

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

THE HONOURABLE DR. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL Nos.1206 & 1312 OF 2012

COMMON JUDGMENT: (Per Hon'ble the Chief Justice Raghvendra Singh Chauhan)

Aggrieved by the judgment dated 23.11.2012, passed by the IV Additional District and Sessions Judge (FTC) at Mahabubnagar, whereby the learned trial Court has convicted the appellants of offences under Sections 364 r/w 34, 302 r/w 34, 404 r/w 34 and 201 r/w 34 IPC, the appellants have filed two separate appeals, namely Criminal Appeal No. 1206 of 2012 and Criminal Appeal No. 1312 of 2012. While Criminal Appeal No. 1206 of 2012 has been filed by Pathlavath Chandru (A-1), Criminal Appeal No. 1312 of 2012 has been filed by Dannada Yadaiah (A-2). For offence under Section 364 r/w 34 IPC, the appellants have been sentenced to three years of rigorous imprisonment, fine with Rs. 500/- and directed to further undergo simple imprisonment for three months in default thereof. For offence under Section 302 r/w 34 IPC, the appellants have been sentenced to life imprisonment, fine with Rs. 500/- and further directed to suffer a simple imprisonment of three months in default thereof. For offence under Section 404 IPC, the appellants have been sentenced to two years of rigorous imprisonment, fine with Rs. 500/- and further directed to undergo a simple imprisonment of three months in default thereof. For offence under Section 201 IPC, they have been sentenced to rigorous imprisonment for three years, fine with Rs. 500/-, and further directed to undergo simple imprisonment for three months in default thereof. All the sentences were directed to run

concurrently. Since both these appeals arise out of the same judgment, they are being decided by this common judgment.

Briefly stated, the facts of the case are that on 04.11.2011 T. Krishnaiah (P. W. 1) lodged a report (Ex. P. 1) with the Keshampet Police Station wherein he claimed that they are three brothers, who are living separately in Pittalaguda Village. His mother, Yadamma ('the deceased') also lives separately. She runs a kirana store in the village. On 30.10.2011 at 11:00 a.m., his mother left for Shadnagar for going to the hospital, but did not come back. Since then, they have been searching for her. Yesterday i.e. on 03.11.2011 his brother-in-law, G. Anjaiah (P.W. 3) informed them that he had seen his mother at Kothur. He further described his mother as being five feet height, black in complexion, round face and got one mole below her right cheek, and she was wearing blue colour saree, and green colour jacket.

On the basis of this complaint, initially, an FIR, namely Crime No.126 of 2011 was registered for 'woman missing'. However, subsequently, during the course of investigation in the said FIR, on 06.11.2011, around mid-night, the police apprehended A-1 at the RTC bus stand, Shadnagar. Basing upon his confession that he had killed the deceased, subsequently, the case was altered from one of "woman missing" to the one under Section 364, 302, 379 and 201 r/w 34 IPC. On 01.12.2011, at 6:00 p.m., the police also arrested A-2. Moreover, A-1 led the police to the place where the dead body of the deceased was buried in agricultural fields on the outskirts of Shadnagar, by the side of N.H. No. 7 road. The body was exhumed, and an autopsy was carried out. According to Dr. P. Ramchander (P. W. 12), the cause

of death was due to “asphyxia”. Moreover, A-1 also gave a statement under Section 27 of the Evidence Act, and took the police to his house at Yerragadda Thanda, H/o Alwal Village. From his possession, police recovered silver anklets, gold ear tops, gold matees, six rold-gold bangles, and one scooter bearing registration No. AJ 28 4715, allegedly used for commission of the crime. Furthermore, at the instance of A-2, the police recovered a gold chain, one pair of gold ear tops of the deceased. Having completed the investigation, the police charge sheeted A-1 and A-2, and put them for trial.

In order to support its case, the prosecution examined eighteen witnesses, submitted twenty-one documents, and produced twelve material objects. Although the defense did not produce any witness, it did produce two documents. After completing the trial, the learned trial Court convicted and sentenced the appellants as aforementioned. Hence, these two appeals before this Court.

Mr. P. Prabhakar Reddy, the learned counsel for the appellants has raised the following contentions before this Court:-

Firstly, the entire case is based on circumstantial evidence. However, the prosecution has failed to establish all the links in the chain of events, which would unerringly point towards the guilt of the accused persons. Therefore, the learned trial Court is not justified in convicting the appellants for the alleged offences.

Secondly, although the prosecution has examined Gangishetty Anjaiah (P. W. 3) in order to establish the evidence of the last seen, but the witness clearly states that while he was

proceeding on road at Kothur Village, he saw both the accused were sitting with the deceased, by the side of the road, at Kothur Village. But, in his cross-examination, he admits that he did not inform the police about the fact that he saw both the accused sitting with the deceased. Therefore, he is a fabricated witness. Hence, an unreliable one. Moreover, even if, for the sake of arguments, it is accepted that he had seen both the accused sitting with the deceased, by the side of the road, considering the fact that the deceased would go to Shadnagar to buy provisions for her kirana store, her sitting by the side of the road is not an incriminating evidence, which can be read against the accused persons. For, there is a grave possibility that all three of them were waiting for a mode of transportation while they were sitting by the side of the road. Hence, there is no evidence to prove that the deceased was lastly seen in the company of the appellants.

Thirdly, D. Chinna Reddy (P. W. 9) has been produced by the prosecution in order to establish the recovery of gold ornaments at the instance of A-1. However, in his examination-in-chief, he clearly states that *“the gold ornaments were seized by the police at the Police Station”*. Therefore, the said recovery and seizure at the Police Station is not a valid one.

Fourthly, I. Pandaiah (P. W. 10) has also been examined in order to prove the recovery of the gold ornaments at the instance of A-1. However, in his cross-examination, he clearly admits that he is a distant relative of the deceased. Therefore, the requirement of law that an “independent witness” should be connected with a recovery proceeding has not even been followed by the investigating agency. Moreover, this witness clearly admits that he

did not enter the house of A-1 when the recoveries were made. Therefore, the alleged recovery made by the police is unreliable. Furthermore, B. Anjaiah (P.W. 13) has been produced in order to prove the recovery of gold ornaments from A-2. But, most importantly, none of these gold ornaments allegedly recovered from A-1 or A-2 has ever been subjected to a test identification parade. Moreover, this witness does admit that “such ornaments are common ornaments worn in the village”. Therefore, there is not an iota of evidence to reveal that the ornaments recovered from A-1 and A-2 actually belonged to the deceased. Therefore, the recovery of these ornaments does not connect the accused to the alleged offence.

Fifthly, although the prosecution claims that it has discovered spade at the instance of A-2, but the said spade was never sent to the FSL for its report. Therefore, even the recovery of the spade, at the alleged instance of A-2, does not connect A-2 to the alleged crime.

Lastly, the prosecution has produced B. Bazaru (P. W. 4), D. Chinna Reddy (P. W. 9) and I. Pandaiah (P. W. 10) in order to establish that the body of the deceased was recovered at the instance of A-1. Even if the said recovery is accepted, for the sake of argument, even then, it merely creates a strong suspicion against A-1. But suspicion, no matter how strong, cannot take the place of proof. Therefore, merely because the dead body has been discovered at the instance of A-1 does not unerringly point towards his guilt. Furthermore, the said discovery of the dead body at the instance of A-1 cannot be read against A-2. Hence, the case of the prosecution against A-1 is weak one, and the case of the

prosecution against A-2 has not even been established properly. Therefore, the learned trial Court is unjustified in convicting the appellants for the aforementioned offences.

On the other hand, Ms. J. Sridevi, the learned Public Prosecutor, has strenuously pleaded that according to the testimony of G. Anjaiah (P. W. 3), there is the evidence of the last seen. According to the evidence of B. Bazaru (P. W. 4), D. Chinna Reddy (P. W. 9), and I. Pandaiah (P. W. 10), the body was discovered at the instance of A-1. According to the testimony of D. Chinna Reddy (P. W. 9) and I. Pandaiah (P. W. 10), the autopsy on the dead body was carried out by Dr. P. Ramchander (P. W. 12) at the place where the body was discovered. According to Dr. P. Ramchander (P. W. 12), the cause of death was “asphyxia due to strangulation”. Moreover, according to the testimony of D. Chinna Reddy (P. W. 9), and I. Pandaiah (P. W. 10), gold ornaments had been recovered from A-1 at his instance. According to the testimony of B. Anjaiah (P. W. 13), the gold ornaments were recovered at the instance of A-2. Therefore, the prosecution had completed the chain of circumstances in order to unerringly point towards the guilt of the accused. Therefore, the learned Public Prosecutor has supported the impugned judgment.

Heard the learned counsel for the parties, perused the impugned judgment, and examined the record.

In the case of **Bodh Raj @ Bodha v. State of Jammu and Kashmir**¹, the Hon’ble Supreme Court has laid down the principle

¹ AIR 2002 SC 3164

to be applied while dealing with a case of circumstantial evidence.

The principles are as under:-

“(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused. That is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude very possible hypothesis except the one to be proved; and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

In catena of cases, the Hon’ble Supreme Court has also opined that the distance between “*may be true*” and “*must be true*” is a long distance, which the prosecution is required to cover. Moreover, in catena of cases, the Hon’ble Supreme Court has also held that suspicion, however strong, cannot take place of legal proof. Furthermore, a person cannot be convicted on the basis of surmises and conjectures.

In **Shivaji Sahebrao Bobade v. State of Maharashtra**², the Hon’ble Supreme Court made the following observations:-

“(1) Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be

² 1973(2) SC 793 = AIR 1973 SC 2622

explainable on any other hypothesis except that the accused is guilty,

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

In catena of cases, the Hon'ble Supreme Court also held that the prosecution must prove its case beyond reasonable doubt in the case of direct evidence, but in case of circumstantial evidence, the prosecution needs to probablise its case, to the extent that the chain of circumstances should unerringly point towards the guilt of the accused. Such a chain of circumstances does not admit of any hypothesis, which may point towards his/her innocence.

In the present case, T. Krishnaiah (P. W. 1), the son of the deceased, informs the Court, in his examination-in-chief, that his mother was living separately, despite the fact that she had three sons and one daughter. He further informs the Court that his mother was running a kirana store in their village. According to him, *“about eight months back, on one day, at 11:00 a.m. my mother went to hospital at Shadnagar. But, my mother not returned to the village, for which we searched for my mother for three days, but we could not trace her”*. Therefore, he is not the witness of the last seen.

Gangishetty Anjaiah (P. W. 3) has been examined in order to establish the evidence of the last seen. In his examination-in-

chief, he states that *“about eight months back, at 4:30 p.m., I went to Kothur Village to sell vegetables. I sold vegetables in Kothur and I was proceeding on road at Kothur to get my electrical agricultural starter repaired. At that time, both accused and deceased were sitting by the side of the road, at Kothur Village. At that time, I have not talked with accused and deceased Yadamma. Then I returned to Pittalaguda Village”*. According to him, he is son-in-law of the deceased. Yet, when he saw his mother-in-law in the company of the appellants by the side of the road, he neither raised an alarm, nor immediately informed T. Krishnaiah (P. W. 1), the son of the deceased. This clearly proves that either he is not a witness of the last seen, as argued by the learned counsel for the appellants, or there was nothing amiss in the deceased sitting with the appellants by the side of the road. In his cross-examination, he clearly admits that *“I have not stated before police that when I was proceeding on the road for repair of my motor starter, I saw accused and deceased at Kothur. I have not stated before police that I saw both accused and deceased at Shadnagar”*. He further admits in his cross-examination that *“when I saw deceased with A-1 and A-2, they were sitting by the side of the road. At that time, both accused and deceased were not doing anything”*. Interestingly, in his statement under Section 161 Cr.P.C., this witness did not inform the police that he had actually seen both the accused along with the deceased at Kothur Village. It is only in the Court, for the first time, he reveals the said fact. The omission was pointed out to him during his cross-examination. Thus, obviously, the omission tantamounts to a contradiction in his testimony. Therefore, this witness is not reliable on the point of the evidence of the last seen.

Moreover, as stated above, since the factum of seeing the deceased with the appellants was not stated by this witness at the earliest opportunity to the police, the evidence of last seen appears to be an after-thought. Thus, this witness is a fabricated one.

Even if his testimony were to be believed and considering the fact that he admits that deceased used to go to Shadnagar to get the provisions for her kirana store, there is a grave possibility that both the accused and the deceased were waiting for a mode of transportation by the side of the road. Hence, at best, the evidence is exculpatory evidence, and not an incriminating one. Therefore, the prosecution has failed to prove the evidence of the last seen.

The prosecution has examined D. Chinna Reddy (P. W. 9) in order to prove the recovery of gold ornaments at the instance of A-1. Similarly, it has examined B. Anjaiah (P. W. 13) in order to prove the recovery of gold ornaments from A-2. However, admittedly, these ornaments were never subjected to test identification parade. It is, indeed, trite to state that mere recovery of ornaments would not connect the accused to the alleged crime until and unless the said ornaments are subjected to a test identification parade. Although T. Krishnaiah (P. W. 1), son of the deceased, T. Sharada (P. W. 2), the daughter-in-law of the deceased, and G. Anjaiah (P. W. 3), the son-in-law of the deceased, were readily available with the investigating agency, it is, rather, surprising that the investigating agency has not asked any of these three witnesses to identify the ornaments allegedly recovered from the appellants, and which allegedly belonged to the deceased. In the absence of such identification by these three witnesses, there

is no evidence to prove that the ornaments allegedly recovered from A-1 and A-2 actually did belong to the deceased. Hence, even the recovery of the ornaments allegedly made at the instance of the appellants does not connect the appellants to the alleged crime.

B. Anjaiah (P. W. 13) has been produced to establish the recovery of the gold ornaments, and the recovery of the spade at the instance of A-2. However, in his examination-in-chief, he clearly states that *“we all went to Alwal Village, and then A-2-Yadaiah entered into his house and brought gold pustelatrada (marriage thread), gold ear studs. M.O. 3-Pustelatrada (gold one), M.O. 2-Gold ear studs are the same items brought by A-2-Yadaiah from his house and produced before us. Police have drafted panchanama. I signed in the said panchanama”*. However, according to this witness, it is the accused, who went inside the house, and brought out the gold ornaments. Thus, it is unclear as to which part of the house of the gold ornaments were recovered from. Moreover, even the panchanama is not accompanied by a site plan of the recovery. Most importantly, even these M.O. 2 and M.O. 3 are also not subjected to test identification parade, as mentioned above. Thus, even the said recovery does not necessarily connect A-2 to the alleged offence.

B. Anjaiah (P. W. 13) further informs that *“A-2 had brought out a spade from some bushes on the way from Alwal Village and at the outskirts of Veljarla Village”*. But, the spade was never sent to the FSL for its report. Therefore, even the recovery of the spade, at the instance of A-2, does not connect him to the alleged offence. Thus, there is no evidence to connect A-2 to the alleged crime.

The only evidence, which may create some suspicion against A-1, is the alleged recovery of the dead body at his instance. However, it is a settled principle of law that no matter how strong a suspicion may be, it does not take the place of proof. Therefore, the conviction of A-1 cannot be on the basis of mere evidence of recovery of the dead body at his instance. It is too weak an evidence to hang a conviction on. Therefore, the benefit of doubt would necessarily have to be given to A-1.

For the reasons stated above, both the criminal appeals are allowed. The impugned judgment, dated 23.11.2012, passed by the IV Additional District & Sessions Judge (FTC) at Mahabubnagar, in Sessions Case No.212 of 2012, is set aside. Pathlavath Chandru (A-1), appellant in Criminal Appeal No. 1206 of 2012, and Dannada Yadaiah (A-2), the appellant in Criminal Appeal No. 1312 of 2012, are acquitted of the offences under Sections 364 r/w 34, 302 r/w 34, 404 r/w 34 and 201 r/w 34 IPC. They shall be set at liberty, forthwith, if they are not required in any other case.

The fine amount, if any, paid by the appellants (A-1 & A-2) in both these appeals, shall be refunded to them.

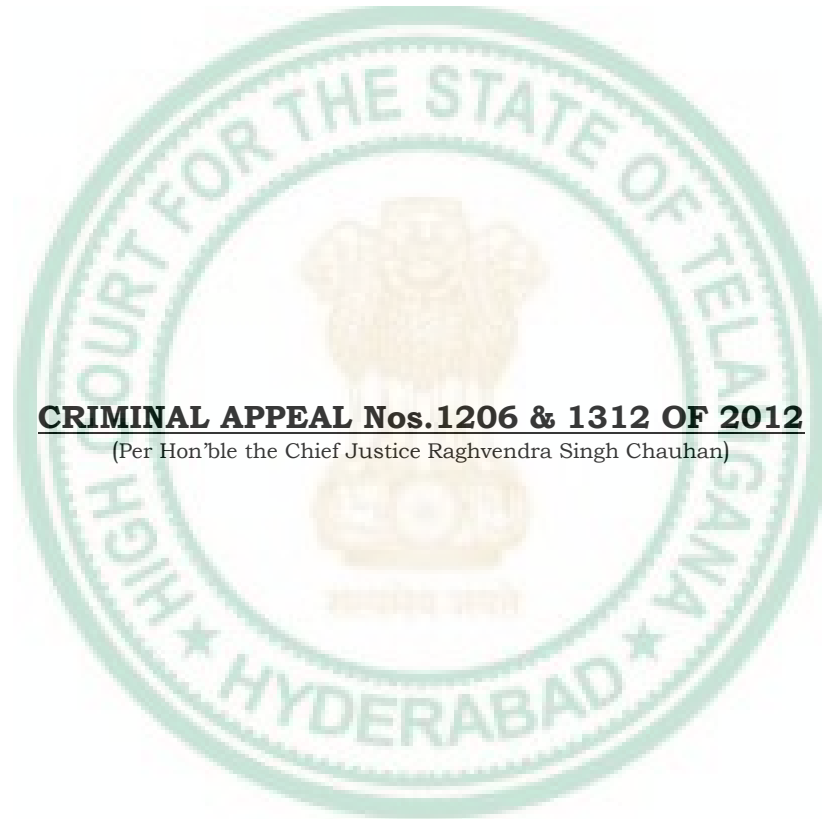
RAGHVENDRA SINGH CHAUHAN, CJ

Dr. SHAMEEM AKTHER, J

Date: 20.08.2019

Tsr

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