

*** THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM
AND
THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY**

+ CRIMINAL APPEAL No.599 of 2013

% Dated 25.08.2018

Between:

T.Laxmi

... Appellant

and

The State of Andhra Pradesh.

...Respondent

! Counsel for the petitioner: Mr.V.L.N.Prasad

^ Counsel for respondents : Public Prosecutor

<GIST:

>HEAD NOTE:

? Cases cited:

1. (1991) 1 SCC 286 = AIR 1990 SC 2140
2. AIR 1959 SC 1012
3. AIR 1958 Bom 225
4. (2008) 12 SCC 173
5. AIR 2013 SC 1940
6. (2012) 6 SCC 403
7. (2013) 12 SCC 50
8. (2015) 12 SCC 644
9. (2012) 6 SCC 403
10. (2007) 2 SCC 310 : (2007) 1 SCC (Cri) 582

**THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM
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JUDGMENT: (per Hon'ble Sri Justice T.Sunil Chowdary)

This Criminal Appeal is filed under Section 374(2) of Cr.P.C., challenging the judgment dated 28.02.2013 passed in S.C.No.54 of 2012 on the file of the Court of the III Additional District & Sessions Judge (FTC) Asifabad, wherein and whereby the appellant herein was found guilty of the offence punishable under Section 302 of IPC, convicted and sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs.500/- in default, to suffer imprisonment for one month.

2. The case of the prosecution, in a nutshell, is that on 18.09.2011 Tekam Marakka-P.W.1 lodged a complaint (Ex.P.1) before the Station House Officer, Neelwai Police Station, basing on which, the Sub-Inspector of Police registered a case in Cr.No.29 of 2011 under Section 302 IPC and issued FIR - Ex.P.11.

3. During the course of investigation, it is revealed that the accused-Tekam Laxmi is the wife of the deceased-Tekam Anjaiah and they are residents of Rajaram village. About 6 years back they both fell in love and eloped from the village. They lived together happily at Mancherial for some period. When the accused conceived pregnancy, the deceased started suspecting her fidelity and dropped her at her parents' house. After six months, the accused gave birth to a female child. Thereafter, at the intervention of elders, the deceased took the accused to the village and they lived happily for some time. Again the deceased started harassing

the accused physically and mentally saying that she is his concubine but not wife. The accused, vexed with the unbearable harassment meted out by the deceased, was waiting for an opportunity to liquidate the deceased.

4. While the things stood thus, on 17.09.2011 morning, the deceased and the accused together went to the nearby forest to fetch firewood. By afternoon they brought two bundles of firewood to the house and at about 3.00 PM the deceased alone went to the forest to fetch the remaining firewood but did not turn-up. Then the mother of the deceased-P.W.1 along with her second son-P.W.2 and some other villagers went into the forest and found the dead body of the deceased with axe inflicted injuries on his body.

5. The Investigating Officer-P.W.10 visited the scene of offence and prepared rough sketch-Ex.P.12, seized MO3-chappals from the scene of offence and got the scene of offence photographed vide Exs.P.2 to P.5. He conducted inquest over the dead body of the deceased and prepared inquest panchanama-Ex.P.13 in the presence of P.W.9 and other mediators. Thereafter, P.W.10 sent the dead body to Government Hospital, Chennur, where Dr.K.Venu-P.W.8 conducted Postmortem over the dead body of the deceased and issued Ex.P.9-Postmortem report. On 21.09.2011 P.W.5 handed over the accused to P.W.10 stating that she admitted the commission of offence before him. The accused narrated the entire incident to P.W.10. The accused told him that she will show the axe and saree. Ex.P.7 is the confessional statement of the accused, in pursuance of which, PW.10 recovered M.O.1-axe and M.O.2-saree under the cover of panchanama-Ex.P.8. P.W.10 arrested the accused and sent her to judicial custody. After completion of the

investigation, P.W.10 laid the charge sheet against the accused for the offence under Section 302 of IPC before the learned Judicial Magistrate of First Class, Chennur.

6. The learned Judicial Magistrate of First Class, Chennur numbered the charge sheet as PRC No.51 of 2011. After appearance of the accused, the learned Magistrate supplied copies of all documents to the accused as required under section 207 Cr.P.C., and committed the case to the District & Sessions Division, Adilabad as contemplated under Section 209 Cr.P.C as the offence under Section 302 IPC is exclusively triable by a Court of Session.

7. The learned Principal District & Sessions Judge, Adilabad took cognizance of the offence under Section 302 of IPC, numbered it as S.C.No.54 of 2012 and made it over to the Court of the III Additional District & Sessions Judge (Fast Track Court), Asifabad for disposal in accordance with law. The learned III Additional District & Sessions Judge, after hearing both sides, framed charge against the accused for the offence punishable under Section 302 of IPC, read over and explained to her in Telugu. The accused denied the charge and claimed to be tried.

8. In order to bring home the guilt of the appellant-accused, before the trial Court, on behalf of the prosecution, P.Ws.1 to 10 were examined and Exs.P.1 to P.13 and M.Os.1 to 8 were marked. After completion of the prosecution side evidence, the accused was examined under Section 313 Cr.P.C., explaining the incriminating material deposed against her by the prosecution witnesses, which

the accused denied. On behalf of the defence, no oral or documentary evidence was adduced.

9. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the appellant was guilty for the offence punishable under section 302 IPC, convicted and sentenced her as stated supra. Hence, the accused preferred the present appeal.

10. Heard the learned counsel for the appellant and the learned Public Prosecutor for the State.

11. The point that arises for consideration in this appeal is:

Whether the prosecution proved the guilt of the accused for the offence punishable under Section 302 I.P.C., beyond reasonable doubt?

12. As per the prosecution version, P.W.1 lodged Ex.P1-original complaint with the Station House Officer, Neelwai Police Station. As seen from the testimony of P.W.10-the Inspector of Police, on 18.09.2011, at about 9 a.m., P.W.1 came to the Police Station and lodged Ex.P1-complaint. Based on Ex.P1-complaint, the Sub-Inspector of Police registered a case in Crime No.29 of 2011 under Section 302 I.P.C., and issued First Information Report-Ex.P11. From the cross-examination of P.Ws.1 and 10, nothing was elicited to shake their testimony so far as lodging of the complaint and registration of the case are concerned. The offence took place on 17.09.2011. The record reveals that P.W.1 and others went to the forest and found the dead body of the deceased during night time. The next day morning i.e., on 18.09.2011, at about 9.00 a.m., P.W.1 lodged the complaint. It is not possible for any one to approach Police Station during the night time, more particularly in

an Agency Area. Even otherwise, there is no delay in lodging the complaint.

13. Having regard to the facts and circumstances of the case, we are of the considered view that P.W.1 set the criminal law in motion.

14. The next question that falls for consideration is:

Whether the death of the accused is homicide or not?

15. As per the testimony of P.Ws.1 to 4, they found the dead body of the deceased in the forest. Their testimony further reveals that they found axe injuries on the body of the deceased. As per the testimony of P.W.9, on 18.09.2011, P.W.10—the Inspector of Police conducted inquest over the dead body of the deceased. Ex.P10 is the inquest panchanama. As seen from the testimony of P.W.10, he conducted inquest over the dead body of the deceased on 18.09.2011 in the presence of P.W.9 and other mediators. P.W.9 opined that the deceased died of axe injuries. The testimony of P.W.10 further reveals that he sent the dead body for autopsy. As seen from the testimony of P.W.8—Dr.K.Venu, he conducted autopsy over the dead body of the deceased on 18.09.2011 and found as many as eight external injuries and three internal injuries on various parts of the body of the deceased. After completion of autopsy, P.W.8 issued Ex.P9—postmortem report opining that the deceased died of the axe injuries sustained to the vital organs of the body. In the cross-examination of P.W.8, nothing was elicited to shake his testimony so far as the nature of the injuries and cause of the death of the deceased are concerned. By examining P.Ws.1, 2, 3, 4, 8, 9 and 10 and marking Exs.P9 and P10, the

prosecution clearly established that the death of the deceased is homicide.

16. As per the prosecution version, the offence took place in the forest. As seen from the testimony of P.W.10, he prepared Ex.P12-rough sketch of scene of offence. A perusal of Ex.P12 clearly reveals that the scene of offence is the forest area. The testimony of P.Ws.1 to 4 also reveals that the offence occurred in the forest area. By examining P.Ws.1 to 4 and 10 and marking Ex.P.12, the prosecution clearly established that the offence took place in the forest area.

17. The next question that falls for consideration is:

Whether the accused intentionally and willingly killed the deceased?

18. Admittedly, P.Ws.1 to 4 are not the eye witnesses to the incident. The entire case is based on circumstantial evidence. In **Kishore Chand vs State Of Himachal Pradesh**¹, the Hon'ble Supreme Court held at paragraph No.4 as under:

4. The question, therefore, is whether the prosecution proved guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused. The proved circumstances should be of a conclusive nature and definite tendency, unerringly pointing towards the guilt of the accused. They should be such as to exclude every hypothesis but the one proposed to be proved. The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. It is not necessary that each circumstance by itself be conclusive but cumulatively must form unbroken chain of events leading to the proof of the guilt of the accused. If those circumstances or some of them can be explained by any of the reasonable hypothesis then the accused must have the benefit of that hypothesis.

¹ (1991) 1 SCC 286 = AIR 1990 SC 2140

19. Let us consider the facts of the case on hand in the light of the above legal principle.

20. P.W.1 is the mother, P.W.2 is the brother and P.W.4 is close relative of the deceased. As per the prosecution version, P.Ws.1 to 4 had last seen the accused in the company of the deceased. As per the testimony of P.Ws.1 and 2, on 17.09.2011 morning, the accused and the deceased went to the forest to fetch firewood. On the same day at 3.00 p.m., they came to the house with two bundles of firewood and again they went to the forest at 3.00 p.m., to fetch the remaining firewood. As per the testimony of P.W.3, he has seen the accused and the deceased while proceeding to the forest at about 3.00 p.m. In the cross-examination, P.W.3, in unequivocal terms, deposed that on the date of the incident, he went to some other village for distribution of Upadhi Pension. In the cross-examination, P.W.3 deposed that he has not seen the deceased and the accused while proceeding to the forest from the house at about 3.00 p.m., for the second time. As per the testimony of P.W.4, while attending to the work in the field, he saw the accused was proceeding to the house from the forest along with an axe. In the cross-examination, P.W.4 categorically deposed that he cannot show his land to the Police. It is needless to say that the Court shall consider the chief-examination of a witness along with his cross-examination in order to ascertain the veracity of his testimony.

21. We have carefully perused the cross-examination of P.W.10. When the learned counsel for the defence questioned P.W.10 with regard to the exact location of the land of P.W.4, the trial Court

rejected the same. When the Court itself rejected that question, it may not be possible for the defence to establish that P.W.4 does not have land near the scene of offence. We are unable to understand as to why the trial Court has rejected such a vital question. The very purpose of the cross-examination of the Investigating Officer is to elicit truth or to substantiate the stand of the defence, eventually to improbabilise the prosecution version. The possibility of P.W.4 having seen the accused proceeding to the house from forest along with the axe on the date of the incident is somewhat improbable and unbelievable, in view of failure on the part of the prosecution to prove that the land of P.W.4 is situated near to the scene of offence. The testimony of P.Ws.3, 4 and 10 does not inspire the confidence of the Court. The possibility of planting P.Ws.3 and 4 cannot be ruled out completely. If the trial Court had taken a little care and caution while considering the testimony of these witnesses, the finding would be otherwise. Appreciation of evidence does not mean accepting the chief-examination of the prosecution witnesses by totally ignoring their cross-examination. The trial Court has not considered the testimony of these witnesses in the light of settled legal principles. The testimony of P.Ws.3 and 4 is no way helpful to the prosecution.

22. Before considering the testimony of the other witnesses, we are placing reliance on the following decisions:

In Tahsildar Singh vs State of U.P.², the Hon'ble Supreme Court in paragraph 23 held as under:

² AIR 1959 SC 1012

23. The conflict of judicial opinion on this question is reflected in the decisions of different High Courts in this country. One of the views is tersely put by Burn, J. in *In Re Ponnuswami Chetty*, (1933) ILR 56 Mad 475, at p.476:

“Whether it is considered as a question of logic or language, ‘omission’ and ‘contradiction’ can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To ‘contradict’ means to ‘speak against’ or in one word to ‘gainsay’. It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but it is not ‘diction’, and therefore it cannot be ‘contradiction’.”

Considering the provisions of Section 145 of the Evidence Act, the learned Judge observed thus at p.477:

“It would be in my opinion sheer misuse of words to say that you are contradicting a witness by the writing, when what you really want to do is to contradict him by pointing out omissions from the writing. I find myself in complete agreement with the learned Sessions Judge of Ferozepore who observed that ‘a witness cannot be confronted with the unwritten record of an unmade statement’.”

The learned Judge gives an illustration of a case of apparent omission which really is a contradiction i.e. a case where a witness stated under Section 162 of the Code that he saw three persons beating a man and later stated in court that four persons were beating the same man. This illustration indicates the trend of the Judge’s mind that he was prepared to treat an omission of that kind as part of the statement by necessary implication. A Division Bench of the Madras High Court followed this judgment in *In Re Guruva Vannan*, (1944) ILR Mad 897. In that judgment, Mockett, J., made the following observation at p. 901:

“I respectfully agree with the judgment of Burn, J. in *Ponnuswamy Chetty v. Emperor*, (1933) ILR 56 Mad 475 in which the learned Judge held that a statement under Section 162 of the Code of Criminal Procedure cannot be filed in order to show that a witness is making statements in the witness box which he did not make to the police and that bare omission cannot be a contradiction. The learned Judge points out that, whilst a bare omission can never be a contradiction, a *so-called* omission in a statement may sometimes amount to a contradiction, for example, when to the police three persons are stated to have been the criminals and later at the trial four are mentioned.”

The Allahabad High Court in *Ram Bali v. State*, AIR 1952 All 289, expressed the principle with its underlying reasons thus at p. 294:

“Witness after witness was cross-examined about certain statements made by him in the deposition but not to be found in his statement under Section 162 CrPC. A statement recorded by the police under Section 162 can be used for one purpose and one purpose only and that of contradicting the witness. Therefore if there is no contradiction between his evidence in court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposes in court that a certain fact existed but had stated under Section 162 either that that fact had not existed or that the reverse and irreconcilable fact had existed it is a case of conflict between the deposition in the court and the statement under Section 162 and the latter can be used to contradict the former. But if he had not stated under Section 162 anything about the fact there is no conflict and the statement cannot be used to

contradict him. In some cases an omission in the statement under Section 162 may amount to contradiction of the deposition in court; they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence.”

At a later stage of the judgment, the learned Judges laid down the following two tests to ascertain whether a particular omission amounts to contradiction: (i) an omission is not a contradiction unless what is actually stated contradicts what is omitted to be said; and (ii) the test to find out whether an omission is contradiction or not is to see whether one can point to any sentence or assertion which is irreconcilable with the deposition in the court. The said observations are in accord with that of the Madras High Court in *In Re Guruva Vannan*. The Patna High Court in *Badri Chaudhry v. King Emperor*, AIR 1926 Pat 20, expressed a similar view. At p. 22, Macpherson, J. analysing Section 162 of the Code of Criminal Procedure, after its amendment in 1923, observed:

“The first proviso to Section 162(1) makes an exception in favour of the accused but it is an exception most jealously circumscribed under the proviso itself. “Any part of such statement” which has been reduced to writing may in certain limited circumstances be used to *contradict* the witness who made it. The limitations are strict: (1) Only the statement of a prosecution witness can be used; and (2) only if it has been reduced to writing; (3) only a part of the statement recorded can be used; (4) such part must be duly proved; (5) it must be a contradiction of the evidence of the witness in court; (6) it must be used as provided in Section 145 of the Evidence Act, that is, it can only be used after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction, and there are others. Such a statement which does not contradict the testimony of the witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer.”

In *Sakhawat v. Crown*, (1937) ILR Nag. 277, much to the same effect was stated at p. 284:

“The section (Section 162) provides that such statements can be used only for the purpose of contradiction. Contradiction means the setting up of one statement against another and not the setting up of a statement against nothing at all. An illustration would make the point clear. If a witness in court says ‘I saw A running away’ he may be contradicted under Section 162 by his statement to the police ‘I did not see A running away’. But by proving an omission what the learned counsel contradicts is not the statement I saw A ‘running away’ but the statement ‘I stated to the police that I saw A running away’. As Section 162 does not allow the witness to depose ‘I stated to the police that I saw A running away’ it follows that there can be no basis for eliciting the omission. Our argument is further fortified by the use of the words ‘*any part of such statement ... may be used to contradict*’. It is not said that *whole* statement may be used. But in order to prove an omission the whole statement has to be so used, as has been done in the present case.”

The contrary view is expressed in the following proposition:

“An omission may amount to contradiction if the matter omitted was one which the witness would have been expected to mention and the Sub-Inspector to make note of in the ordinary course. Every detail is expected to be noted.”

This proposition, if we may say so, couched in wide phraseology enables the trial Judge to put into the mouth of a witness things which he did not state at an earlier stage and did not intend to say, on purely hypothetical considerations. The same idea in a slightly different language was expressed by Bhargava and Sahai, J.J. in *Rudder v. State*, AIR 1957 All 239, at p.240:

“There are, however, certain omissions which amount to contradictions and have been treated as such by this Court as well as other courts in this country. Those are omissions relating to facts which are expected to be included in the statement before the police by a person who is giving a narrative of what he saw, on the ground that they relate to important features of the incident about which the deposition is made.”

A similar view was expressed in *Mohinder Singh v. Emperor*, AIR 1932 Lah 103, *Yusuf Mia v. Emperor*, AIR 1938 Pat 579, and *State of M.P. v. Banshilal Behar*, AIR 1958 M.P. 13. Reliance is placed by the learned counsel for the appellants on a statement of law found in *Wigmore on Evidence* Vol. III, 3rd Edn., at p. 725. In discussing under the head “what amounts to a self-contradiction”, the learned author tersely describes a self-contradiction in the following terms:

“...it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required.”

The learned author further states, at p. 733:

“A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact.”

The said statement is no doubt instructive, but it cannot be pressed into service to interpret the provisions of Section 162 of the Code of Criminal Procedure. In America, there is no provision similar to Section 162 of the Code. It is not, therefore, permissible, or even possible, to interpret the provisions of a particular Act, having regard to stray observations in a textbook made in a different context.”

In **Sayyed Husan Sayad Husen v The State**³, the Bombay

High Court held in paragraph No.13 as under:

13. ... That being so, unless the police officer who had taken down the witness' statement during investigation is examined and unless he says in his evidence that the witness had not made a particular statement in his police statement, it would be wholly irregular and unfair to the witness to attempt to establish contradictions or omissions in the manner above-stated as between his evidence and the police statement. The correct way and the proper way of proving a contradiction or omission is to ask a Sub-Inspector about it in his evidence as to whether a certain statement was made before him by a witness. If such a procedure is not adopted, as it invariably ought to be, then, in any event, unless the record shows, by a Judge making a note about it, that the witness' police statement was read out to him and his attention was drawn to the non-existence of a certain statement therein, it could not be said

³ AIR 1958 Bom 225

that there was proof that in fact the statement concerned was not made by the witness.

In **Ashok Kumar Chaudhary vs State of Bihar**⁴, the Hon'ble

Supreme Court in paragraph No.8 held as under:

8. Insofar as the question of creditworthiness of the evidence of relatives of the victim is concerned, it is well settled that though the Court has to scrutinize such evidence with greater care and caution but such evidence cannot be discarded on the sole ground of their interest in the prosecution. The relationship per se does not affect the credibility of a witness. Merely because a witness happens to be a relative of the victim of the crime, he/she cannot be characterized as an "interested" witness. It is trite that the term "interested" postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive.

In **Kanhaiya Lal vs. State of Rajasthan**⁵, the Hon'ble

Supreme Court in paragraphs Nos.18, 19 and 20 held as under:

18. In Hari Obula Reddy and others Vs. The State of Andhra Pradesh, (1981) 3 SCC 675, a three-Judges Bench has opined that it cannot be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon.

19. In Kartik Malhar Vs. State of Bihar, (1996) 1 SCC 614, this Court has stated that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

20. In the case at hand, the witnesses have lost their father, husband and a relative. There is no earthly reason to categorise them as interest witnesses who would nurture an animus to see that the accused persons are convicted, though they are not involved in the crime. On the contrary, they would like that the real culprits are prosecuted and convicted. That is the normal phenomena of human nature and that is the expected human conduct and we do not perceive that these witnesses harboured any ill motive against the accused persons, but have deposed as witnesses to the brutal incident. We may proceed to add, as stated earlier, that this Court shall be careful and cautious while scanning their testimony and we proceed to do so."

⁴ (2008) 12 SCC 173

⁵ AIR 2013 SC 1940

23. The prosecution witnesses may depose some new facts for the first time before the Court, which were not stated by them to the Investigating Officer at the time of recording their statements under Section 161 of Cr.P.C. There are several modes for impeaching the credibility of a prosecution witness. Proving contradictions is one of the modes to impeach the credibility of a witness. If a witness has deposed in the chief examination a certain fact, which he had not stated before the Investigating Officer in his statement, it is called omission. If the said omission is a minor or trivial one, it is not a contradiction and the Court need not take into consideration such an omission to discard prosecution version. A material omission which goes to the root of the prosecution case is called a contradiction. Court has to consider those omissions, which amount to contradictions, in view of the ratio laid down in **Tahsildar Singh** and **Sayyed Husan Sayad Husen** (2nd and 3rd supra).

24. It is an admitted fact that P.W.1 is the mother and P.W.2 is the brother of the deceased. Simply because P.Ws.1 and 2 are blood-relatives of the deceased, their testimony cannot be discarded in toto. In case of interested witnesses, the Court has to scrutinise their testimony meticulously so as to eliminate exaggerations or embellishments. The possibility of interested witnesses implicating the accused cannot be completely ruled out. P.W.1 is the author of Ex.P1-complaint.

25. We have carefully scanned Ex.P1-complaint and the statements of P.Ws.1 and 2 recorded under Section 161 Cr.P.C. There is no mention in Ex.P1 that on 17.09.2011, at about 3.00

p.m., the accused and the deceased went to the forest for fetching firewood. As per the testimony of P.Ws.1 and 2, on 17.09.2011, at about 3.00 p.m., the accused and the deceased went to the forest for fetching firewood. In the chief-examination, P.Ws.1 and 2 deposed that they had last seen the deceased in the company of the accused. The fact remains that on 17.09.2011, the deceased did not return to the house. The testimony of P.Ws.1 and 2 reveals that they found the dead body of the deceased in the forest area. In the cross-examination, P.Ws.1 and 2 deposed that they have not stated to P.W.10 that they had seen the deceased in the company of the accused. P.W.10-the Inspector of Police, in his cross-examination, categorically admitted that P.Ws.1 and 2 did not state in their statements that they had seen the accused in the company of the deceased on 17.09.2011 at about 3.00 p.m. It is needless to say that the F.I.R. is not an encyclopaedia to include all the minute details. At the same time, the *de facto* complainant has to mention material facts in the F.I.R. The accused accompanying the deceased on the date of the incident is a material fact or not, is a crucial question that has to be addressed by this Court.

26. Admittedly, P.Ws.1 and 2, at the time of recording of their statements, did not state that they have seen the accused in the company of the deceased on the date of the incident. Non-stating of this fact by P.Ws.1 and 2 to P.W.10, during the course of investigation, is an omission. The Court has to consider whether this omission amounts to contradiction or not. If any omission goes to the very root of the prosecution case, then the Court can consider such an omission as a contradiction. P.Ws.1 and 2

having seen the accused in the company of the deceased, is a material fact. Undoubtedly, non-mentioning of such a fact by P.W.1 in Ex.P.1-complaint and P.Ws.1 and 2 in their statements recorded by P.W.10 goes to the very root of the prosecution's case; therefore, such an omission amounts to a contradiction.

27. Having regard to the facts and circumstances of the case and also the principles enunciated in the decisions 3 and 4 cited supra, it is not safe to place reliance on the testimony of the P.Ws.1 and 2. To put it in a different way, the testimony of P.Ws.1 and 2 do not inspire the confidence of the Court. The trial Court has not properly considered all of the above aspects and simply believed the testimony of P.Ws.1 and 2.

28. The other circumstance on which the prosecution placed reliance is that the accused made an extra judicial confession in the presence of P.W.5. Before considering the evidence on record on this aspect, it is apposite to refer to the following case-law:

In **Sahadevan v. State of T.N.**⁶, the Hon'ble apex Court held at paragraph No.16 as follows:

16. Upon a proper analysis of the above referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

⁶ (2012) 6 SCC 403

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

The same principles were reiterated in **Tejinder Singh @ Kaka v State of Punjab**⁷.

In **Vijay Shankar v. State of Haryana**⁸, the Hon'ble apex Court after reiterating the principles laid down in **Sahadevan v State of T.N.**⁹, held at paragraph No.19, as follows:

19. Extra-judicial confession is a weak piece of evidence and the courts are to view it with greater care and caution. For an extra-judicial confession to form the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities. In the case on hand, extra-judicial confession allegedly made to PW 12 does not inspire confidence and cannot form the basis for the conviction.

29. According to P.W.5, he is a coolie by profession and he knows the deceased and the accused. As seen from the testimony of P.W.5, three days after the incident, the accused came to his house and confessed that she killed her husband for not marrying her. As per the testimony of P.W.10-the Investigating Officer, P.W.5 handed over the accused to him. P.W.5 has not reduced the alleged extra judicial confession of the accused into writing. In the cross examination, P.W.5 categorically admitted that the accused was in the police station for a period of three days prior to approaching him. This itself indicates that the accused was in police custody for a period of three days. Under such circumstances, P.W.5 handing over the accused to P.W.10-Investigating Officer is only a make-believe story. Normally, an accused may approach the person in whom he reposes confidence and make extra judicial confession in order to escape from the

⁷ (2013) 12 SCC 50

⁸ (2015) 12 SCC 644

⁹ (2012) 6 SCC 403

clutches of law. There is no relation between P.W.5 and the accused. In such circumstances, the possibility of making extra judicial confession by the accused before P.W.5 is unnatural and improbable. The trial Court has not properly considered the trustworthiness of the testimony of P.W.5 and believed the same in a mechanical manner. Having regard to the facts and circumstances of the case and also the principle enunciated in **Sahadevan, Tejinder Singh @ Kaka and Vijay Shankar** (6th to 8th cited supra), we have no hesitation to hold that the prosecution failed to prove that the accused made an extra judicial confession before P.W.5.

30. The other strong circumstance on which the prosecution relied on is the recovery of M.Os.1 to 3 in pursuance of the information given by the accused.

In **Amitsingh Bhikamsingh Thakur v. State of Maharashtra**¹⁰, the Hon'ble apex Court held at paragraph Nos.18 to 20 as follows:

18. At one time it was held that the expression "fact discovered" in the section 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 case* [(1946-47) 74 IA 65 : AIR 1947 PC 67 : 48 Cri LJ 533] and in *Udai Bhan v. State of U.P.* [AIR 1962 SC 1116 : (1962) 2 Cri LJ 251]

19. 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 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.

¹⁰ (2007) 2 SCC 310 : (2007) 1 SCC (Cri) 582

(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 deposited 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.

20. As observed in *Pulukuri Kotayya case* [(1946-47) 74 IA 65 : AIR 1947 PC 67 : 48 Cri LJ 533, it can seldom happen that information leading to the discovery of a fact forms the foundation of the prosecution case. It is one link in the chain of proof and the other links must be forged in manner allowed by law. To similar effect was the view expressed in *K. Chinnaswamy Reddy v. State of A.P.* [AIR 1962 SC 1788 : (1963) 1 Cri LJ 8]

31. As per the testimony of P.W.7, the accused told them that she will show M.Os.1 to 3 if they follow her. As per the testimony of P.W.7, P.W.10 seized M.O.Nos.1 to 3 under Ex.P8-cover of panchanama. The trial Court considered Ex.P7-confessional statement of the accused as if it falls within the ambit of Section 27 of the Evidence Act. It is needless to say that any information given by the accused, which leads to discovery of a fact will alone fall within the ambit of Section 27 of the Act. The word '*any fact*' as deployed in Section 27 of the Act encompasses in it, discovery of incriminating material connected to the commission of the offence. A confessional statement made by the accused before the Police Officer is not admissible under law in view of Sections 25 and 26 of the Act. Section 27 of the Act is an exception to Sections 25 and 26 of the Act.

32. Let us consider whether Ex.P7 satisfies the basic ingredients of Section 27 of the Act. We have carefully perused Ex.P7. The trial Court marked the entire confessional statement of the accused. Ex.P7 is nothing but a confessional statement of the accused. In the appendix of evidence also, it is mentioned that Ex.P7 is the confessional statement of the accused. Once the

Court comes to a conclusion that Ex.P.7 is a confessional statement of the accused made before the Police Officer, the same is not admissible under law. Suffice it to say, while marking a document, the trial Court has to keep in mind the relevant portion of such document. Had the trial Court marked the relevant portion in Ex.P.7, legality of the same would be otherwise. The trial Court, without properly considering the scope of Sections 25 to 27 of the Evidence Act, placed reliance on Ex.P7, which is not admissible under law. Moreover, the possibility of planting M.O.1 cannot be ruled out completely. Having regard to the facts and circumstances of the case and also the principle enunciated in **Amitsingh Bhikamsingh Thakur** (10th cited supra), we are of the considered view that the prosecution miserably failed to prove recovery of M.O.Nos.1 to 3 in pursuance of the information given by the accused.

33. In the light of the foregoing discussion, we have no hesitation to hold that the prosecution failed to prove the following aspects:

- (1) motive for the offence;
- (2) the deceased was last seen in the company of the accused;
- (3) extra judicial confession of the accused; and
- (4) recovery of M.Os.1 to 3 in pursuance of the information given by the accused.

34. The trial Court, without properly appreciating the testimony of the prosecution witnesses, erroneously arrived at a conclusion that the prosecution proved the guilt of the accused for the offence punishable under Section 302 I.P.C. If the judgment of the trial Court is allowed to stand, it would certainly amount to miscarriage of justice. In the light of the foregoing discussion, we are of the

considered view that the prosecution failed to prove the guilt of the accused for the offence punishable under Section 302 I.P.C.

35. Having regard to the facts and circumstances of the case, we have no hesitation to hold that the accused is found not guilty of the offence punishable under Section 302 IPC and accordingly, she is acquitted of the said offence.

36. In the result, the appeal is allowed and the conviction and sentence imposed on the appellant-accused for the offence punishable under Section 302 IPC *vide* judgment, dated 28.02.2013, in Sessions Case No.54 of 2012 on the file of the Court of III Additional Sessions Judge (FTC), Asifabad, are set aside. The Superintendent, Central Prison, Warangal is hereby directed to release the appellant-accused forthwith, if she is not required in any other case. The bail bonds of the accused shall stand cancelled. M.O.Nos.1 to 8 shall be destroyed after expiry of the appeal time. The fine amount, if any, paid by the accused shall be refunded to her, after appeal time is over. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

JUSTICE CHALLA KODANDA RAM

JUSTICE T.SUNIL CHOWDARY

Dated: 25.08.2018

NOTE:

L.R. Copy be marked : YES / NO
(By order)
kdl