecution relied upon, are the seizure of MO.4-axe from the heap of sticks under the cover of seizure panchanama (Ex.P10) and the motive to commit the offence and abscondence of the appellant-accused after the omission of offence. Based on the circumstantial evidence, the trial Court believed the prosecution case and observed that B.Niranjan (PW.8) is also not an eye-witness to the occurrence. Even according to Ex.P-8, the 161 Cr.P.C. statement of PW.8, it is difficult to conclude that the appellant-accused killed the deceased-Mogulamma, merely PWs.1, 2, 4 and 6 and others came to know about it. Thus, the trial Court expressed a serious doubt about the commission of offence by the appellant-accused and if the evidence of PWs.1, 2, 4 and 6 is excluded from consideration, there is absolutely no evidence on record to connect the appellant-accused with the offence punishable under Section 302 of IPC.

The present Criminal Appeal is filed under Section 374 Cr.P.C, which conferred a substantive right of appeal on the accused who is convicted by the Trial Court and this Court while exercising power under Section 374(2) Cr.P.C is bound to re-appreciate entire evidence to come to an independent conclusion, uninfluenced by the findings recorded by the Court below and decide the legality of conviction and sentence passed by

the Sessions Court. Therefore, it is the duty of this Court to re-appreciate entire evidence recorded by the Court below after giving an opportunity to both the parties, i.e accused and the respondent, unless the Court finds manifest perversity in the calendar and judgment or such findings were recorded without evidence, normally, this Court cannot interfere with such fact findings in appeal, while exercising jurisdiction under Section 374(2) Cr.P.C. It is the sacrosanct duty of the appellate court, while sitting in appeal against the judgment of the trial Judge, to be satisfied that the guilt of the accused has been established beyond all reasonable doubt after proper re-assessment, re-appreciation and re-scrutiny of the material on record. Appreciation of evidence and proper re-assessment to arrive at the conclusion is imperative in a criminal appeal. That is the quality of exercise which is expected of the appellate court to be undertaken and when that is not done, the cause of justice is not sub-served, for neither an innocent person should be sent to prison without his fault nor a guilty person should be let off despite evidence on record to assure his guilt (vide **Kamlesh Prabhudas Tanna & Anr v. State Of Gujarat**¹). Keeping the scope of Section 374(2) Cr.P.C we would like to re-appreciate entire evidence on record to come to an independent conclusion, uninfluenced by the findings recorded by the Court below.

The case of prosecution is totally based on circumstantial evidence, since the incident allegedly took place at a far off place to

¹ (2013) 15 SCC 263

the place where PWs.1 to 3 were waiting at the panchayat office and it is not the case of any of the witnesses that they witnessed the incident, but totally relied on circumstantial evidence. In such a case, the burden of proof is always on the prosecution to establish each and every circumstance to complete the chain of circumstances unerringly pointing out the guilt towards the appellant-accused and inconsistent with the innocence.

When the case is based on circumstantial evidence, burden of proof is always on the prosecution to prove all the circumstances from which conclusion of guilt is to be drawn must be fully established and the facts so established must be consistent with hypothesis of guilt of accused and any circumstance consistent with innocence of accused, he is entitled to benefit of doubt. (vide **Kishore Chand v. State of Himachal Pradesh**²)

The Apex Court while discussing the scope of Section 3 of the Evidence Act, more particularly, circumstantial evidence held that, in a case of murder when the prosecution relying on circumstantial evidence, it is for the prosecution to prove all the incriminating facts and circumstances and the circumstances which are incompatible with innocence of the accused to draw inference of guilt and such evidence should be tested by touchstone of law relating to circumstantial evidence laid down by Supreme Court (vide **Syed Hakkim & another v. State**³)

² AIR 1990 S.C. 2140

³ 2009 Cr.L.J. 1891

Similarly, in **G.Parshwanath v. State of Karnataka**⁴, the Supreme Court is of the view, when the case of the prosecution is based on proof of circumstantial evidence on the basis of which conclusion of guilt is drawn must be established fully, individual chain of circumstances must be complete pointing out the guilt of accused, all proved facts must lead to inference of guilt of the accused alone and court has to draw distinction between primary and basic facts while appreciating the circumstances and regard must be had to common course of natural events and human conduct and finally the facts established should be consistent only with hypothesis of guilt of accused and it does not mean that each and every hypothesis suggested by the accused must be excluded by proved facts. In **Rukia Begum v. State of Karnataka with Issaq Sait and another v. State of Karnataka with Nasreen v. State of Karnataka**⁵; **Jagroop Singh v. State of Punjab, Inspector of Police, Tamil Nadu v. Balaprasanna**⁶ and **Shaik Khadar Basha v. State of Andhra Pradesh**⁷, the same principle was reiterated.

The Supreme Court in **Trimukh Maloti Kikran v. State of Maharashtra**⁸, held as follows:

“In the case in hand there is no eye-witness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the

⁴ AIR 2010 S.C. 2914

⁵ AIR 2011 SC 1585

⁶ 2009(1) ALD (CrL.) 113

⁷ 2009(1) ALD (CrL.) 859 (AP)

⁸ (2006) 10 SCC 681

circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence

In view of the settled principle of law, the prosecution has to made a sincere attempt to prove each and every circumstance, pointing out the guilt of the accused that the offence punishable under Section 302 I.P.C by drawing inference from the proved facts and circumstances which are consistent only with hypothesis of guilt of accused before the Trial Court and inconsistent with innocence.

Coming to the present facts and circumstances of this case, the circumstances relied on are the motive and absconding of the appellant-accused. The consistent case of the prosecution from the beginning is that the appellant-accused had a motive to kill the deceased-Mogulamma as she hurled abusive language against him in the panchayat held at the panchayat office in the presence of her husband and her son. But, this fact was denied by the defence in the cross-examination by putting suggestions to the prosecution witnesses. If really both hurled abusive words against each other, the question of their jointly leaving the panchayat office after holding panchayat is highly improbable to the natural circumstances, when they are in such a bitter enmity. But, this improbable circumstance was believed by the trial Court for one reason or the other reason while expressing a doubt as to the veracity of evidence of PWs.1 to 3 and in the absence of any other evidence, the prosecution case cannot be accepted.

One of the circumstances relied by the prosecution is the motive. But, motive is not a substantive piece of evidence, it is only a corroborative piece of evidence to complete the links in the chain of circumstances, and that itself is not sufficient to connect the appellant-accused to the grave offence punishable under Section 302 of IPC.

In **Anil Rai v. State of Bihar**⁹, the Apex Court held that the admitted position of law is that enmity is a double edged weapon which can be a motive for the crime as also the ground for false implication of the accused persons. In case of inimical witnesses, the Courts are required to scrutinize their testimony with anxious care to find out whether their testimony inspires confidence to be acceptable notwithstanding the existence of enmity. Where enmity is proved to be the motive for the commission of the crime, the accused cannot urge that despite proof of the motive of the crime, the witnesses proved to be inimical should not be relied upon. Bitter animosity held to be a double edged weapon may be instrumental for false involvement or for the witnesses inferring and strongly believing that the crime must have been committed by the accused. Such possibility has to be kept in mind while evaluating the prosecution witnesses regarding the involvement of the accused in the commission of the crime. Testimony of eye-witnesses, which is otherwise convincing and consistent, cannot be discarded simply on the ground that the deceased were related to the eye-witnesses or previously there were some disputes between

⁹ 2001(2) ALD (Cri.) 446

the accused and the deceased or the witnesses. The existence of animosity between the accused and the witnesses may, in some cases, give rise to the possibility of the witnesses exaggerating the role of some of the accused or trying to rope in more persons as accused persons for the commission of the crime. Such a possibility is required to be ascertained on the facts of each case. However, the mere existence of enmity in this case, particularly when it is alleged as a motive for the commission of the crime cannot be made a basis to discard or reject the testimony of the eye-witnesses, the deposition of whom is otherwise consistent and convincing.

In the present circumstances of the case, it is abundantly clear that there was bitter enmity between PWs.1, 2 and the accused as the deceased-Mogulamma, wife of PW.1, was eloped with the appellant-accused and they lived for some time as wife and husband and thereafter, the panchayat was held. Normally, there was a possibility of enmity between the husband of the eloped wife and the paramour, the appellant-accused. Therefore, PWs.1 and 2 are totally inimical witnesses to the appellant-accused and their evidence cannot be believed and that too, they are not direct witnesses to the incident. In their evidence, they clearly stated that they did not witness who killed the mother of PW.2 and wife of PW.1. Therefore, their testimony is not helpful to the prosecution and connect the appellant-accused with the offence punishable under Section 302 of IPC, because the enmity may be a ground to commit such an offence or to implicate the

appellant-accused in such a grave crime. If really deceased and accused were so inimical, the question of their leaving the panchayat office together does not arise and that itself is improbable to the natural conduct of human beings. Therefore, the motive was not established by the prosecution before the trial Court, but still while expressing a doubt as to evidence available on record to conclude that the appellant-accused committed such grave offence of murder, the trial Court accepted the motive erroneously. In view of our discussion, the motive is not established by the prosecution by producing cogent and convincing evidence.

The other circumstance, relied upon by the prosecution, is recovery of MO.4-Axe, with which, the appellant-accused allegedly axed the deceased-Mogulamma to death by causing injuries on her body. The basis for recovery is the statement of Mr.S.Prabhakar (PW.10), who is a panchayatdar to the recovery, and in whose presence, the appellant-accused made a confession leading to the recovery, while in custody of the police.

According to the evidence of Mr.S.Prabhakar (PW.10), one of the mediator, in his presence, the accused confessed before the police that he concealed the MO.4-axe in a heap of sticks and promised to show the weapon used in the commission offence, if the police accompanied the accused and accordingly, the accused led the police and the mediators to the place where MO.4-axe was concealed i.e. in a heap of sticks and this confession leading to discovery is marked as Ex.P-10. The recovery was after a long

time, since the appellant-accused was absconding. Therefore, the recovery of MO.4-axe, after lapse of more than four days from open place accessible to public in general, cannot be accepted.

Section 27 of the Indian Evidence Act is an exception to Sections 25 and 26. The conditions necessary for invoking the aid of the Section are as follows:

- a) there must be a discovery of a fact albeit relevant fact in pursuance of an information received from a person in police custody;*
- b) the discovery of such fact must be deposed to ;*
- c) at the time of giving information the accused must be in police custody;*

Then the effect is that so much of the information as relates distinctly to the fact thereby discovered is admissible. What is allowed to be proved is the information or such part thereof as related distinctly to the fact thereby discovered.

Discovery evidence is not substantive evidence (vide **Dinakar v. State**¹⁰].

Similarly, in **Inspector of Police, Tamil Nadu v. Balaprasanna**¹¹, the Apex Court held that the 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 lead 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 the Supreme Court. However, in almost all such decisions reference is made to the

¹⁰ AIR 1970 Bombay 438

¹¹ 2009(1) ALD (CrI.)(SC) 113

observations of the Privy Council in **Pulukuri Kotayya v. Emperor**¹². At one time it was held that the expression 'fact discovered' in the second is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in **Pulukuri Kotayya's** case. 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."

In view of the principle laid down in the above decision, when a fact is discovered in pursuance of confession leading to discovery is only relevant piece of evidence, but it is not a

¹² AIR 1947 PC 67

substantive piece of evidence.

Even otherwise, in **Brijesh Mavi Vs. State of NCT of Delhi**¹³, the Apex Court, held that recovery evidence, when not sufficient to prove culpability of accused and no direct evidence connecting accused to murder. Recovery of weapon of offence at the instance of accused two years after incident is not believable. Mere recovery of weapon, therefore, not sufficient to convict the accused for the offence of murder under Section 302 of I.P.C.

In view of the law declared by the Apex Court in the judgments referred supra, the confession leading to discovery alone is relevant piece of evidence, but it is not a substantive evidence. However, recovery of incriminating material on the confession leading to discovery after lapse of three days from open place accessible to public cannot be relied upon to rope the appellant-accused with a grave offence punishable under Section 302 of IPC. Therefore, based on such confession leading to discovery and recovery of MO.4-axe under the cover of Ex.P10-confession and seizure panchanama cannot be accepted as a substantive piece of evidence. But, the trial Court believed it basing on the recovery evidence without considering the gap of time between the alleged commission of offence and the recovery of MO.4-axe from open place accessible to public in general, under Ex.P-10. The conclusions arrived by the trial Court are contrary to the principles laid down in the judgments referred supra. Therefore, the findings of the trial Court as to recovery of MO.4-axe

¹³ 2012 (2) ALD (Cri.) 865 (SC)

under Ex.P10 cannot be accepted, for the reason that it was allegedly recovered basing on the confession from open place accessible to public in general after three days and planting MO.4-axe cannot be ruled out.

The other circumstance, relied upon by the prosecution, is abscondence. Abscondence may be one of the circumstance, but that itself is not a ground to connect the appellant-accused and when there were disputes between the two families with regards developing illicit intimacy by the appellant-accused with the deceased-Mogulamma and living together for some time as husband and wife, and in the panchayat, the appellant-accused was admonished by the elders. Therefore, it is difficult to hold that there is a possibility of the appellant-accused absconding, on account of panchayat held at the panchayat office just before the alleged commission of offence. Therefore, it is not a strong circumstance to connect the appellant-accused with grave offence.

The other circumstance relied on by the prosecution, if proved, would not serve any purpose for the reason that the prosecution failed to establish the main circumstances, which we discussed in the earlier paragraphs. Since the prosecution failed to establish all the links in the chain of circumstances, it is difficult to hold that the appellant-accused is guilty for the offence punishable under Section 302 of IPC and apart from that the trial Court made a clear observation, in para 20 of its judgment, that the Court cannot conclusively hold that the accused killed the deceased-Mogulamma merely because of enmity. When the trial

Court itself expressed its doubt as to the commission of offence by the appellant-accused, finding the appellant-accused guilty without extending the benefit of doubt is a grave illegality and that too, when the PWs.3 to 6, who are claiming to be the direct witnesses to the incident, did not support the case of the prosecution and turned hostile and nothing could be elicited in their cross-examination by the prosecution, therefore, their statements cannot be looked into for any purpose. If their statements are not considered, the other evidence is only hear-say and the circumstantial evidence. When the prosecution based its case on circumstantial evidence, it must prove all the circumstances linking one and another to complete the chain of circumstances, unerringly pointing the guilt of the accused, without any reasonable hypothesis and the circumstances proved must consistent with the guilt of the accused. But, here, in the present facts of the case, as discussed above, the prosecution failed to prove the motive for the commission of offence and also failed to establish recovery of MO.4-axe under Ex.P10-confession and seizure panchanama, in view of the gap between the alleged commission of offence and recovery and that too, from an open place, which is accessible to the public. In such circumstances, and in view of the reasons discussed supra, it is difficult to sustain conviction and sentence imposed upon the appellant-accused under the impugned calendar and judgment of the trial Court and the same is liable to be set aside, finding the appellant-accused not guilty for the offence under Section 302 of IPC holding that the

prosecution failed to establish the links in the chain of circumstances and thereby, the appellant-accused is entitled for acquittal extending benefit of doubt. Accordingly, both the points are answered in favour of appellant-accused and against the prosecution.

In the result, the Criminal Appeal is allowed and the sentence and conviction imposed against the appellant-accused- Begari Gangaiah S/o.Durgaiah, for the offence punishable under Section 302 of IPC, in Sessions Case No.389 of 2012 on the file of III Additional District and Sessions Judge (Fast Track Court), Medak, dated 29.11.2013, is set aside. The appellant-accused is acquitted and he shall be set at liberty forthwith, if he is not required in any other case. His bail bonds shall stand cancelled.

Consequently, miscellaneous applications pending, if any, shall stand closed.

RAGHVENDRA SINGH CHAUHAN, J.

M. SATYANARAYANA MURTHY, J.

Date: 06-12-2018.

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