

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

AND

HON'BLE SRI JUSTICE T. AMARNATH GOUD

CRIMINAL APPEAL No.163 of 2013

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

The Sole accused in S.C.No.344 of 2012 on the file of II-Additional District and Sessions Judge (FTC), Mahabubnagar, preferred this appeal challenging the conviction and sentence imposed against him finding him guilty for the offence punishable under section 302 of Indian Penal Code (for short 'the IPC').

2. The case of the prosecution is that the deceased Kavali Ramesh who is resident of Shadnagar Village residing near Kanyaka Parameshwari Temple and leading his life by doing Hamali work under Pittela Narendra-Pw.1, and various merchants at vegetable market for loading and unloading vegetables and cleaning the shops. He used to sleep in shutter No.21 belonging to Pw.1. The deceased-Ramesh and accused/appellant Lemamidi Krishnaiah used to work together under Pw.1. Due to non-availability of work, Pw.1 removed the accused from service and kept Ramesh to work under him. On that the accused shifted to machinery works. The deceased-Ramesh developed illicit affair with the first wife of the accused by name Ramulamma and the said Ramulamma and Ramesh provoked Pw.1 against the accused. Since then, the appellant developed grudge against Ramesh and waiting for an opportunity to eliminate him.

3. While the matter stood thus, on 06.02.2012 morning the accused came to Shadnagar to attend masonry work and after attending the work, in the evening, when he was returning to home, on the way guzzled whisky and begged for food in a house near Railway quarter and had it. Further when he was at the office of DSP, Shadnagar, met the deceased-Ramesh and he asked the accused to offer alcohol. On that, the accused had agreed and purchased a quarter bottle of whisky, food parcel in a hotel and paid cost of food. The deceased-Ramesh has purchased one knock out beer bottle from wine shop and reached vegetable market during night at about 22.30 hours and the same was witnessed by Pw.3. Both lifted shutter No.21 belonging to Pw.1, had food and consumed beer while chitchatting.

4. In the early hours of 07.02.2012 i.e., at 02.00 hours the accused and deceased slept inside the shutter room. Taking advantage of the same, the accused had taken the 20 Kgs weightment (weighing iron stone of 20 kgs weight) and smashed the head of Ramesh twice. He sustained bleeding injuries on head and died on the spot instantaneously. Thereafter, the accused fled away, changed his clothes and on 07.02.2012 early hours of the day i.e., at 5.00 a.m., when Pw.1 came to the shop for cleaning, noticed the dead body of Ramesh lying in a pool of blood. On noticing the dead body in a pool of blood, Pw.1 lodged report with the police Ex.P.1 dated 07.02.2012, a crime was registered and issued FIR Ex.P.9. Later the investigation was taken up by Pw.6-B.Naveen Reddy, inspector of police and during investigation he visited the scene of offence, observed scene of offence in the presence of mediators and seized M.O.1-20 kgs weight under cover

of panchanama and later conducted inquest over the dead body in the presence of mediators and on the basis of statement of blood relatives, the mediators opined that the cause of death was due to injury to head. After completion of the inquest, the dead body was sent to hospital for autopsy and after conducting post-mortem examination by Pw.8-Dr.P.Ramchandra Rao, after arrest of accused/appellant, on interrogation in the presence of mediators he made a confession leading to discovery and in pursuance of confession leading to discovery, the accused lead the Police inspector and mediators to his house and produced M.Os.2 to 4 seized under panchanama marked as Ex.P.7. Later M.Os.1 to 4 were sent to FSL with a letter of advise and received FSL report marked as Ex.P.10 dated 11.05.2012 and opined that on item No.1, 3 to 9, blood was detected, the origin of blood stains on item Nos.1, 4 to 9 is of human, blood stains on item No.4 is of 'B' blood group and origin of blood on item No.3 could not be determined, the blood stains on item No.1, 5 to 9 could not be determined and blood is not detected on item No.2.

5. On the strength of Post mortem certificate, FSL report and other material collected during investigation, the Sub-Inspector of Police Pw.6 filed charge sheet before the Judicial Magistrate of First Class, Shadnagar. The Magistrate having come to the conclusion that the case is exclusively triable by the court of Sessions, after following procedure under Section 207 of Code of Criminal Procedure (for short 'the Cr.P.C'), committed the case to the Court of Sessions, Mahabubnagar under Section 209 Cr.P.C.

6. The Sessions Judge, took the case on file and registered the same as Sessions Case No.344 of 2012 and made over to

II Additional District and Sessions Judge, Mahabubnagar for disposal according to law.

7. On securing the presence of accused, the learned Sessions Judge, framed sole charge for the offence punishable under Section 302 IPC against the accused, read over and explained to him in Telugu. He pleaded not guilty and claimed to be tried.

8. During the course of trial, Pws.1 to 8 were examined, Exs.P.1 to P.10 and M.Os.1 to 4 were marked. After closure of prosecution evidence accused was examined under Section 313 Cr.P.C., explaining the incriminating material found against him in the testimony of prosecution witnesses. He denied the same and reported no defence.

9. Upon hearing argument of public prosecutor for the State and defence counsel, the trial Court found the accused guilty for the offence punishable under Section 302 IPC and convicted him under Section 235 (2) Cr.P.C., and sentenced him to under go imprisonment for life and to pay a fine of Rs.500/- in default sentenced to under go simple imprisonment for three months.

10. Aggrieved by the conviction and sentence imposed by the II-Additional District and Sessions Judge, Mahabubnagar, the present appeal is filed on the ground that the prosecution case is not based on direct evidence, but based on the evidence of Pws.1, 3 and 4 whose evidence did not inspire confidence of the Court. But the trial Court on erroneous appreciation of evidence, recorded conviction for the grave offence punishable under Section 302 IPC and committed an error.

11. Praying to set aside the conviction and sentence passed by the court below, and to acquit him for the said charge, the accused preferred this appeal.

12. During hearing the legal aid counsel Sri V.Ramesh Reddy contended that the basis for the case of prosecution to establish the last scene theory, is the testimony of Pw.1 who did not support the case of prosecution, turned hostile and the other circumstances is recovery of M.O.1, on the basis of confession leading to discovery which is relevant under Section 27 of the Indian Evidence Act (for short 'the Evidence Act'). But the prosecution failed to establish the first circumstance to prove the offence punishable under Section 302 IPC and mere proof of discovery under Section 27 of the Evidence Act, is not suffice to hold the accused guilty, since it is not a substantive piece of evidence. But the trial Court on erroneous appreciation of evidence, committed grave error in finding the accused guilty for the offence punishable under Section 302 IPC and prayed to set aside the same finding him not guilty and to acquit him.

13. The Public Prosecutor appearing for the State supported the judgment in all respects, and requested this Court to confirm the conviction and sentence passed by the court below.

14. Considering rival contentions and material on record, the point that arises for consideration is :

“Whether the accused caused death of Ramesh with an intention to kill him and with knowledge that the injury caused on the head of deceased is sufficient to cause death in normal course of event, if so, whether the conviction and sentence recorded by the trial court is sustainable ?”

POINT :

15. As per the facts narrated above, the incident took place inside the closed shutter of the room in vegetable market of Shadnagar and it is the consistent case of the prosecution from the beginning that there were disputes between the accused and Ramesh (Deceased), since the accused was removed from service by Pw.1 and engaged the services of Ramesh (deceased) and thereafter, the accused was attending to masonry work. On the date of incident i.e., on 6.2.2012 the accused after completion of work was proceeding to his house and on the way Ramesh (deceased) met him and accused purchased whisky and food pack and Ramesh purchased knock out beer bottle and food in a near by shop and they both went to shop No.21 and entered inside the room, consumed food, whisky and beer. Taking advantage of the situation, the accused allegedly caused head injury, with M.O.1-20 kgs weight. The incident was not witnessed by any one, but the prosecution developed theory of last scene together alive and discovery under Section 27 of the Evidence Act.

16. Pw.1 is the owner of shop bearing No.21, where Ramesh was found in a pool of blood on its opening, and reported the same vide Ex.P.1 and Ex.P.9-FIR was issued. Thereafter, Pw.6-B.Naveen Reddy took up investigation, observed scene of offence in the presence of mediators, prepared report Ex.P.5 dated 07.02.2012 and recorded the statement of witnesses under Section 161 Cr.P.C. The homicidal death of Ramesh, the knowledge of disputes and the perpetrated murder of Ramesh is not in dispute. The evidence of Pw.1 is useful to establish unnatural death of Ramesh and differences between the accused and deceased-Ramesh.

17. Pw.2 is another coolie and step mother of deceased who received information from police about the unnatural death of Ramesh in a shop located in the vegetable market and she found an injury on the head of Ramesh and his body was found in a pool of blood. Therefore, she did not support the case of prosecution regarding the person who caused the death of Ramesh and the public prosecutor after obtaining permission from the court below cross-examined but could not elicit anything in support of the prosecution.

18. The crucial witness to establish the theory of last seen together alive is Pw.3 who is a resident of Shadnagar working as a private clerk. According to his testimony he know the deceased Ramesh and accused and both worked under Pw.1 for sometime. Prior to the incident accused left the services under Pw.1. But the deceased- Ramesh continued to work under Pw.1 and about seven months ago he was killed. He further stated that he went to the shop of Pw.1 in the early hours of the day after attending Namaz between 5.30 to 6.00 a.m., noticed shutters of the shop half opened. Then he entered into the shop and found the dead body in a pool of blood with head injury. He noticed blood stains on 20 kgs weight-M.O.1 and empty beer bottle. He further stated that the accused and deceased-Ramesh moved closely. Even if the testimony of Pw.3 is accepted as true, his evidence is not useful to the prosecution case to establish the guilt of the accused for the grave offence punishable under Section 302 IPC, as his testimony is only to the effect that the accused and Ramesh were moving closely. He did not state anything as to who caused death of Ramesh during night in shop No.21 belonging to Pw.1. He was

cross-examined by learned public prosecutor after obtaining permission from the court below, but nothing could be elicited except putting a suggestion to the witness and denial by the witness flatly.

19. Similarly, Pw.4 also did not support the case of prosecution and turned hostile. Therefore, the theory of last seen together alive is not established by the prosecution. But the trial Court recorded a finding in Para No.27 that last seen together alive is accepted on the ground that Pw.3 evidence supports the prosecution case regarding last seen theory. But a bare look at the testimony of Pw.3 it is totally contrary to the finding recorded by the Court below. He did not state anything about the company of Ramesh alive with the accused soon before his death. In such case, it is difficult to accept the finding recorded by the court below. When the case of prosecution is based on last seen theory, the prosecution has to establish the important circumstance that is proximity of time between death and last seen together alive. According to the doctor, the approximate time of death was 24 to 48 hours prior to his examination. The post mortem examination was conducted on 07.02.2012. The alleged incident took place during the night of 06.02.2012 and early hours of 07.02.2012. If the opinion of doctor is accepted, it is prior to 12.00 mid night of 06.02.2012. But it is not the case of prosecution at any time that Ramesh was found in the company of accused alive before 12.00 midnight of 06.02.2012. In such case, it is difficult to accept the prosecution case that the deceased-Ramesh was found alive in the company of accused soon before his death. When the prosecution totally relies on the theory of last seen together, it has to prove the

said fact by producing cogent and satisfactory evidence. When the case of prosecution is depending upon circumstantial evidence, last seen together deposed by natural witness about 'last seen' only after 5 years in Court and made improvements, makes his evidence unreliable without corroboration as held in ***Sampath Kumar Vs Inspector of Police, Krishnagiri***¹.

20. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something mere establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide in ***Mohibur Rahman and Another v. State of Assam***².

21. In view of the law declared by the Apex court last seen theory is one of the circumstances but for accepting the said theory there must be some more evidence to corroborate that they were seen together. In the present case though Pw.3 allegedly saw the deceased-Ramesh alive in the company of accused before his death, in the statement recorded by the police under Section 161 Cr.P.C., he did not support the case of prosecution. Hence, based on the testimony of Pw.3 the finding recorded by the court below cannot be upheld. Hence, we find no iota of evidence to

¹ AIR 2012 SC 1249

² AIR 2002 SC page 3064

substantiate one of the circumstances of last seen theory and the consequent finding of the trial court is hereby set aside.

22. The other circumstance that there was enmity on account of removal of accused from employment by Pw.1 and engaging the service of deceased-Ramesh. But the said fact spoken by Pw.1 and the evidence of Pw.3 is totally contrary to it, since his statement establishes that the accused and deceased-Ramesh were moving closely. Therefore, it is doubtful about strained relationship between them, even otherwise the motive attributed to accused to kill Ramesh is only an un-reliable circumstance. As per, section 8 of the Evidence Act, it is not a substantive evidence. Animosity between the accused and deceased-Ramesh and developing grudge may be relevant circumstance, but that by itself is not suffice to convict the accused for the grave offence punishable under Section 302 IPC.

23. In **Anil Rai v. State of Bihar**³, 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

³ 2001(2) ALD (Cri.) page 446

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 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.

24. From the principle laid down by the Hon'ble Apex Court, enmity by itself is not a ground to conclude that the accused is the person who perpetrated the murder. After developing enmity the accused must develop motive to commit murder. If really they were so, inimical the question of their proceeding together with whisky, knock out beer bottle and food does not arise and entering into shop No.21 is suffice to conclude that there was no bitter enmity between them to develop motive to commit murder of Ramesh by the accused. Therefore, the contention of prosecution that they were inimical and accused developed motive to do away

with the life of Ramesh is not substantiated by the circumstances. Hence, one of the circumstances i.e., motive is not established by the prosecution.

25. The last circumstance relied by the prosecution is discovery under Section 27 of the Indian Evidence Act, i.e., to establish seizure of M.O.1. Pw.7 was examined to establish that the accused made a confessional statement leading to discovery who led the police and Pw.7 to his house and shown the clothes kept in his house and police seized the clothes under a cover of panchanama-Ex.P.7. It is the consistent case of prosecution from the beginning that the accused after commission of crime went to his house and concealed the blood stained clothes in his house. Pw.7 in his evidence failed to identify the shirt of the accused which was allegedly seized at the instance of the accused. Moreover the evidence leading to discovery of clothes of accused marked as M.Os.2, 3 and 4 by itself is not sufficient to record conviction of the accused. The recovery of M.Os.2 and 3 may be one of the circumstances but that would not form basis for recording conviction of accused.

26. As held by the Apex Court that 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**⁴).

27. Similarly, in **Inspector of Police, Tamil Nadu Vs. Balaprasanna**⁵, the Apex Court held as follows:

“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 leads 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 observations of the Privy Council in *Pulukuri Kotayya vs. Emperor*, AIR 1947 PC 67. 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.”

⁴ AIR 1970 Bombay page 438

⁵ 2009(1) ALD (CrL.)(SC) page 113

28. Even otherwise, in **Brijesh Mavi Vs. State of NCT of Delhi**⁶, 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 and mere recovery of weapon, therefore, not sufficient to convict the accused for the offence of murder under Section 302 of I.P.C.

29. In the present facts of the case, the accused was arrested on 11.02.2012 at 9.30 p.m., in the presence of Pw.7 and another and on interrogation he made confession leading to discovery and led the police and mediators to his house and produced M.Os.2 to 4 seized by the inspector of police under cover of panchanama-Ex.P.7, but failed to identify the pant and shirt is another strong suspicion to believe the case of prosecution about discovery and recovery under the cover of Ex.P.7 panchanama. Even according to the RFSL report, blood was detected on item Nos.4 to 9, but blood group on item No.4 i.e., a torn dark ash colour terry cotton pant with dark brown stains is of 'B' group blood and other item Nos.3, 5 to 9 no blood group of blood stain was determined. But item 4 i.e., M.O.2 was not identified in the evidence of Pw.7. Unless the blood group of deceased is determined, mere determination of blood group on M.O.2 is not sufficient to connect the accused with the offence of murder of Ramesh.

30. Therefore, the evidence of recovery under Section 27 of the Evidence Act is not satisfactorily proved by adducing cogent and satisfactory evidence. But the trial Court on erroneous

⁶ 2012 (2) ALD (Cri.) page 865 (SC)

appreciation of evidence held that the accused/appellant guilty for such offence.

31. When the case of prosecution is totally based on circumstantial evidence, prosecution has to prove all the incriminating facts and circumstances which are incompatible with innocence of the accused to draw inference of guilt and such evidence should be tested by touch-stone of law relating to circumstantial evidence laid down by Supreme Court in **Syed Hakkim & another v. State**⁷.

32. Similarly, in **G.Parshwanath v. State of Karnataka**⁸, the Supreme Court is of the view, when the case of prosecution is based on proof of circumstantial evidence on the basis of which conclusion of guilt is drawn must be fully established, 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 Vs. State of Karnataka with Issaq Sait and another v. State of Karnataka with Nasreen v. State of Karnataka**⁹; **Jagroop Singh Vs. State of Punjab, Inspector of Police, Tamil Nadu Vs. Balaprasanna**¹⁰ **Shaik**

⁷ 2009 Cr.L.J. page 1891

⁸ AIR 2010 S.C. page 2914

⁹ AIR 2011 SC page 1585

¹⁰ 2009(1) ALD (CrL.) page 113

Khadar Basha v. State of Andhra Pradesh¹¹, the same principle was reiterated.

33. The Supreme Court in **Trimukh Maloti Kikran v. State of Maharashtra**¹², wherein the Supreme Court 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 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

34. In view of the law laid down by the Apex Court it is for the prosecution to establish each and every link of circumstances to complete the chain of circumstances to draw an inference that the accused alone is the person who committed murder, missing of any link in the chain of circumstances would lead to acquittal of accused disbelieving the case of prosecution. In the present facts of the case nothing was proved by producing cogent and satisfactory evidence. But the trial court on erroneous appreciation of facts and law committed grave error in finding guilty for the offence punishable under Section 302 IPC.

35. Hence, the finding of the II Additional District and Sessions Judge, Mahabubnagar, in S.C.No.344 of 2012, finding the accused guilty for the offence punishable under Section 302 IPC and sentencing him to under go imprisonment for life and to pay fine of Rs.500/- is illegal and the same is hereby set aside while finding him not guilty for the offence punishable under Section 302 IPC

¹¹ 2009(1) ALD (CrI.) page 859 (AP)

¹² (2006) 10 SCC 681

and accordingly, he is acquitted.

36. IN THE RESULT, the Criminal Appeal is allowed, conviction and sentence imposed on the accused/appellant by the II-Additional District and Sessions Judge (FTC), Mahabubnagar, in Sessions Case No.344 of 2012, on 31.12.2012, for the offence punishable under Section 302 of Indian Penal Code, is hereby set aside and he is acquitted of the said offence. The accused/appellant be set at liberty forthwith, if he is not required in any other case. The fine amount paid by him, if any, shall be refunded to him.

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

M. SATYANARAYANA MURTHY,J

T.AMARNATH GOUD,J

24th February, 2018

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