THE HON'BLE SRI JUSTICE A.V.SESHA SAI
AND
THE HON'BLE MR. JUSTICE B.KRISHNA MOHAN

CRIMINAL APPEAL No.763 OF 2015

JUDGMENT
(Per AVSS, J.)

This Criminal Appeal, preferred under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to, as 'CrPC'), by the appellants/A.1 and A.2 in Sessions Case No.44 of 2013 on the file of the Sessions Judge, Mahila Court, Visakhapatnam, challenges the judgment of the said Court dated 22.07.2015. By way of the said judgment, the learned Sessions Judge convicted the appellants/A.1 and A.2 of the offences punishable under Sections 302 and 380 of the Indian Penal Code, 1860 (for short, 'IPC'). For the charge under Section 302 IPC, the learned Sessions Judge imposed sentence of imprisonment for life till natural death and to pay fine of Rs.1,000/- each, in default to suffer simple imprisonment for a period of three months each. For the charge under Section 380 IPC, the learned Sessions Judge sentenced them to undergo rigorous imprisonment for a period of two years and to pay fine of Rs.500/- each, in default to suffer simple imprisonment for a period of one month each.

2. On the basis of complaint dated 27.07.2012 (Ex.P1) lodged by P.W.1, one K.Tufan, younger son of the deceased, the III Town police station, Visakhapatnam city registered crime

No.433 of 2012 on the said date, for the offences punishable under Sections 302, 380 and 411 IPC.

3. In brief, the case of the prosecution is that mother of the informant Kari Yellamma (hereinafter referred to, as 'the deceased') went to bed on 26.07.2012 in the night and on 27.07.2012 at about 4.30 AM, P.W.2 (sister-in-law of P.W.1), who is eldest daughter-in-law of the deceased, went to the room of the deceased for firewood and found the dead body of the deceased with bleeding injuries. On that, family members of the deceased woke up and found the deceased dead. They also found cloth thread of petty coat tied around the neck of the deceased and also observed marks of beatings on the face of the deceased and that the nose and ears were cut and gold weighing 3 tulas was committed theft.

4. After completion of investigation, police filed charge sheet, and on committal, the same was numbered as Sessions Case No.44 of 203 on the file of the learned Sessions Judge.

5. In order to substantiate its case, the prosecution examined P.Ws.1 to 9 and Exs.P1 to P18 and M.Os. 1 to10. On defence side, D.Ws. 1 and 2 were examined and no documents were exhibited.

6. The learned Sessions Judge framed the following point for determination.

> "Whether the accused had murdered Kari Yellamma and committed theft in dwelling house of gold ornaments from her body and thereby committed an offence punishable u/s 302, 380 or 411 IPC?"

7. The learned Sessions Judge, by way of the impugned judgment, convicted the appellants/A.1 and A.2 and sentenced them in the manner indicated supra. Hence, the present Criminal Appeal.

8. Heard Smt. C.Vasundhara Reddy, learned counsel for the appellants and Sri K.Srinivasa Reddy, learned Public Prosecutor for the State, apart from perusing the material available on record.

9. According to the learned counsel for the appellants, the impugned judgment is highly erroneous and contrary to law and settled principles. It is further submitted that having regard to the dispute existing among the family members of the deceased for the amount received by the deceased towards pension and the existence of ink marks on fingers, the involvement of the family members of the deceased in commission of the alleged offence cannot be ruled out. It is the further submission of the learned counsel that the conviction based on extra judicial confession and recovery of M.Os. 1 to 4 cannot be sustained, having regard to the settled principles of law. It is her further submission that non-examination of L.W.15-Ragithi Yellayya is fatal to the case of the prosecution. She further contended that the impugned conviction and sentence for the offence under Section 380 IPC are liable to be set aside in view of the failure of the prosecution in conducting Test Identification Parade as enunciated under Rule 34 of the Criminal Rules of Practice.

10. On the contrary, it is contended by the learned Public Prosecutor that there is no error in the judgment rendered by the learned Sessions Judge, as such, the questioned judgment does not warrant any interference of this Court under Section 374 (2) CrPC. It is the further submission of the learned Public Prosecutor that having regard to the reasons assigned by the learned Sessions Judge, the impugned judgment cannot be faulted.

11. With regard to aspect of extra judicial confession, it is to be noted that P.W.4, V.Appala Raju, before whom the accused alleged to have confessed, deposed that on 29.07.2012 at about 6.00 AM, he, along with L.W.14-S.Dasu, went to tea stall which was near the house of L.W.15-Ragithi Yellayya. He further deposed that at that time, both the accused came and confessed that they murdered the deceased Kari Yellamma, and thereafter, himself, L.W.14-S.Dasu and L.W.15-Ragithi Yellayya took both the accused to police station and informed of the statement of appellants/A.1 and A.2 to police, and the police recorded the statements of both the accused before all the three. P.W.4 further deposed that he gave the statement before the police when they handed over A.1 and A.2 to police for necessary action and Ex.P3 is the said statement. P.W.4 stated during the course of cross-examination that he is not the elder in the village for settling the disputes between the disputed persons in their village. He also stated that he did not put his signatures on pages 1 and 2 of Ex.P4, so also L.W.14-

S.Dasu and L.W.15-Ragithi Yellayya. Admittedly, L.W.14-S.Dasu and L.W.15-Ragithi Yellayya were not examined by the prosecution.

12. According to the learned counsel for the appellants, Ex.P4 cannot be construed as extra judicial confession and it needs to be treated as hear-say only. In support of her submission, the learned counsel placed reliance on the judgment rendered by a Division Bench of Rajasthan High Court in case of *Bhanwar Singh v. the State.*[1] In the said judgment, the Division Bench of Rajasthan High Court, by placing reliance on the judgment of the Hon'ble Supreme Court, held as under : (paragraph No.8)

> "Now, coming to the extra-judicial confession, it may be stated that the only evidence is of Gangu Singh (PW 9), who is an uncle of the deceased. Megh Singh, who was admittedly present at that time has not been examined. He was an independent witness and his non-examination is fatal to the prosecution, and an adverse inference has to be drawn against the prosecution for not examining Megh Singh. Extra-judicial confession in the very nature of things is a very weak piece of evidence, as has been observed by the Supreme Court in , (State of Punjab v. Bhajansingh) (Jagta v. State of Haryana (Heramba Brahna v. State of Assam) and 1977 WLN (UC) 531 Remni v. State of Rajasthan). The exact words stated by the accused have not been reproduced by PW 9 Gangu Singh. It is very doubtful whether it was voluntary, because PW 9 Gangu Singh has stated that he and Megh Singh had assured the accused-appellant that they will not involve him in any criminal proceedings. Therefore, in our opinion, the

[1] 1988 CriLJ 1054

evidence of extra-judicial confession is unworthy of belief and lacks in probability."

13. It is significant to note in this context that in his statement under Section 164 CrPC, P.W.4 clearly stated that he was told by one Ragithi Yellayya (L.W.15), their village gentleman, by phone that the appellants/A.1 and A.2 surrendered to him and he asked to support him in handing over them to police. P.W.4 also stated in the said statement that L.W.15-Ragithi Yellayya told him that the appellants/A.1 and A.2 accepted to have killed the deceased Kari Yellamma. As rightly pointed out by the learned counsel for the appellants, the version of P.W.4 is required to be taken as hear-say only.

14. Having regard to the law laid down in the above referred judgment of the Division Bench of the Rajasthan High Court by placing reliance on the judgment of the Hon'ble Supreme Court of India, the impugned judgment rendered on the basis of Ex.P4-extra judicial confession, is liable to be set aside.

15. Coming to the aspect of failure to hold test identification parade, it is required to be noted that no test identification parade was conducted as stipulated under Rule 34 of the Criminal Rules of Practice. While dealing with the said provision of law, a Division Bench of the composite High Court, in case of *Shai Pashamiya v. State of Andhra Pradesh*[2], held at thus: (paragraph Nos.18 and19).

[2] 2019 (1) ALD (Cri) 665

“The only link on which the Court below has placed reliance is the seizure of MO.1- gold ring, which, allegedly belonged to D.2. PW.6- son of D.2, allegedly, identified MO.1 under Ex.P.10- Identification of property report, which was prepared at the Police Station by the Police. Rule 35 of the Criminal Rules of Practice and Circular Orders, 1990, laid down the procedure for identification of Property. This provision reads as under:

"35. Identification of property:- (1) Identification parades of properties shall be held in the Court of the Magistrate where the properties are lodged;
(2) Each item of property shall be put up separately for the parade. It shall be mixed up with four or similar objects.
(3) Before calling upon the witnesses to identify the property, he shall be asked to state the identification marks of his property. Witnesses shall be called in one after the other and on leaving shall not be allowed to communicate with the witness not yet called."

For the reasons best known to the Investigating Officer, he has not followed the aforesaid procedure. Therefore, no sanctity could be attached to Ex.P.10 and the evidence of PW.6 in this regard. Even MO.1 was not directly seized from the appellant. While the incident has taken place on 16-06-2010, the appellant, allegedly, sold MO.1 to PW.10 on 03-09-2010. PW.10 claimed that he was running a gold jewellery shop under the name and style of Raja Jewellery at shop No.10, Shivalayam Street, Vijayawada. He deposed that on 03-09-2010, the appellant came to his shop, stated that he was ill and as he had no money, he wanted to sell gold ring; and that accordingly, he has taken the ring and paid Rs.6,500/- to the appellant. He further deposed that MO.1 is the said ring; that on 13.09.2010, the Ibrahimpatnam Police came along with the appellant and two persons to his shop; that they questioned him as to whether he knows the appellant; that he informed the Police that he knows the appellant as he sold the gold ring to him; that the Police

> have seized the gold ring in the presence of the appellant and the other two persons. In his cross- examination, PW.10 admitted that he does not have license to run the shop; that he is not paying sales tax or commercial tax; and that the Police have neither weighed the ring nor issued any acknowledgment for having seized the ring. He had also admitted that he did not obtain the signatures of the appellant at the time of purchase of the ring in his register."

Therefore, on this ground also, the impugned judgment cannot be sustained in the eye of law.

16. For the foregoing reasons, Criminal Appeal is allowed, setting the conviction and sentence against the appellants/ A.1 and A.2 in the judgment dated 22.07.2015 in Sessions Case No.44 of 2013 on the file of the Sessions Judge, Mahila Court, Visakhapatnam. The appellants/A.1 and A.2 are found not guilty of the charges under Sections 302 and 380 IPC and accordingly they are acquitted of the said charges. The appellants/A.1 and A.2 shall be released forthwith, if they are not required in any other case.

Miscellaneous petitions, if any, pending in this Criminal Appeal, shall stand closed.

A.V.SESHA SAI, J

B.KRISHNA MOHAN, J

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