IN THE HIGH COURT OF KARNATAKA, AT BENGALURU

DATED THIS THE 15TH DAY OF DECEMBER, 2020

PRESENT

THE HON'BLE MR.JUSTICE B.VEERAPPA

AND

THE HON'BLE MR. JUSTICE K.NATARAJAN

CRIMINAL APPEAL NO.516/2015

BETWEEN

STATE BY CHELUR
POLICE – 572 117. ... APPELLANT

(BY SRI.S.RACHAIAH, HCGP)

AND

1. DEVARAJA,
S/O OBALANARASAIAH,
AGED ABOUT 42 YEARS,
OCC: AGRICULTURIST,
R/O KANCHIGANAHALLI,
NITTUR HOBLI, GUBBI TALUK,
TUMKURU DISTRICT – 572 216.

2. MALLESH,
S/O SHIVARAMAIAH,
AGED ABOUT 27 YEARS,
OCC: AGRICULTURIST,
R/O KANCHIGANAHALLI,
NITTUR HOBLI,

GUBBI TALUK,
TUMKURU DISTRICT – 572 216. ... RESPONDENTS

(BY SRI.S.SHANKRAPPA, ADVOCATE FOR R1;
SRI.A.H.BHAGAVAN, ADVOCATE AND
SRI.A.N.RADHAKRISHNA, ADVOCATE FOR R2)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 378(1) AND (3) OF CR.P.C. PRAYING TO a)GRANT LEAVE TO APPEAL AGAINST THE JUDGMENT AND ORDER OF ACQUITTAL DATED 14.01.2015 PASSED IN S.C.NO.252/2012 BY THE II ADDL. DISTRICT AND SESSIONS JUDGE, TUMAKURU, THEREBY ACQUITTING THE RESPONDENTS/ACCUSED FOR THE OFFENCE P/U/S 302, 201, 120-B READ WITH 34 OF IPC.

THIS CRIMINAL APPEAL COMING ON FOR HEARING THIS DAY, ***B. VEERAPPA J***., DELIVERED THE FOLLOWING:

JUDGMENT

The State has filed the present appeal against the impugned judgment and order of acquittal dated 14.1.2015 passed in S.C. No.252/2012 by the II Additional District and Sessions Judge, Tumkur acquitting the accused for the offences punishable under Sections 302, 201, 120-B read with Section 34 of IPC.

2. The State, through Circle Inspector of Police, Gubbi Circle, after investigation, filed charge sheet against accused Nos.1 and 2 for the offences punishable under Sections 302, 201, 120-B read with Section 34 of IPC

3. It is the case of the prosecution that one deceased Basavaraju, the son of complainant Puttathimmaiah was earlier working at Sira Toll Gate, left the job and returned to the village and rearing sheep. The deceased Basavaraju had illicit relationship with one Ambika, wife of accused No.1 and there was exchange of words between accused No.1 and Basavaraju, who got saved the phone number of Ambika as prostitute and got recorded telephonic conversation between P.W.12 and Ambika and he shared the said conversation with friends. Disgusted with the activities of the deceased Basavaraju, accused No.1 consulted accused No.2 and they planned to commit murder of the deceased. It is the further case of the prosecution that on 23.11.2011, accused No.2 told accused No.1 that, on that day, Basavaraju is coming to

Doddaguni tank to rear sheep and if he comes by that time, he can commit the murder of Basavaraju. Accordingly, on the arrival of the deceased to the Doddaguni Tank Bund, accused No.2 intimated to accused No.1, who at about 1.30 p.m., came with a machchu (M.O.4) and started quarrelling with the deceased Basavaraju stating that the deceased is humiliating him saying that his wife is a prostitute and assaulted him with machchu on his head at 3-4 places and Basavaraju died on the spot. Later, accused No.1 washed machchu with water nearby the place. As Basavaraju did not come home, father of Basavaraju, the complainant herein, sent one Kantharaju to see and search Basavaraju. At about 2.30 p.m., the complainant came to know about the death of Basavaraju and filed a complaint to the jurisdictional police.

4. On receipt of the complaint of C.W.1, the Station House Officer of Chelur Police registered a case in crime No.169/2011 for the offences punishable under Sections 302 and 201 IPC. The Circle Inspector of Police of Gubbi taluk

took up further investigation from the Sub Inspector of police, Chelur police station. During investigation, accused Nos.1 and 2 were arrested on 9.12.2011 and produced before the learned JMFC, Gubbi, and they were remanded to judicial custody. The voluntary statement of the accused came to be recorded. After completion of investigation, charge sheet came to be filed by the police for the offences punishable under Sections 120-B, 302 and 201 read with Section 34 of IPC against the accused. The learned Civil Judge and JMFC, Gubbi, took cognizance and committed the case to the Sessions Court. The learned Sessions Judge framed the charges, read over and explained to the accused persons. The accused persons pleaded not guilty and claimed to be tried.

5. The prosecution in order to prove its case, in all, examined PWs.1 to 20, got marked Exs.P.1 to P.21 apart from the material objects MOs. 1 to 5. On behalf of the accused persons, they got marked 3 documents as per Exs.D.1 to D.3 under the statements of P.Ws.3, 5 and 9. After completion of

the evidence of the prosecution witnesses, the learned Sessions Judge recorded the statement of the accused persons under Section 313 of Cr.P.C. The accused persons denied all the incriminating evidence adduced against them by the prosecution witnesses, but did not lead any defence evidence.

6. The Learned Sessions Judge upon considering both oral and documentary evidence on record, formulated six points for consideration. After considering the entire material on record, the learned Sessions Judge recorded the finding that the prosecution has failed to prove beyond reasonable doubt that on 23.11.2011 at about 1.30 p.m., in Doddaguni tank bund area, situated within the limits of complainant police station, with common intention of both the accused, accused No.1 committed murder of Basavaraju, assaulting on his head with a chopper and thereby, committed the offence punishable under section 302 read with section 34 of IPC. The learned Sessions Judge further recorded the finding that the prosecution has failed to prove beyond reasonable doubt

that accused No.1 having reason to believe that offence of murder is committed, washed the chopper with water, did cause the evidence of the said offence to disappear with intention to screen, from legal punishment and thereby accused No.1 committed the offence punishable under Section 201 of IPC. The learned Sessions Judge also recorded the finding that the prosecution has failed to prove that accused Nos.1 and 2 planned and committed the murder of the deceased, in pursuance of the agreement, accused No.2 informed accused NO.1 about the presence of deceased near Doddaguni tank and accused No.1 committed murder as agreed earlier and thereby, committed an offence punishable under Section 120-B read with Section 34 of IPC. Based on the above findings, the learned Sessions Judge acquitted all the accused persons from the charges framed against them. Hence, the present appeal by the State.

7. We have heard the learned counsel for the parties.

8. Sri Rachaiah, learned HCGP appearing for the appellant-State mainly contended with vehemence that the impugned judgment and order of acquittal passed by the learned Sessions Judge acquitting the accused persons for the offences alleged is without any basis, contrary to the oral and documentary evidence on record and is liable to be set aside.

He would further contend that the entire case of prosecution is based on the circumstantial evidence. The learned Sessions Judge has not properly analyzed the material evidence of P.Ws.1, 2, 5, 8, 10 to 13. The learned Sessions Judge has also not properly scrutinized the evidence of doctor-P.W.17, who conducted post mortem examination on the dead body of the deceased and issued post mortem report as per Ex.P.9. The incident in question was last seen by P.Ws.2, 3, 6, 8 and 11. Though P.Ws.6 and 8 have treated hostile, P.W.3 stood the test of defence. The said material was not considered by the learned Sessions Judge. P.Ws.15 and 16 have supported the case of prosecution. The said material has not been considered by the learned Sessions Judge while

acquitting the accused. It is contended that motive for the death of the deceased by accused Nos.1 and 2 is that P.W.12 who was in close relationship with wife of accused No.1 had conversation with her and the same was recorded by the deceased and in that context, there was quarrel between the deceased Basavaraju and accused NO.1 and committed the murder of the deceased and accused No.2 has also supported accused No.1.

9. The learned HCGP further contended that P.W.2 has deposed that wife of accused No.1 had illicit relationship with the deceased and there was quarrel between accused and deceased in that regard. P.W.3 is the younger brother of P.W.1-complainant, who deposed that accused No.1 stated that 'today onwards, your brother will have only one son' and accordingly, accused No.1 had threatened to kill the deceased. The said material was not considered by the learned Sessions Judge. It is further contended that the oral and documentary evidence on record clearly depicts the involvement of accused

Nos.1 and 2 in murdering deceased by the use of M.O.4. Therefore, he sought to allow the appeal.

10. Per contra, Sri Bhagwan, learned Counsel for accused No.2 while justifying the impugned judgment of acquittal contended that the entire case of prosecution has places of three circumstances; motive, last seen theory and recovery of machchu (M.O.4) and blood stained T-shirt (M.O.5). It is contended that there is no incriminating circumstance to prove that accused Nos.1 and 2 involved in homicidal death of the deceased. P.W.3, according to him, the deceased was last seen near tank bund. The evidence of P.W.3 is an improvement and contrary to what was stated before the police with regard to threat by accused Nos.1 and 2 to murder the deceased. P.Ws.1, 6 and 7 are the hearsay witnesses stated about the motive and they have no personal knowledge of the incident. P.W.12 stated that the deceased might have circulated the message. No persons in the village who received the message have not been examined. The evidence of P.Ws.5 and 8 is vague and not supported the case

of prosecution. Therefore, the learned Sessions Judge is justified in acquitting the accused. Unless any perversity or erroneous finding recorded by the learned Sessions Judge is shown, this Court cannot interfere with the finding recorded by the learned Sessions Judge acquitting accused Nos.1 and 2 under Section 378(1) and (3) of Cr.P.C. Therefore, sought to dismiss the appeal.

11. Sri S. Shankarappa, learned Counsel for accused No.1 while adopting the arguments of learned Counsel for accused No.2 contended that P.W.19 - Assistant Sub-Inspector, SHO, received the message of the death of the deceased and he went to the spot. P.Ws.1, 2, 5, 6, 7, 8 and 11 and 12 are treated as hostile witnesses. The evidence of P.W.3 is an improvement and contrary to the statement made before the police. It is contended that the learned Sessions Judge, considering the entire material on record, has recorded a finding that the evidence of PWs.2, 5, 6, 7, 8, 11 ands 13 with regard to illicit relationship between the deceased and Ambika is an improvement over the statement made before

the police. The improvement being the vital aspect, same is liable to be excluded for consideration. Therefore, sought to dismiss the appeal. It is further contended that the prosecution has failed to prove the case against the accused persons.

12. In view of the aforesaid rival contentions urged by the learned counsel for the parties, the point that would arise for our consideration in this criminal appeal is:

> " *Whether the prosecution has made out a case to interfere with the impugned Judgment and order of acquittal passed by the learned Sessions Judge acquitting all the accused persons for the offences under Sections 302, 201 and 120-B read with Section 34 of IPC?"*

13. In order to re-appreciate the evidence on record, it is relevant to consider the evidence of the prosecution witnesses:

P.W.1 who is the father of the deceased and complainant, lodged a complaint as per Ex.P.1. He is the

witness to spot cum seizure mahazar (Ex.P.2) under which M.Os.1, 2 and 3 have been seized at the instance of the accused. The prosecution treated him as hostile. In the cross examination, P.W.1 has deposed about motive.

P.W.2 Dharmapalaiah is brother of the deceased. He has spoken about illicit relationship between his deceased brother and wife of accused No.1. He has supported the prosecution case.

P.W.3-younger brother of P.W.1 has seen accused No.1 going by holding chopper and has stated that accused No.1 told him that today onwards, he has only one son. He has identified M.O.4 chopper.

P.W.4 has seen the dead body in the pond and also noticed the injury found on the head of the deceased. He has supported the case of the prosecution.

P.W.5, who is the friend of P.W.2, has deposed that the deceased has confessed about the illicit relationship with wife of accused No.1 and he has also deposed about motive. He has supported the case of prosecution.

P.W.6-the independent witness has deposed about the presence of accused persons near the land where the deceased was grazing sheep. He has deposed about holding of chopper by accused No.1. P.W.6 has not supported the case of prosecution.

P.W.7 is the impendent witness deposed about the alleged relationship between the deceased and wife of accused No.1, but has not supported about the earlier quarrel taken between accused and the deceased.

P.W.8, younger brother of P.W.1, has deposed about presence of accused near the land where the deceased was grazing sheep. He has not supported the case of prosecution.

P.W.9 is the friend of the deceased. Both the deceased and himself were working together in mines. He was supposed to depose about the illicit relationship between deceased and wife of accused No.1. He has not supported the case of prosecution.

P.W.10 is the friend of deceased, who deposed about the motive for murder. He has supported the case of prosecution.

P.W.11 is the independent witness who deposed with regard to motive and also the presence of the accused in the vicinity of pond area where the deceased was grazing sheep. He had seen accused No.1 holding chopper in his hand. He has not supported the case of prosecution.

P.W.12 is an independent witness deposed about the alleged conversation between him and Ambika, wife of accused No.1 and the same was recorded by the deceased and circulated among the friends in the village and tarnished the image of the accused in the society. He has partly supported the case of the prosecution.

P.W.13 is an independent witness who deposed about the alleged conversation taken between P.W.12 and wife of accused No.1. He has also deposed about the deceased recording the conversation and making the boys to listen the same. P.W.13 he has further stated that there was quarrel

between the deceased and the accused. After 15 days, he has seen the dead body of the deceased, which was found near the pond area. He has supported the case of prosecution.

P.W.14 is the independent witness to seizure mahazar (Ex.P.2) and supported the case of prosecution.

P.W.15 has witnessed the seizure mazahar (Ex.P.8) under which chopper (M.O.4) and blood stained T-shirt of accused (M.O.5) has been seized at the instance of the accused. He has supported the case of prosecution.

P.W.16 has witnessed the seizure mazahar (Ex.P.8) under which chopper (M.O.4) and blood stained T-shirt (M.O.5) has been seized at the instance of accused No.1. He has supported the case of prosecution.

P.W.17- Dr. Devanand has deposed that he conducted post mortem of the deceased and issued the post mortem report as per Ex.P.9 and opinion as per Ex.P.10. He has supported the case of prosecution.

P.W.18 working as Assistant Engineer in Gubbi Sub-Division has deposed that as per the request of jurisdictional

police, he prepared sketch of the spot where the incident taken place and gave the report as per Ex.P.12. He has supported the case of prosecution.

P.W.19-ASI who received complaint as per Ex.P.1 and registered FIR as per Ex.P.13. He has supported the case of prosecution.

P.W.20 is the Circle Inspector who conducted investigation and filed charge sheet.

14. Based upon the aforesaid oral and documentary evidence on record, the learned Sessions Judge has recorded a finding that the prosecution has failed to prove the circumstances, involvement of the accused persons in the alleged offence. Disbelieving the entire case of the prosecution, the learned Sessions Judge proceeded to acquit the accused persons.

15. On careful reading of complaint (Ex.P.1) dated 23.11.2011, it is only stated by P.W.1-father of the deceased that his son Basavaraju went to graze sheep on 23.11.2011 at

about 11.45 a.m. near Doddaguni tank and on that day, only the sheep were coming towards the garden and his son was not seen. Therefore, he sent his eldest son-P.W.2 stating that only sheep have come back and Basavaraju might have slept. When P.W.2 went near tank at about 2.30 p.m., he has seen somebody killed the deceased Basavaraju and at that time, Gowrammajji was weeping. So after return from Tiptur, P.W.1 lodged a complaint to jurisdictional police against unknown persons and stated that for unknown reasons, his son Basavaraju has been killed. P.W.1 in his evidence has further deposed that he suspect that accused Nos.1 and 2 might have killed his son as his son Basavaraju had illicit relationship with Ambika-wife of accused No.1 and admitted that there was quarrel between accused No.1 and deceased in that regard.

16. P.W.2 brother of the deceased has deposed that the wife of accused No.1 had illicit relationship with deceased Basavaraju and there was quarrel between accused NO.1 and deceased. The evidence of P.W.2 was an improvement and

contrary to what was stated before the police. P.W. 3 has deposed that accused Nos.1 and 2 threaten that his brother will have only one son. Admittedly, P.W.3 has not initiated any proceedings before the police or not lodged any complaint. The evidence of P.W.3 is an improvement, which was neither made before the police nor lodged any complaint with regard to threat by accused Nos.1 and 2.

17. P.W.6-the villager has seen the accused near vicinity Doddaguni tank, but very strangely. The evidence of P.W.6 is contrary to inquest panchanama (Ex.P.14). At Sl. No.4 of Ex.P.14, it depicts that the deceased was last seen by P.W.1-father of the deceased. Therefore, P.W.6 cannot be considered as the last seen witness. P.W.6 has stated that the deceased has spread rumour in the village about illicit relationship between P.W.12 and wife of accused No.1 and he has seen the deceased.

18. The evidence of P.W.10 does not depict the involvement of accused Nos.1 and 2 in the death of the

deceased. P.W.12 has stated about the motive. He has stated that he is very close to the wife of accused No.1 and he had conversation with her and the same was recorded by the deceased and had spread in the village. In that regard, there was quarrel between accused and deceased. The evidence of P.Ws.1, 2 and 3 is contrary to the evidence of P.W.12. P.Ws.1 to 3 specifically have stated that the deceased had illicit relationship with wife of accused No.1. However, P.W.12 has stated he had relationship with wife of accused No.1, and the conversation between wife of accused No.1 and himself was recorded by the deceased and the deceased had spread the conversation in the village. Admittedly, none of the villagers had been examined about spreading of the rumor. Therefore, the evidence of prosecution witnesses namely P.Ws.1 to 4, 6, 10, 12 was rightly rejected by the learned Sessions Judge.

19. It is also submitted by P.Ws.15 and 16 who are the witnesses to seizure mahazar (Ex.P.8) have stated that at the instance of accused, chopper (M.O.4) and blood stained shirt

(M.O.5) have been seized. Though they have supported the case of prosecution, but blood stains were not detected in chopper (M.O.4) and even the blood stained clothes (M.O.5) where the blood stains found do not disclose whether it is human blood or animal blood. There is no incriminating circumstance to implicate accused Nos.1 and 2.

20. It is also not in dispute that though investigation officer produced the call details as per Exs.P.16 to 20, the prosecution has not examined the authority who issued the details or it is not certified by the concerned authority as per Section 65(B)(4) of the Evidence Act. It is not in dispute that the alleged conversation recorded by the deceased in respect of intimacy between P.W.12 and wife of accused No.1 is neither proved by the prosecution nor examined any of the villagers who secured the message from the deceased or seized the mobile phone of the deceased by the police. In view of the aforesaid circumstance, the stand taken by the prosecution with regard to motive and the presence of the

accused at the place of incident or recovery of M.Os.4 and 5 are not proved in accordance with law.

21. It can be seen from the oral evidence of the prosecution witnesses, it is clear that the deceased died near Doddaguni tank. The medical evidence of the doctor (P.W.17) who issued the post mortem report (Ex.P.9) shows that the cause of death is due to respiratory failure or heart failure due to head injury. Homicidal death of the deceased is not in dispute. Considering the entire material on record, the prosecution has failed to prove beyond reasonable doubt the alleged involvement of accused Nos.1 and 2. The learned Sessions Judge, considering the entire material on record, has found that the evidence of P.W.2, 5, 6, 8, 11, 13 with regard to the illicit relationship between deceased and Ambika is an improvement over the statement made before the police. That being the vital aspect, is liable to be excluded from consideration. P.Ws.7, 8, 11 and 12 who are examined by the prosecution in respect of illicit relationship between the deceased and Ambika, have turned hostile to the prosecution

case. Though they were cross examined by public prosecutor, nothing has been elicited to prove that they are deposing falsely so as to help the accused.

22. The learned Sessions Judge has further recorded a finding with regard to the presence of accused persons at Doddaguni tank. The prosecution has examined P.Ws.3, 5, 6, 8, 11. P.W.3, who is none other than paternal uncle of deceased, has stated that on 23.11.2011 at about 11.30 a.m., the deceased took sheep for grazing. After 10 minutes, accused holding Machchu in their hands proceeded on a motor cycle saying that his elder brother will have only one son from today. After taking lunch, he went towards Kondali cross. When he was taking tea at about 2.30 p.m., he received a phone call that somebody assaulted Basavaraju and he visited the tank bund at 3.30 p.m., where the deceased sustained grievous injuries. It is also recorded by the learned Sessions Judge that prosecution has alleged that accused No.1 has washed blood stains on the machchu and also tried to destroy the evidence of commission of offence. Surprisingly, the

investigation officer has not directed his investigation with regard to the alleged destruction of evidence by accused No.1. Though it is the voluntary statement of accused No.1 that he washed chopper in nearby water source, but the investigation officer has not made any efforts to examine the place where chopper was washed and prepare a mahazar.

23. On meticulous examination of evidence on record, it is clear that there are so many omissions and contradictions in the evidence of the prosecution witnesses, that the entire fabric of the prosecution case appears to be ridden with gapping holes. It is true that due to passage of time, witnesses to deviate from their police statements as their memory fades to some extent. Reasonable allowance can be made for such discrepancies. But when such discrepancies make the foundation of the prosecution case shaky, the court has to take strict note thereof. On thorough reading of the aforesaid evidences of the prosecution witnesses, the discrepancies are located and the witnesses have discredited themselves. It is well settled that there is no embargo on

the appellate court reviewing the evidence upon which an order of conviction is based. The golden threat which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice which may arise from the acquittal of the guilt is no less than the conviction of an innocent.

24. Admittedly, in the present case, the wife of accused NO.1, C.Ws.20 and 21 who have first seen the dead body of the deceased have not been examined. P.W.19 who received the message has also not been examined. Therefore, learned Sessions Judge is justified in acquitting the accused persons and the prosecution has made out no case to interfere with the impugned judgment and order of acquittal. This Court will have to interfere only if the perverse or contrary evidence is recoded by the learned Sessions Judge.

25. For the reasons stated supra, the point raised in the present appeal has to be answered in the negative holding that the present appellant-state has not made out any case to interfere with the impugned judgment and order of acquittal in exercise of powers under Section 378 of Cr.P.C. Accordingly, the appeal filed by the State is dismissed as devoid of any merit.

Sd/-
JUDGE

Sd/-
JUDGE

Cs/-