

Andhra Pradesh High Court - Amravati

Palle Sateesh, Guntur Dist. vs P.P., Hyd on 9 November, 2020

Bench: A V Sai, B Krishna Mohan

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

AND THE HON'BLE SRI JUSTICE B.KRISHNA MOHAN CRIMINAL APPEAL Nos. 322 OF 2015 AND 809 OF 2015 COMMON JUDGMENT: (Per Hon'ble Sri Justice A.V.Sesha Sai) Since these two Criminal Appeals arise out of one judgment, this Court deems it appropriate to dispose of these two appeals by this common judgment.

2. Accused Nos.1 and 2 in Sessions Case No.101 of 2014 on the file of the Court of XI Additional District and Sessions Judge, Tenali, are the appellants in Criminal Appeal Nos.809 of 2015 and 322 of 2015 respectively. Challenge in these two appeals is to the judgment dated 02.03.2015 rendered by the said Court in the following manner:

"A1 is found guilty of the offence under Section 201 I.P.C. r/w 302 I.P.C. and A2 is found guilty of the offence under Section 302 r/w 34 I.P.C., Sec.201 r/w 302 I.P.C. and considering the nature of the offence, A1 and A2 are not entitled to the benefits of Probation of Offenders Act, 1948. Consequently, A1 and A2 are convicted under Section 235(2) Cr.P.C., A1 is not found guilty of the offence under Section 302 r/w 34 I.P.C. and she is acquitted under Section 235(1) Cr.P.C. A3 is not found guilty of the offence under Sections 302 r/w 34 I.P.C. and Section 201 r/w 302 I.P.C. and he is acquitted under Section 235(1) Cr.P.C. His bail bonds shall stand cancelled."

3. Learned Sessions Judge acquitted Accused No.3 by way of the impugned judgment.

4. In brief, case of the prosecution is as follows: - At about 2-00 p.m., on 22.06.2013, P.W.1- brother of the deceased lodged a written complaint, stating that accused No.1 (wife of the deceased) and accused Nos.2 and 3 murdered his brother. On the basis of the said complaint, the Station House Officer, Kolluru Police Station registered Crime No.37 of 2013 for the offences punishable under Sections 302, 201 read with 34 I.P.C.

5. The sum and substance of the case of the prosecution is that A1 developed illegal intimacy with A2 and with an intention to continue her relationship, eliminated the deceased.

6. In order to substantiate its case, the prosecution examined P.Ws.1 to 14 and exhibited Exs.P.1 to P.14 and M.Os.1 to 3 and, on defence side, Exs.D.1 to D.4 (statements of P.Ws.6, 8 and 9 recorded under Section 161 Cr.P.C.) were marked.

7. Learned Sessions Judge framed the following point for determination: -

"Whether the accused sharing common intention caused the death of the deceased and screened the evidence? If so, whether they committed the offences charged against them?"

8. Learned Sessions Judge, by way of the impugned judgment, acquitted accused No.3 and convicted A1 and sentenced her to undergo rigorous imprisonment for five years and also to pay fine of Rs.1,000/- and, in default, to undergo rigorous imprisonment for three months and also convicted accused No.2 and sentenced him to undergo imprisonment for life and fine of Rs.1,000/- and, in default, to undergo rigorous imprisonment for three months. Hence, these two Criminal Appeals by accused Nos.1 and 2 in the Sessions Case.

9. Heard Sri Pradyumna Kumar Reddy, learned counsel for the appellant (A2) in Criminal Appeal No.322 of 2015, Smt. D.S.Lakshmi, learned counsel for the appellant (A1) in Criminal Appeal No.809 of 2015 and Sri K.Srinivasa Reddy, learned Public Prosecutor, appearing for the State.

10. It is contended by Sri Pradyumna Kumar Reddy, learned counsel for the appellant (A2) in Criminal Appeal No.322 of 2015, that the judgment rendered by the learned Sessions Judge, completely on the basis of the evidence of P.W.1, is neither sustainable nor tenable in the eye of law, as the evidence of P.W.1 is untrustworthy and unreliable. It is further submitted by the learned counsel that since the entire case of the prosecution is based on circumstantial evidence, the prosecution is required to establish complete chain of events which connects the accused with the commission of offence. It is further contended by the learned counsel that the learned Sessions Judge grossly erred in convicting the appellants herein on the basis of the extra judicial confession said to have been made by accused No.1 before P.W.1 and that the evidence of P.W.1 is full of contradictions, as such, the learned Sessions Judge erred in giving credence to the same. It is further submitted by the learned counsel that from the evidence of P.W.14-investigating officer, it can safely be concluded that P.W.1 is an untrustworthy and unreliable witness and his presence at the place of occurrence of the alleged offence cannot be believed. In support of his submissions, Sri Pradyumna Kumar Reddy places reliance on the following judgments:

(1) Vadivelu Thevar v. The State of Madras¹. (2) Uppala Bixam v. The State of Andhra Pradesh².

(3) Anjan Kumar Sarma and others v. State of Assam³.

(4) Sk. Yusuf v. State of West Bengal⁴. (5) Balwinder Singh v. State of Punjab⁵. (6) Chaya Kant Nayak v. State of Bihar⁶. (7) Amitsingh Bhikamsing Thakur v. State of Maharashtra⁷.

11. Totally supporting the arguments of the learned counsel for the appellant (A2) in Criminal Appeal No.322 of 2015, it is submitted by Smt. D.S.Lakshmi, learned counsel for the appellant (A1) in Criminal Appeal No.809 of 2015 that the judgment rendered by the learned Sessions Judge is liable to be set aside. It is further submitted that since the conclusions arrived at by the learned Sessions Judge in the impugned judgment against A1 are baseless, the conviction recorded against A1 is not tenable.

AIR 1957 SC 614 2019 (1) ALD (Crl.) SC 538 (2017) 14 SCC 359 (2011) 11 SCC 754 1995 Supp (4) SCC 259 1997 (2) Crimes 297 (Patna) 2007 Law Suit (SC) 14

12. On the contrary, it is vehemently contended by Sri K.Srinivasa Reddy, learned Public Prosecutor appearing for the State, that since accused No.1 made the extra judicial confession voluntarily and in accordance with the provisions of Section 24 of the Indian Evidence Act, 1872, learned Sessions Judge is perfectly justified in relying upon the same for recording the conviction against the appellants herein. It is further submitted by the learned Public Prosecutor that being an inmate of the house, it is the responsibility of accused No.1 to disclose the cause of death and to offer proper explanation and since accused No.1 failed in her duty in accordance with the provisions of Section 106 of the Indian Evidence Act, 1872, the impugned judgment rendered by the learned Sessions Judge, convicting A1, cannot be faulted. It is further submitted that the prosecution by adducing evidence established successfully the chain of events which shows the involvement of the appellants herein in the commission of offence.

13. In the above background, now, the points that arise for consideration of this Court are:

(1) Whether the prosecution established the guilt of accused Nos.1 and 2/appellants herein beyond reasonable doubt?

(2) Whether the judgment rendered by the learned Sessions Judge, convicting accused Nos.1 and 2/appellants herein is sustainable and tenable, having regard to the facts and circumstances of this case?

14. It is very much evident from a perusal of the material available on record that the entire case of the prosecution rests on the extra judicial confession said to have been made by A1 before P.W.1 and the evidence of P.W.1. The case of the prosecution is that when P.W.1, brother of the deceased, was entering the house, he heard the version of the inmates of the house, who were talking about the decision taken to kill the deceased. It is not the case of the prosecution that P.W.1 waited for some time at the door and, in fact, according to P.W.1, he knocked the door and thereupon, accused No.1 opened the door and suddenly, A2 and A3 came out and pushed him aside and ran away and he fell down and got up and entered the house. P.W.1 also stated in the cross-examination that he did not have any acquaintance with A2 and A3 by that date.

15. The motive for the offence was the alleged illegal intimacy of A1 with A2 and according to P.W.1, he saw them once when they were going on a motorcycle and, according to him, he had seen accused No.2 from backside and he did not see the face of A2. Therefore, it can be safely concluded that, obviously, P.W.1 had no opportunity to identify A2 at the scene of offence. It is significant to note in this context that no test identification parade was conducted by the police.

16. The further case of P.W.1 is that when he questioned A1 about her behaviour and threatened her, after seeing her on motorcycle along with A2 that he would inform the same to the deceased, A1 did not respond. It is his further evidence that when he came to the house, the deceased-brother of P.W.1 picked up a quarrel with P.W.1 and questioned him as to why he talked to A1 in that way and that they were maintaining P.W.1 on mercy grounds, as if P.W.1's behaviour was not good. It is also his categorical evidence that thereafter, he was spending most of his time in the church. P.W.1 also categorically deposed that he was not in talking terms with A1 and the deceased, as such, the

presence of P.W.1 and his version of coming to the house in the morning and evening for nature calls and taking bath is highly improbable and cannot be believed, that too, when he went out after he made such allegation, impacting the fidelity of a woman.

17. Though P.W.5, a neighbour was examined, he turned hostile and he stated that by the time he went to the scene of offence, A1 alone was present in the house and subsequently, public gathered and P.W.1 also came at that time. According to P.W.4, the maternal uncle of the deceased and P.W.1, when he went to the scene of offence, P.W.1 was in an unconscious state and only after bringing down the dead body along with L.W.5-Kavuru Koteswara Rao and P.W.5, he sprinkled water on the face of P.W.1 and made him conscious. This version runs counter to the version and evidence of P.W.1 who never said that he fell unconscious and P.W.4 did so.

18. P.W.8 deposed that on hearing cries from the house of the deceased at about 9-45 p.m., he went to the house of the deceased and he found no lights and he along with P.W.4 removed that dead body from the beam and laid it on the cot in front of their house. He also never deposed about the presence of P.W.1 at the scene of offence by the time they brought down the dead body. There is no cogent evidence placed on record by the prosecution to show and establish the alleged illegal intimacy of A1 with A2 which was obviously the alleged motive and in the absence of the said basic foundation, it is not safe to convict the accused. The learned Sessions Judge disbelieved the participation of A3 and according to P.W.10, the doctor, who conducted the autopsy, the deceased was well built and nourished.

19. On the aspect of extra judicial confession said to have been made to P.W.1 by A1, it is vehemently contended by the learned Public Prosecutor that in view of Section 24 of the Indian Evidence Act, 1872, the same is admissible and basing on which, the conviction can be sustained. Section 24 of the Indian Evidence Act, 1872, reads as under:

"24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding-- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

20. On the other hand, the contention of the learned counsel for the appellants is that since the evidence of P.W.1 is not trustworthy and unreliable, the extra judicial confession said to have been made before P.W.1 cannot be given any credence and this Court is in agreement with the said contention of the learned counsel for the appellants, having regard to the unreliable nature of evidence of P.W.1.

21. While referring to Section 106 of the Indian Evidence Act, 1872, learned Public Prosecutor strenuously contends that since A1 was under the same roof along with the deceased, the burden lies

on her to disclose the cause of death and, on the other hand, Sri Pradyumna Kumar Reddy, learned counsel for the appellant (A2), contends that the initial burden of proving the case lies on the prosecution and it is obligatory on the part of the prosecution to prove that all the three accused were present in the house and in the absence of the same, the burden cannot be thrown on the accused and the conviction cannot be imposed on the basis of the evidence of unreliable witness and presumptions and assumptions.

22. According to P.W.10-doctor, the deceased was well built and the learned Sessions Judge also observed that A1 was incapable of killing the deceased. When extra judicial confession is the basis and when the same is disbelieved, in the considered opinion of this Court, this aspect pales into insignificance. It is also very much evident from the evidence of P.W.14-investigating officer that whatever P.W.1 stated before the Court was not stated before him. Therefore, on the basis of suspicious circumstances and presumptions, the conclusions cannot be arrived simply because real culprits could not be detected and the presumptions cannot be made the basis and foundation for punishing an individual and the same would be in total violation of most valuable fundamental rights, as enshrined under Article 21 of the Constitution of India, which guarantees the right to live and it is also well settled principle of criminal jurisprudence, which mandates that 100 culprits may escape but one innocent should not be punished.

23. Coming to the judgments cited by the learned counsel for the appellant (A2) in Criminal Appeal No.322 of 2015: --

(1) In Vadivelu Thevar's case (1 supra), the Hon'ble Apex Court while categorizing the witnesses into three types, viz., (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable, categorically held that in third category of cases, the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony.

(2) In Uppala Bixam's case (2 supra), at paragraph No.10, the Hon'ble Apex Court held as under:

"The circumstance of recovery of the dead body on the basis of confession may indicate that the Accused might have been involved in the incident. However, as held in Raj Kumar Singh alias Raju Alias Batya v. State of Rajasthan, MANU/SC/0468/2013 : (2013) 5 SCC 722 that suspicion however grave but cannot take the place of the proof. There is a wide gap between "may be" and "must be". In the present case, the circumstance of recovery of the dead body allegedly based on the alleged confessional statement may raise a suspicion against itself cannot take itself the evidence of proof. In our view conviction Under Section 302/201 Indian Penal Code cannot be sustained, more so, when the motive attributed for the murder has been theft of the sheep, and the accused-Appellant has been acquitted of the charge of theft."

(3) In Anjan Kumar Sarma's case (3 supra), the Hon'ble Apex Court at paragraph Nos.16, 19, 21 and 23 held as under:

"16. It is no more *res integra* that suspicion cannot take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and the legal proof. At times it can be a case of "may be true". But there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. (See *Jaharla Das v. State of Orissa* (1991) 3 SCC 27: 1991 SCC (Crl.) 527).

19. The circumstance of last seen together cannot by itself from the basis of holding the accused guilty of the offence. In *Kanhaiya Lal v.*

State of Rajasthan (2014) 4 SCC 715: (2014) 2 SCC (Crl.) 413), this Court held that: (SCC p.719, paras 12 & 15) "12. 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 more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

15. The theory of last seen -- the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh v. State of Rajasthan* (2010) 15 SCC 588: (2012) 4 SCC (Cri.) 767."

21. This Court in *Bharat v. State of M.P.*

(2003) 3 SCC 106: 2003 SCC (Cri) 738, held that the failure of the accused to offer any explanation in his statement under Section 313 CrPC alone was not sufficient to establish the charge against the accused. In the facts of the present case, the High Court committed an error in holding that in the absence of any satisfactory explanation by the accused the presumption of guilt of the accused stood un rebutted and thus the appellants were liable to be convicted.

23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction."

(4) In *Sk. Yusuf's case* (4 supra), the Hon'ble Apex Court held at paragraph Nos.28, 29, 32 and 33 as under:

"28. Both, *Nurul Islam* (PW.11) and *Ali Hossain* (PW.13) are chance witnesses as they alleged to be in *Shyamsundar Bazar* on that date for marketing and none of them had regular business in that bazar. The Court while dealing with a circumstance of

extra-judicial confession must keep in mind that it is a very weak type of evidence and require appreciation with great caution. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witness must be clear, unambiguous and clearly convey that accused is the perpetrator of the crime. The "extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility". (See: State of Rajasthan v. Raja Ram, (2003) 8 SCC 180; and Kulvinder Singh & Anr. v. State of Haryana, (2011) 5 SCC 258).

29. Nurul Islam (PW.11) who is maternal uncle of the deceased had deposed about extra-judicial confession made by the accused in presence of others, though he was not able to explain who were the other persons as no other person has been examined in this respect.

Digambar Mondal (PW.19) had deposed that Nurul Islam (PW.11) had told him about the confession by the accused in presence of other persons and police personnel. The accused had told him also that dead body was buried in the courtyard. Thus, the theory of extra-judicial confession revealed by Nurul Islam (PW.11) does not get corroboration from the statement of Ali Hossain (PW.13) or any other independent witness or police personnel. Nor the body of the deceased was recovered from the courtyard. While considering the material contradictions in the statement of Nurul Islam (PW.11) and Ali Hossain (PW.13), we do not consider that it would be safe to accept his version in this respect.

32. Undoubtedly, conviction can be based solely on circumstantial evidence. However, the court must bear in mind while deciding the case involving the commission of serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. 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. (Vide:

Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622, Krishnan v. State represented by Inspector of Police, (2008) 15 SCC 430; and Wakkar & Anr. v. State of Uttar Pradesh, (2011) 3 SCC 306).

33. No presumption could be drawn on the issue of last seen together merely on the fact that Abdul Rajak (PW.2), father of the deceased had stated that Sahanara Khatun had gone to pluck the jhinga and her dead body was recovered from there. The witnesses merely stated that the accused was present in the close proximity of that area. That does not itself establish the last seen theory because none of the witnesses said that the accused and deceased were seen together. Most of the witnesses had deposed that the accused was having spade. It may connect the appellant to the factum of

digging the earth. A person going for catching fish normally does not take a spade with him."

(5) In Balwinder Singh's case (5 supra), the Hon'ble Apex Court held at paragraph Nos.4 and 10 as under:

"4. In a case based on circumstantial evidence, it is now well settled that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond a reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence the Court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, howsoever strong they may be, to take the place of proof.

10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances its credibility becomes doubtful and it loses its importance. The courts generally look for independent reliable corroboration before placing any reliance upon an extra judicial confession."

(6) In Chaya Kant Nayak's case (6 supra), the High Court of Patna held at paragraph No.10 as under:

"If the extrajudicial confession appears to be suspicious for the reasons mentioned above and the prosecution has also not been able to establish the entire chain of the circumstances, which give an impression about the complicity of the appellant, then in such situation, we are of the opinion that the recording of order of conviction and sentence by the trial court is unjustified."

24. In the case of K.H. Shekarappa and others v.

State of Karnataka⁸, while dealing with the evidentiary value of hostile witness, the Hon'ble Apex Court held that the evidence of hostile witness should not be considered in support of the prosecution case and the same can be taken into consideration for the purpose of determining whether the prosecution case is proved or not, if the same is corroborated by any reliable independent witness. In the instant case, since the prosecution failed to show any corroborative evidence, the 2010 (4) SCJ 731 evidence of P.W.5 that he did not hear the cries cannot be taken into consideration.

25. In the case on hand, in the considered opinion of this Court, the prosecution failed to establish the complete chain of events which connects the accused with the commission of offence. Since this Court is under the view that the evidence of P.W.1 is unreliable and untrustworthy, the extra judicial

confession said to have been made by accused No.1 is of no consequence and cannot be the basis for convicting the appellants herein. It is also important to note that the prosecution could not establish the motive in committing the offence.

26. The failure on the part of the police in conducting test identification parade, in the light of the evidence of P.W.1 that he had no acquaintance earlier with A2 and A3 is undoubtedly fatal to the case of the prosecution and no reasons are forthcoming and no plausible explanation is offered as to why the police did not conduct test identification parade. For all these reasons, this Court is of the opinion that it is not safe to convict the appellants herein.

27. Accordingly, both the Criminal Appeals are allowed and the conviction and sentence recorded against accused Nos.1 and 2/appellants herein, vide judgment dated 02.03.2015, by the XI Additional District and Sessions Judge, Tenali, in Sessions Case No.101 of 2014, are hereby set aside. Accused Nos.1 and 2/appellants herein are found not guilty of the offences charged and are accordingly, acquitted of the same. Appellants/accused Nos.1 and 2 are set at liberty and they shall be released forthwith, if they are not required in any other case. Fine amount, if any paid by the appellants herein/A.1 and A.2, shall be refunded to them.

As a sequel, miscellaneous petitions, if any pending in these appeals, shall stand closed.

_____ A.V.SESHA SAI, J _____ B.KRISHNA
MOHAN, J Date: 09.11.2020 siva THE HON'BLE SRI JUSTICE A.V.SESHA SAI AND THE
HON'BLE SRI JUSTICE B.KRISHNA MOHAN CRIMINAL APPEAL Nos. 322 OF 2015 AND 809 OF
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