

Andhra Pradesh High Court - Amravati

Afghan Sha Alikhan, Kadapa Anr., vs State Of Ap., Rep. Pp. Hyd., on 27 July, 2020

Bench: M.Satyanarayana Murthy, B Krishna Mohan

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

AND

THE HON'BLE SRI JUSTICE B.KRISHNA MOHAN

CRIMINAL APPEAL NO.573 OF 2014

JUDGMENT: (Hon'ble Sri Justice B.Krishna Mohan)

This Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, 1973 (for short 'Cr.P.C') by the Accused Nos.1 and 2 in Sessions Case No.226 of 2012 on the file of the Principal Sessions Judge, Kadapa, dated 01.05.2014, where under the accused were found guilty for the offences punishable under Sections 302, 201, 363 and 392 of the Indian Penal Code, 1860 (for short 'IPC') and convicted under Section 235(2) of Cr.P.C and sentenced to undergo imprisonment for life and pay a fine of Rs.500/- each for the offence punishable under Section 302 of IPC, in default of payment of fine amount, A1 and A2 shall suffer simple imprisonment for a period of one year each, sentenced to undergo rigorous imprisonment for a period of two years each and pay fine of Rs.500/- each for the offence punishable under Section 201 of IPC, in default of payment of fine amount, A1 and A2 shall suffer simple imprisonment for a period of six months each, sentenced to undergo rigorous imprisonment for a period of one year each and pay fine of Rs.500/- each for the offence punishable under Section 363 of IPC, in default of payment of fine amount, A1 and A2 shall suffer simple imprisonment for a period of three months and further sentenced to undergo rigorous imprisonment for a period of

two years each and pay fine of Rs.500/- each for the offence

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punishable under Section 392 of IPC, in default of payment of fine amount, A1 and A2 shall suffer simple imprisonment for a period of six months each by ordering all the sentences shall run concurrently. Both the accused assailed the conviction and sentence passed in Sessions Case No.226 of 2012 on the file of the Principal Sessions Judge, Kadapa, dated 01.05.2014 on various grounds.

2. The facts of the case in nutshell are that, Syed Nadeem Basha (herein after referred as 'the deceased boy'), aged about 5 years, was studying LKG in Huda English Medium High School located at Rahamthullah street, Kadapa District. On 09.12.2011, as usual the deceased boy went to school and during interval at about 2.00 p.m., he came to the house for taking water and after taking water, he went back to school. After school hours at about 4.30 p.m., he did not return home. Then the parents of the deceased boy went to school, enquired school teacher (P.W.2) and she informed that the deceased boy went to the house during interval for taking water and did not return to the school. Then they searched for the deceased boy and as they could not trace the boy, they went to police station and presented a written complaint in Kadapa I town police station.

(ii) Basing on the written complaint of P.W.1, father of the deceased boy, P.W.15 Sub-Inspector of Police, Kadapa I town police

station registered a case under the caption 'boy missing' and issued FIR under Ex.P10.

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(iii) P.W.1 got photo of his deceased son and distributed pamphlets in the surrounding villages of Kadapa, Vontimitta, Sidhout, Chennur Mandals and requested the villagers to intimate about tracing of the boy by giving his address and phone number. On 14.12.2011, when P.W.1 was enquiring about his son at Saipet, P.W.4 Shaik Mohammad Azam informed that on 09.12.2011 at about 7.00 p.m., he saw the deceased boy near Saipet Katta and A1 and A2 were taking the deceased boy on Yamaha motor cycle by force, they forcibly snatched away the gold chain and the gold ring. He further informed that on seeing him, the accused fled away and they might have caused harm to the boy. Immediately, P.W.1 went to the house of A1 and A2, found their houses locked.

(iv) On 15.12.2011 at about 7.00 a.m., P.W.1 received phone call from fisherman of Narasannagaripalli, Vontimitta Mandal stating that near Narasannagaripalli, Penna river, the body of the deceased boy was found floating. Then P.W.1 and his relatives rushed to Penna river (isukametta) and found the body of the deceased boy. P.W.1 kept his persons there, came to police station and presented second written complaint alleging that A1 and A2 kidnapped his son, committed theft of gold chain and gold ring, killed his son and threw the dead body of his son into Penna river.

(v) Basing on the second written complaint of P.W.1

under Ex.P2, P.W.15 issued an altered FIR under Ex.P11 in Crime
No.284 of 2011 of Kadapa I Town police station for the offences
punishable under Sections 364-A, 302, 201, 380 read with Section
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34 of IPC and handed over further investigation to P.W.16
Inspector of police, Kadapa.

(vi) During the course of investigation, P.W.16 along with
P.W.15 rushed to Penna river. P.W.3 brought the dead body of the
boy from the river to canal bund and then P.W.16 conducted
inquest over the dead body of the boy near Penna river in the
presence of panchayatdars and seized clothes of the deceased
under M.O.1 and sent requisition to P.W.14 Assistant Professor,
Department of Forensic Medicine, RIMS Medical College, Kadapa
for conducting post mortem examination. Ex.P7 is the inquest
panchanama. The inquest panchayatdars opined that the deceased
boy might have been killed and thrown into the river.

(vii) P.W.14 conducted Post Mortem examination over the
dead body of the boy and issued autopsy report marked as Ex.P9.
P.W.14 preserved viscera and sternum for sending the same to
Forensic Science Laboratory. P.W.16 examined P.W.1 and other
witnesses, recorded their statements and enquired about the
accused and Yamaha motor cycle.

(viii) On 24.12.2011 at about 8.00 a.m., A1 and A2 came to
P.W.7 Village Revenue Officer, Kadapa and stated that they
kidnapped the deceased body and while the boy was crying, they
gave him cool drink mixed with brandy and as the boy was still

crying, A2 pressed the neck of the boy, while A1 was holding the body and that the boy died and that they have taken away the gold ring and gold chain of the boy and threw the dead body of the boy into Penna River at Sidhout and later they pledged the gold

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ornaments at Y.V street. P.W.7 reduced the statement of accused into writing marked as Ex.P3 and took the accused to police station and handed over them to P.W.16. P.W.16 arrested the accused and at their instance, seized receipt showing the pledge of gold ornaments, original passport of A1 and motor cycle marked as M.O.4, xerox copy of Registration Certificate of motor cycle and water bottle under cover of seizure panchanama which was marked as Ex.P4. Both the accused led P.W.16 to P.W.10 (owner of gold shop) and P.W.10 gave Ex.P6 receipt of gold ornaments. Then P.W.16 seized gold ornaments M.Os.2 and 3 from P.W.10 under cover of panchanama marked as Ex.P5 and sent both the accused to judicial remand. After completion of investigation, after receipt of opinion from Forensic Science Laboratory and after receipt of Post Mortem Certificate, vide Ex.P9, P.W.16 filed charge sheet against the appellants/accused.

4. Case was taken on file for the offences punishable under Sections 364-A, 302, 201, 380 read with 34 of IPC by the learned I Additional Judicial Magistrate of I Class, Kadapa and registered the same as PRC No.12 of 2012. The learned I Additional Judicial Magistrate of I Class, Kadapa committed the case to the Sessions

Division, Kadapa, as the offence punishable under Section 302 IPC is exclusively triable by Court of Sessions. The learned Principal Sessions Judge, Kadapa registered the same as Sessions Case No.226 of 2012 on the file of Principal Sessions Judge, Kadapa.

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5. Upon hearing the learned Public Prosecutor and the Defence Counsel, the Sessions Court framed charges against the appellants/accused for the offences punishable under Sections 302, 201, 364-A, 380 and 392 IPC, read over and explained to them in Telugu, they pleaded not guilty and claimed to be tried.

6. During the course of trial, the prosecution has examined PWs.1 to 17 and got marked Exs.P1 to P13 and M.Os.1 to 4 to substantiate the case of the prosecution. After closure of prosecution evidence, the accused were examined under Section 313 Cr.P.C, explained the incriminating material that appeared against them in the testimony of prosecution witnesses and they denied the same. On behalf of the defence, none were examined, except marking Exs.D1 and D2 - the marked portions in 161 Cr.P.C statements of P.W.4 and P.W.10.

7. Upon hearing the arguments of learned Public Prosecutor and Defence Counsel, the trial Court believed that A1 and A2 kidnapped the deceased boy, snatched his gold chain and gold ring, killed him by pressing his throat and mouth and in order to screen away the evidence, threw the dead body of the boy into Penna river and thereby found the accused guilty for the offences

punishable under Sections 302, 201, 363 and 392 of IPC and convicted them as stated supra.

8. The present appeal is filed by both the accused on various grounds. The main contention of the appellants/accused before this Court is that the entire prosecution case rests on MSM,J & BKM,J
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circumstantial evidence and the prosecution failed to prove the chain of circumstances, pointing out the guilt of the accused for the alleged offences, the alleged extra judicial confession is a weak piece of evidence and there is no corroboration to support the evidence of P.W.7 and there is no motive for the accused to kill the deceased. The evidence of P.Ws. 1 to 11 cannot be accepted for the reason that they are highly interested witnesses and their testimony is discrepant, thus there is absolutely no proof that the death of deceased boy was 'homicidal'. 'Therefore, the finding of the Court below that the accused are guilty for the offences punishable under Sections 302, 201, 363 and 392 of IPC and sentencing them as stated supra is an erroneous conclusion and requested to set aside the conviction and sentence passed by the Court below against the appellants/accused for the offences punishable under the above said sections and sought for acquittal in the interest of justice.

9. During hearing, the learned counsel for the appellants/accused contended that except official witnesses, the other witnesses examined before the Court are relatives of P.W.1.

He also contended that as per the evidence of P.W.4, fracture of hyoid bone and fracture of thyroid cartilage are indications of death due to asphyxia by throttling and the prosecution failed to establish that the deceased boy died due to asphyxia by throttling. Therefore, the learned counsel for appellants/accused contended that the appellants/accused are entitled for acquittal.

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10. Per contra, the learned Additional Public Prosecutor for the State supported the conviction and sentence passed against the appellants/accused by the trial Court in all respects and contended that absence of fracture of hyoid bone is not a circumstance to reject the opinion of P.W.14 and requested to dismiss the appeal, affirming the conviction and sentence passed by the Sessions Court in its Judgment in Sessions Case No.226 of 2012 on the file of the Principal Sessions Court, Kadapa.

11. Considering rival contentions and perusing the material available on record, the points that arise for consideration are as follows:

1. Whether the death of Syed Nadeem Basha is homicidal?
2. Whether the accused caused injuries on the body of Syed Nadeem Basha with an intention to kill him knowing that those injuries are sufficient to cause death in ordinary course and thrown the dead body into Penna river, if not so whether the conviction recorded against the appellants for offences punishable under Sections 302 and 201 of IPC and sentence imposed upon them for the said offences by the Sessions Court are liable to be set aside?

3. Whether the accused kidnapped the minor boy and robbed gold ornaments from the body of Syed Nadeem Basha, if not so, the conviction recorded by the trial Court against the appellants for the offences punishable under Sections 363 and 392 of IPC and sentence imposed upon them for the said offences are liable to be set aside?

12. Before deciding the points for consideration, it is appropriate to advert to the scope of jurisdiction of the High
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court in appeal under Section 374(2) of Cr.P.C. Section 374 of Cr.P.C conferred a substantive right of appeal on the accused who is convicted by the Trial court and this Court, while exercising power under Section 374(2) Cr.P.C, is bound to re-appraise entire evidence to come to an independent conclusion, uninfluenced by the findings recorded by the Court below and decide the legality of conviction and sentence passed by the Sessions Court. Therefore, it is the duty of this Court to re-appraise entire evidence recorded by the Court below after giving an opportunity to both the parties, i.e accused and the respondent, unless the Court finds manifest

perversity in the calendar and judgment or such findings were recorded without evidence, normally, this Court cannot interfere with such fact findings in appeal, while exercising jurisdiction under Section 374(2) Cr.P.C. It is the sacrosanct duty of the appellate court, while sitting in appeal against the judgment of the trial Judge, to be satisfied that the guilt of the accused has been established beyond all reasonable doubt after proper re- assessment, re-appreciation and re-scrutiny of the material on record. Appreciation of evidence and proper re-assessment to arrive at the conclusion is imperative in a criminal appeal. That is the quality of exercise which is expected of the appellate court to be undertaken and when that is not done, the cause of justice is not sub-served, for neither an innocent person should be sent to prison without his fault nor a guilty person should be let off despite evidence on record to assure his guilt (vide Kamlesh MSM,J & BKM,J 10 Crl.A.573 of Prabhudas Tanna & Anr v. State Of Gujarat). Keeping the scope of Section 374(2) Cr.P.C, we would like to re-appreciate entire evidence on record to come to an independent conclusion, uninfluenced by the findings recorded by the Court below.

13. It is well to remember that for a crime to be proved, it is not always necessary that it must be proved by direct ocular evidence. The factum probandum may be proved indirectly by certain inferences drawn from factum probans. Therefore, conviction can be entitled based on circumstantial evidence, but it should be tested on the standards of law relating to circumstantial evidence which was laid down by the Hon'ble Apex Court as far back as in 1952 in Hanumant G Nargundkar Vs State of Madhya Pradesh². The Hon'ble Supreme Court in para 10 observed as follows:

"10. ...It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. [...]"

14. Subsequently, the Hon'ble Supreme Court in Sharat Birdhichand Sarda Vs State of Maharashtra,³ analysed what (2013) 15 SCC 263 AIR 1952 SC 343 (1984)⁴ SCC 116 MSM,J & BKM,J 11 CrL.A.573 of was observed in Hanumant (supra). The Court laid down five golden principles or 'Panchsheel' (as referred to by the Hon'ble Supreme Court) which are to be fully satisfied before the conviction is based on circumstantial evidence. The five golden rules as laid down in para 153 are as hereunder:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047] "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 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 MSM,J & BKM,J 12 CrI.A.573 of the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

These principles have been reiterated in a series of judgments given by the Hon'ble Apex Court.

15. Similarly, in *G.Parshwanath v. State of Karnataka*,⁴ the Hon'ble Supreme Court is of the view, when the case of the prosecution is based on proof of circumstantial evidence on the basis of which conclusion of guilt is drawn must be established fully, 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.

16. The Hon'ble Supreme Court in *Trimukh Maloti Kikran v. State of Maharashtra*,⁵ 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 AIR 2010 S.C. page 2914 (2006) 10 SCC 681 MSM,J & BKM,J 13 CrI.A.573 of 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."

In *Jaharlal Das v. State of Orissa*,⁶ the Hon'ble Supreme Court held as follows:

"8. ...It is well settled that the circumstantial evidence in order to sustain the conviction must satisfy three conditions:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) 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 none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

[...]"

[See also *Usman Mian V. State of Bihar*, (2004) 10 SCC 786;

Ganpat Singh V. State of Madhya Pradesh, (2017) 16 SCC 353; *Venkatesam V. State of Tamilnadu*, (2008) 8 SCC 456; *Rukia Begum Vs. State of Karnataka with Issaq Sait and another v. State of Karnataka with Nasreen v. State of Karnataka*, AIR 2011 SC (1991) 3 SCC 27 MSM,J & BKM,J 14 Crl.A.573 of page 1585; *Jagroop Singh Vs. State of Punjab, Inspector of Police, Tamil Nadu Vs. Balaprasanna*, AIR 2011 SC page 1585; *Shaik Khadar Basha v. State of Andhra Pradesh*, AIR 2011 SC page 1585]

17. It is the obligation of the prosecution to establish each and every circumstance to complete the chain of circumstances pointing out the guilt towards the appellants/accused and inconsistent with the innocence.

18. In *Sharad Birdhichand Sarda* (supra), the Hon'ble Apex Court also held that the onus is on the prosecution to prove that the chain is complete.

19. In *Kishore Chand v. State of Himachal Pradesh*,⁷ the Hon'ble Supreme Court held that when the case is based on circumstantial evidence, burden of proof is always on the prosecution to prove all the circumstances from which conclusion of guilt is to be drawn must be fully established and the facts so established must be consistent with hypothesis of guilt of accused and any circumstance consistent with innocence of accused, he is entitled to benefit of doubt.

20. In view of the settled principle of law, the prosecution made a sincere attempt to prove each and every circumstance, pointing out the guilt of the accused that the offence punishable under Section 302 I.P.C and other Sections of law by drawing inference from the proved facts and circumstances which are AIR 1990 S.C. page 2140 MSM,J & BKM,J 15 Crl.A.573 of consistent only with hypothesis of guilt of the accused before the Trial court and inconsistent with innocence. POINT NO.1:-

21. As per prosecution case, the deceased boy as usual went to school on 09.12.2011 and at about 3.30 p.m., during interval the deceased boy came to the house for taking water and after taking water, he returned to school. After school hours on 09.12.2011, the deceased boy did not return to the house. P.W.1 searched for his son and later gave complaint to the police regarding missing of his son. Basing on the complaint of P.W.1, a case was registered in Kadapa I-Town police station under the caption 'boy missing'. Subsequently, P.W.1 got information from P.W.4 that P.W.4 has seen both

the accused taking the deceased boy along with them on motor cycle and on seeing P.W.4, both the accused fled away along with the boy and that on seeing the photo of the boy which was distributed in his village, P.W.4 approached P.W.1 and informed to P.W.1 that he saw his son in the company of A1 and A2. P.W.1 then visited the house of A1 and A2 and found both the houses of A1 and A2 locked. On 15.12.2011, P.W.1 received information about floating of the dead body of his son in Penna river (isukametta), P.W.1 and his relatives rushed to Penna river and saw the dead body of the boy was floating in the river. Then P.W.1 presented second written complaint which was marked as Ex.P2 and basing on Ex.P2, P.W.15 Sub-Inspector of Police, Kadapa I town police station issued an altered FIR under sections 364-A, 302, 201, 380 read with Section 34 of IPC. P.W.16 Inspector of MSM,J & BKM,J 16 CrI.A.573 of Police conducted further investigation in this case and sent requisition to P.W.14 Assistant Professor, Department of Forensic Medicine, RIMS Medical College for conducting autopsy. Accordingly, P.W.14 issued autopsy report under Ex.P9.

22. As per the evidence of P.W.14, he conducted Post Mortem examination over the deceased boy on 15.12.2011 at about 3.45 p.m., and found the body dressed in snuff coloured wash coat, snuff coloured tie, light pink coloured full shirt, snuff coloured pant, adipocene formation was metted all over available body, it indicates late decomposing state. Scalp hair loosing, fishes crustacean (crabs) and water warts destroyed the body, crawling of maggots are seen, left hand fingers and right hand thumb are missing. On opening of scalp, coronal and sagittal sutures are separated, brain was liquefied. He found ante-mortem injuries. Ante-mortem injuries:-

Internal Injuries:- On opening of neck structures muscles surrounding the thyroid cartilage shows bruising, centre and left side hyoid bone shows modest blue bruising.

P.W.14 deposed that he has preliminarily opined that the deceased boy would appear to have died due to asphyxia due to throttling and the time of death is about 5 to 6 days prior to Post Mortem Examination. As per the evidence of P.W.14, it is clear that the deceased boy died due to asphyxia due to throttling. But it is contended by the learned counsel for the appellants/accused that PW14 has not noticed either fracture of hyoid bone or fracture of MSM,J & BKM,J 17 CrI.A.573 of thyroid cartilage and as such, the death was not due to asphyxia due to throttling.

23. The Hon'ble Supreme Court in Ponnuswamy v. State of Tamilnadu, 8 in para Nos. 20 to 25 held as follows:

"It is true that the autopsy surgeon, P.W.17, did not find any fracture on the hyoid bone. Existence of such a fracture lead to a conclusive proof of strangulation but absence thereof does not prove contra.

In Taylor's Principles and Practice of Medical Jurisprudence, Thirteen Edition, Pages 307, 308, it is stated :

The hyoid bone is 'U' shaped and composed of five parts : the body, two greater and two lesser horns. It is relatively protected, lying at the root of the tongue where the body is difficult to feel. The greater horn, which can be felt more easily, lies behind

the front part of the strip- muscles sternomastoid), 3 cm below the angle of the lower jaw and 1.5 cm from the midline. The bone ossifies from six centres, a pair for the body and one for each horn. The greater horns are, in early life, connected to the body by cartilage but after middle life they are usually united by bone. The lesser horns are situated close to the junction of the greater horns in the body. They are connect to the body of the bone by fibrous tissue and occasionally to the greater horns by synovial joints which usually persist throughout life but occasionally become ankylosed.

Our own findings suggest that although the hardening of the bone is related to age there can be considerable variation and elderly people sometimes show only slight ossification.

From the above consideration of the anatomy it will be appreciated that while injuries to the body are unlikely, a grip high up on the neck may readily produce fractures of the greater horns. Sometimes it would appear that the local pressure from the thumb causes a fracture on one side only.

While the amount of force in manual strangulation would often appear to be greatly in excess of that required to cause death, the application of such force, as evidenced by extensive external and soft tissue injuries, make it unusual to find fractures of the hyoid bone in a person under the age of 40 years.

As stated, even in older people in which ossification is incomplete, considerable violence may leave this bone intact. This view is confirmed by Green. He gives interesting figures : in 34 cases of manual strangulation the hyoid was fractured in 12(35%) as compared with the classic paper of Gonzales who reported four fractures in 24 2008 Crl. Law Journal 2563 MSM,J & BKM,J 18 Crl.A.573 of cases. The figures in strangulation by ligature show that the percentage of hyoid fracture was 13. Our own figures are similar to those of Green.

If Journal of Forensic Sciences volume 41 under the Title - Fracture of the Hyoid Bone in strangulation : comparison of Fractured and Unfractured Hyoids from Victims of Strangulation, it is stated :

"The hyoid is the U-shaped bone of the neck that is fractures in one-third of all homicides by strangulation. On this basis Post-mortem detection of hyoid fracture is relevant to the diagnosis of hyoid fracture is relevant to the diagnosis of strangulation. However, since many cases lack a hyoid fracture, the absence of this finding does not exclude strangulation as a cause of death. The reasons why some hyoids fracture and others do not may relate to the nature and magnitude of force applied to the neck, age of the victim, nature of the instrument (ligature or hands) used to strangle, and intrinsic anatomic features of the hyoid bone. We compared the case profiles and xeroradiographic appearance of the hyoids of 20 victims of homicidal strangulation with and without hyoid fracture (n=10 each). The fractured hyoids occurred in older victims of strangulation (39+_14 years) when compared to the victims with unfractured hyoids (30+_10 years). The age-dependency of hyoid

fracture correlated with the degree of ossification or fusion of the hyoid synchondroses. The hyoid was fused in older victims of strangulation (41+_12 years) where as the infused hyoids were found in the younger victims (28+_10 years). In addition, the hyoid bone was ossified or fused in 70% of all fractured hyoids, but, only 30% of the unfractured hyoids were fused. The share of the hyoid bone was also found to differentiate fractured and unfractured hyoids. Fractured hyoids were longer in the anterior-posterior plane and were more steeply sloping when compared with unfractured hyoids. These data indicate that hyoids of strangulation victims, with and without fracture, are distinguished by various indices of shape and rigidity. On this basis, it may be possible to explain why some victims of strangulation do not have fractured hyoid bones."

Mr. Rangaramanujam, however, relied upon Modi's Medical Jurisprudence and Toxicology, Twenty-Third Edition at page 584 where a difference between hanging and strangulation has been stated. Our attention in this connection has been drawn to point No.12 which reads as under :

Hanging	Strangulation
Fracture of the larynx and trachea-	Fracture of the larynx and trachea-
Very rare and that took in judicial hanging	Often found also hyoid bone.

A bare perusal of the opinion of the learned Author by itself does not lead to the conclusion that fracture of hyoid bone, is a must in all the cases.

We must also take into consideration the fact that the dead- body was decomposed with maggots all over it. Other marks of Strangulation which could have been found were not to be found in this MSM,J & BKM,J 19 CrI.A.573 of case. The dead body was found after a few days. We are therefore, of the opinion that medical evidence does not negate the prosecution case."

24. In Gargie v. State of Haryana,⁹ the Hon'ble Supreme Court held that the absence of fracture of hyoid bone would not necessarily lead to the conclusion that the deceased did not die due to strangulation. Paragraph 23.1 reads as follows:

"23.1. ...Equally, it is not laid down as an absolute rule in medical jurisprudence that in all cases of strangulation, hyoid bone would invariably be fractured. On the contrary, medical jurisprudence suggests that only in a fraction of such cases, a fracture of hyoid bone is found. [Modi: A Textbook of Medical Jurisprudence and Toxicology, 26th Edn. p. 529 where it is also noted:"In Journal of Forensic Sciences, Vol. 41 under the Title -- Fracture of the Hyoid Bone in Strangulation: Comparison of Fractured and Unfractured Hyoids from Victims of Strangulation, it is stated: The hyoid is the u-shaped bone of the neck that is fractured in one-third of all homicides by strangulation. On this basis, post-mortem detection of hyoid fracture is relevant to the diagnosis of strangulation. However, since many cases lack a hyoid fracture, the absence of this finding does not exclude strangulation as a cause of death. The reasons why some hyoids fracture and others do not may relate to the nature and

magnitude of force applied to the neck, age of the victim, nature of the instrument (ligature or hands) used to strangle, and intrinsic anatomic features of the hyoid bone...."] In other words, absence of fracture of hyoid bone would not lead to the conclusion that the deceased did not die of strangulation."

In view of the law laid down by the Apex Court in the decisions cited supra and as per the evidence of P.W.14 coupled with Ex.P7 inquest panchanama and Ex.P9 Post Mortem report, we find that the cause of the death of deceased is due to asphyxia due to throttling and it is a homicide only.

Hence, the contention of the learned counsel for the appellants that absence of either fracture of hyoid bone or the fracture of thyroid cartilage is the indication that the death is not due to asphyxia by throttling is rejected.

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POINT NO.3: -

25. One of the offences allegedly committed by the appellants is under Section 363 of IPC i.e., punishment for Kidnapping and the other offence allegedly committed by the appellants is under Section 393 of IPC i.e., Robbery. It is the consistent case of the prosecution from the beginning that Syed Nadeem Basha is a student studying LKG, aged about 5 years, came from school during interval, took water from the residence and later did not return to the house. The reason for failure to return to house is that he was forcibly taken away by both the accused on a motor cycle. The alleged kidnapping is supported by the evidence of P.W.4, who deposed that he saw the deceased boy sitting in between A1 and A2 on motor cycle on 09.12.2011 at about 7.00 p.m., and accused were trying to remove gold ring from the finger of the deceased boy and on seeing P.W.4, the accused by taking the deceased boy fled away on Pallem palli road on their two wheeler bearing No.AP04-2441.

26. P.W.5 deposed that on 09.12.2011, A1 came to P.W.5 and requested to give his vehicle to attend some work and accordingly, P.W.5 gave his vehicle to A1. As A1 did not return his vehicle, P.W.5 telephoned to A1 and found the phone is switched off. Subsequently, he learnt that his vehicle M.O.4 was used by the accused for kidnapping the boy. In the cross examination, P.W.5 denied the suggestion that M.O.4 does not belong to him and the vehicle is planted in this case.

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27. P.W.6 deposed that on 09.12.2011 at about 3.45 p.m., he has seen the deceased boy sitting

between A1 and A2 on a motor cycle and A1 was riding the motor cycle and they proceeded towards Guralagadda. On 15.12.2011, he came to know that the boy was killed by the accused.

28. P.W.7 Village Revenue Officer deposed that A1 and A2 came to him on 24.12.2011 at about 8.00 a.m., and stated before him that they have kidnapped the deceased boy and while the boy was crying, they gave him a cool drink mixed with brandy and as the boy was still crying, A2 pressed the neck of the boy, while A1 was holding the body and therefore the boy died and also stated that they took the gold chain and gold ring from the boy and threw the dead body of the boy in a tank at Sidhout and later they mortgaged the gold ornaments in a shop at Y.V street. Ex.P3 is the confessional statement of accused.

29. The word 'Kidnap' is defined under Section 359 of IPC. Kidnap is of two kinds. (i) Kidnapping from India and

(ii) Kidnapping from lawful guardianship. The facts of the present case would fall under second category i.e., Kidnap from lawful guardianship as defined under Section 361 of IPC.

30. According to Section 361 of IPC, whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person MSM,J & BKM,J 22 CrI.A.573 of or unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation thereto specified the word 'lawful guardian' implied in Section 361 of IPC include any person lawfully entrusted with the care or custody of such minor or other person.

31. In the instant case, the minor boy was under the custody of his father P.W.1 and he is deemed to under the custody of lawful guardian i.e., father of Syed Nadeem Basha/P.W.1. Therefore, taking away the boy Syed Nadeem Basha without the consent of the lawful guardian/P.W.1, constitute an offence punishable under Section 363 of IPC, as the act of the appellants/Accused amount to kidnapping a boy aged less than sixteen years from lawful custody and liable for punishment.

32. Here, the evidence of witnesses referred above cumulatively proved that Syed Nadeem Basha was taken away without the consent of the lawful guardian and later robbed gold ornaments from Syed Nadeem Basha. Syed Nadeem Basha, being a child cannot resist such kidnapping and such act of removal of gold ornaments from the body of Syed Nadeem Basha whether constitutes an offence punishable under Section 392 of IPC has to be examined.

33. Robbery consists of either theft or extortion. In the facts of the present case, the question of commission of theft does not arise, but it is only by way of robbery by extortion. Extortion is 'robbery', if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the MSM,J & BKM,J 23 CrI.A.573 of extortion by putting that person in fear of instant death, or instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the

thing extorted.

34. Here, in the present facts of the case, as discussed above, the boy Syed Nadeem Basha was killed by throttling and we recorded a specified finding that the death of Syed Nadeem Basha was homicidal and the evidence on record clearly established that the boy was killed and gold ornaments from his body were removed forcibly after kidnapping and such act would constitute an offence punishable under Section 392 of IPC as the act constitutes an offence of robbery as defined under Section 390 of IPC.

35. The trial Court rightly believing the evidence available on record which completes the links in the chain of circumstances directly pointing out the complicity of the accused and inconsistent with the innocence of the accused and those proved circumstances are sufficient to record conviction of the accused for the offences punishable under Sections 363 and 392 of IPC and therefore, the accused were rightly convicted and sentenced for the offences punishable under Sections 363 and 392 of IPC by the trial Court. Even after re-appreciation of entire evidence afresh uninfluenced by the finding of the trial Court, this Court finds no illegality, warranting interference of this Court to set aside the conviction and sentence passed against the accused for the offences punishable under Sections 363 and 392 of IPC. Therefore, the finding of the trial Court for the offences punishable under MSM,J & BKM,J 24 CrI.A.573 of Sections 363 and 392 of IPC, are hereby confirmed. Accordingly, Point No.3 is held against the appellants/accused and in favour of the prosecution/respondent.

POINT NO.2:-

36. To prove the offences punishable under Sections 302 and 201 of IPC, the prosecution relied on last seen theory. The last- seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and there was no possibility of any intrusion to that place by any third party.

37. In Bodhraj V. State of Jammu and Kashmir,¹⁰ the Hon'ble Supreme Court held as follows:

"31. The last-seen theory comes into play where the time- gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. [...]"

The above principle has been reiterated in State of Goa v. Sanjay Thakran and another¹¹. In para 34 the Hon'ble Supreme Court observed as follows :

34. From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the (2002)8 SCC 45 (2007) 3 SCC 755 MSM,J & BKM,J 25 CrI.A.573 of deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

38. In the present case, as seen from the evidence of P.W.14 doctor, who conducted Post Mortem examination on 15.12.2011 at about 3.45 p.m., who deposed that the death of the deceased boy would have occurred 5 to 6 days prior to Post MSM,J & BKM,J 26 CrI.A.573 of Mortem examination. The evidence of P.W.6, who deposed that he had seen the deceased boy sitting between A1 and A2 on a motor cycle and A1 was riding the motor cycle on 09.12.2011 at 3.45 p.m. The last seen theory is further established by the evidence of P.W.4, who has last seen the deceased boy sitting between the appellants/accused on a motor cycle on 09.12.2011 at about 7.00 p.m., and A1 and A2 were trying to remove gold ring from the finger of the deceased boy and that on seeing P.W.4, the accused fled away on Pallem palli road on their motor cycle. P.W.8 deposed that on 09.12.2011 at about 8.45 p.m., A1 throwing something into the river and A2 was also present. P.W.11 deposed that he noticed body of the deceased boy floating in the Penna river at isukametta and he informed the same to P.W.1. The evidence of P.Ws. 4, 6 and 8 coupled with evidence of P.W.14 doctor establishes that the time gap between the time when the accused and the deceased were last seen alive is proximate and the possibility of any other person coming in between does not exist. This further established the chain

of circumstances pointing out the guilt of the accused. The evidence of P.W.6, P.W.4 and P.W.8, who have last seen the deceased boy in the company of the appellants/accused at different spots and situations, do inspire the confidence of this Court so as to prove the guilt of the accused in furtherance of their common intention, and as such their evidence is trustworthy and it cannot be disbelieved in any manner with respect to the corroboration of the other evidence.

39. One of the circumstances relied on by the prosecution is the extra judicial confession made by the accused before the Village Revenue Officer. To prove the extra judicial confession, prosecution examined P.W.7/Village Revenue Officer, Kadapa. According to his evidence, A1 and A2 came to him on 24.12.2011 at about 8.00 a.m., and stated before him that they have kidnapped the deceased boy and while the boy was crying, they gave him a cool drink mixed with brandy and as the boy was still crying, A2 pressed the neck of the boy, while A1 was holding the body and therefore the boy died and also stated that they took the gold chain and gold ring from the boy and threw the dead body of the boy in a tank at Sidhout. The statement of the accused was reduced into writing and marked as Ex.P3 duly signed by the accused. It is not the case of the appellants/accused that they had no acquaintance with P.W.7 at any time. When P.W.7 is a Village Revenue Officer, having acquaintance with the accused, it appears that the accused approached him and made such confessional statement perhaps to save them. Therefore, such statement can be accepted, as such, extra judicial confession, though not a substantive piece of evidence, the same can be relied upon as a piece of evidence which completes the links in the chain of circumstances. An extra judicial confession if voluntarily made, such confession can be relied upon.

40. In Baldev Raj v. State of Haryana¹² the Hon'ble Supreme Court held that extra judicial confession can be relied upon by the Court along with other evidence in convicting the accused if made voluntarily. Paragraph 9 reads as follows :

An extra-judicial confession, if voluntary, can be relied upon by the court along with other evidence in convicting the accused. The value of the evidence as to the confession depends upon the veracity of the witnesses to whom it is made. It is true that the court requires the witness to give the actual words used by the accused as nearly as possible but it is not an invariable rule that the court should not accept the evidence, if not the actual words but the substance were given. It is for the court having regard to the credibility of the witness to accept the evidence or not. When the

court believes the witness before whom the confession is made and it is satisfied that the confession was voluntary, conviction can be founded on such evidence. ...

In State of Rajasthan v. Raja Ram¹³ the Hon'ble Supreme Court held as follows :

19 An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such 12 1991 SCC (Cri) 659 13 (2003) 8 SCC 180 MSM,J & BKM,J 29 CrI.A.573 of a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.

In Ramlal v. State of Himachal Pradesh¹⁴ the Hon'ble Supreme Court held that:

An extra judicial confession being a weak piece of evidence the Court must ensure the same inspires confidence and is corroborated by other prosecution evidence. If the court is satisfied that the extra judicial confession is made voluntarily it can be acted upon to base the conviction.

Applying the same to the present facts of the case, we find that the extra judicial confession marked as Ex.P3 is voluntary, as such, the trial Court rightly relied upon the extra judicial confession made by both the accused under Ex.P3. Though the counsel for the appellants/accused before the trial court denied the extra judicial confession, but Ex.P3 was duly signed by both the accused and they failed to give any explanation under what circumstances they signed on any document without knowing the 14 2018 SCC OnLine SC1730.

contents. In the absence of any explanation, we have no hesitation to conclude that the extra judicial confession marked as Ex.P3 is voluntary. Therefore, such confession is to be accepted.

41. The other circumstance that relied on by the prosecution is confession leading to discovery and recovery of M.Os.2 and 3. To prove the recovery of M.Os. 2 and 3, P.W.7 was examined besides investigating officer, who specifically stated that when the accused were produced along with Ex.P3 before the police, police interrogated both the accused separately, who in turn made extra judicial confession, in which they specifically stated that they pledged the gold ornaments at Y.V. Street and this evidence is supported by the testimony of P.W.10, the owner of the gold shop and who in turn produced M.Os.2 and 3 which were pledged in his shop and recovery of the same under the cover of panchanama marked as Ex.P5, is sufficient to establish the recovery of M.Os.2 and 3. Therefore, the evidence of P.Ws. 7 and 10 who are independent witnesses, not interested either in the prosecution case or in the defence case, is to be accepted, as it inspires confidence of this Court. Hence, the trial Court rightly accepted the evidence of P.Ws.7 and 10 regarding proof of recovery of M.Os. 2 and 3 and the said finding cannot be disturbed even after re- appraisal of entire evidence.

42. The last circumstance relied on by the prosecution is identification of gold ornaments. Identification evidence is relevant under Section 9 of the Indian Evidence Act, but it is not a substantive evidence. According to Rule 35 of Criminal Rules of MSM,J & BKM,J 31 CrI.A.573 of Practice and Circular Orders, 1990, identification parade of the property shall be held in the Court of the Magistrate, where the properties are lodged. Each item of property shall be put up separately for the parade. It shall be mixed up with four or five similar objects. 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 in. This procedure is mandatory as per Rule 35 of the Criminal Rules of Practice.

43. In the instant case, P.W.13, who is working as Revenue Inspector, Kadapa, held test identification parade of property. According to his evidence, the identification parade was held at Tahsildar's office and he brought similar gold ornaments from a gold shop mixed with M.Os.2 and 3 and P.W.1 identified M.Os.2 and 3. Ex.P8 is the identification proceedings. In the cross examination, P.W.13 admitted that he does not know the procedure for conducting Test Identification Parade of property. His evidence is silent as to the procedure followed by him as mandated under Rule 35 of the Criminal Rules of Practice. To accept such identification evidence, the property to be identified shall be mixed with four or five similar items, but here, the evidence of P.W. 13 is silent as to the number of items similar to M.Os.2 and 3 brought from the gold shop and proceedings were not even prepared by P.W.13/Revenue Inspector. Therefore, his evidence with regard to identification of the property by P.W.1 MSM,J & BKM,J 32 CrI.A.573 of during Test identification parade of property held in the Tahsildar's office is not acceptable and the procedure followed by P.W.13 is contrary to the procedure prescribed under Rule 35 of the Criminal Rules of Practice, since the Test Identification parade was not held in the Court of the Magistrate, where the properties were lodged. Therefore, the evidence regarding Test Identification parade of property cannot be accepted and no evidentiary value can be attached to such proceedings which are contrary to the mandatory procedure under Rule 35 of the Criminal Rules of Practice.

44. It is well settled that the identification evidence cannot be a substantive evidence as held by the High Court of Andhra Pradesh in Bommidi Mallikarjuna @ Malca and others Vs State of Andhra Pradesh.¹⁵ But it is only a piece of evidence, when Test Identification parade is held in accordance with law.

45. In the present case, no procedure mandatory under Rule 35 of the Criminal Rules of Practice was followed and therefore, the Test identification parade proceedings marked as Ex.P8 cannot be accepted and no evidentiary value cannot be attached to such proceedings to arrive at any specific conclusion based on such Test Identification parade held contrary to Rule 35 of the Criminal Rules of Practice. Hence, we find that the prosecution failed to prove identification of M.Os.2 and 3 in the presence of P.W.13.

46. Even if the evidence with regard to identification of property is discarded from consideration, still the proved circumstances completes the links in the chain of circumstances 2004(1) ALD Criminal 391 MSM,J & BKM,J 33 CrI.A.573 of unerringly pointing the hypothesis of guilt and inconsistent with the innocence of both the accused, consequently, the trial Court recorded such finding that the accused caused the death of Syed Nadeem Basha and to screen the evidence of murder, thrown the dead body of Nadeem Basha into Penna river at Sidhout. Hence, the trial Court rightly recorded the finding that the accused committed the offences punishable under Sections 302 and 201 of IPC and such finding cannot be interfered by this Court, even after re-appreciation of the evidence. Accordingly, point No.2 is answered.

47. Hence, in concurrence with the finding recorded by the trial Court and in view of the foregoing discussion, we find no grounds to set aside the conviction and sentence imposed upon the accused and the appeal deserves to be dismissed.

In the result, the Criminal Appeal is dismissed. The Conviction and Sentence passed in Sessions Case No.226 of 2012, dated 01.05.2014 on the file of the Court of the Principal Sessions Judge, Kadapa is hereby affirmed.

Consequently, miscellaneous applications pending if any in the Criminal Appeal, shall stand closed.

MURTHY _____ JUSTICE M. SATYANARAYANA
Dated:27.07.2020 mp/yvk JUSTICE B.KRISHNA MOHAN