***THE HON'BLE SRI JUSTICE A. ABHISHEK REDDY**

AND

THE HON'BLE SRI JUSTICE NAMAVARAPU RAJESHWAR RAO

+CRIMINAL APPEAL No.671 of 2014

%20-01-2023

#MD. Mokthar Pasha .... Appellant

vs.

The State of Telangana .... Respondent

!Counsel for the appellant : Sri Dr. K. Satyanarayana Rao

!Counsel for Respondent : Learned Public Prosecutor

<Gist :

>Head Note:

? Cases referred:

1) (2011) 14 SCC 117
2) 2022 LawSuit(TR) 2012
3) (1984) 4 SCC 116
4) AIR 1990 Supreme Court 79
5) (1976) 1 SCC 621
6) (2019) 7 SCC 678
7) (2005) 12 SCC 438
8) 1994 Supp (2) SCC 372
9) (1994) 5 SCC 188
10) AIR 1985 SC 48
11) (2019) 9 SCC 738
12) (2002) 8 SCC 45

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AND
THE HON'BLE SRI JUSTICE NAMAVARAPU RAJESHWAR RAO

CRIMINAL APPEAL No.671 OF 2014

JUDGMENT: (per Hon'ble Sri Justice A. Abhishek Reddy)

This Criminal Appeal, under Section 374(2) of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C'), is filed by the appellant/sole accused aggrieved by the judgment, dated 01.05.2014 (inadvertently mentioned as 01.04.2014 at the top of the impugned judgment), passed in Sessions Case No.376 of 2013 by the learned Judge, Family Court-cum-VIII Additional District and Sessions Judge, Mahabubnagar, whereby, the Court below has convicted the appellant/sole accused for the offence under Sections 302 and 380 of Indian Penal Code (for short 'IPC') and sentenced him to undergo life imprisonment and also to pay a fine of Rs.100/-, in default to undergo simple imprisonment for one month, for the offence under Section 302 IPC and also to undergo imprisonment for three years and for the offence under Section 380 I.P.C. Both the sentences shall run concurrently.

2. We have heard the submissions of Sri Dr.K. Satyanarayana Rao, learned counsel for the appellant, the learned Public Prosecutor appearing for the respondent-State and perused the record.

3. The case of the prosecution, in brief, is as follows:

On 24.10.2012 at 3.00 p.m. P.W.1-Mekala Goverdhan has lodged a complaint-Ex.P.1 alleging that on 24.10.2012 at 8.00 a.m. he along with his wife went to Dayapanthulapally Village for celebrating Dasara festival. When they reached the house, they found the doors of the house opened. On suspicion, he went into the kitchen and found his mother Smt. Sathyamma in supine state. On observation, he found his mother dead due to throttling and saw her gold ear studs and silver anklets missing. On receipt of above complaint, a case in crime No.114/2012 was registered by S.I. of Police, who issued Ex.P.8-F.I.R.

4. During the course of investigation, the S.I. of Police has examined and recorded the statements of PWs 1 to 3, L.W.4, P.W.6, visited the scene of offence located at Dayapathulapally Village, conducted scene of offence panchanama-Ex.P.3 in the presence of P.W.7 and L.W.10, conducted inquest panchanama Ex.P.2 over the dead body of the deceased in the presence of P.W.5 and L.W.9, and sent the dead body for post mortem examination. P.W.10-Doctor, who conducted inquest over the dead body of the deceased and issued Ex.P.7 Postmortem report opining that the cause of death of the deceased was due to Cardio Respiratory failure due to throttling. On 31.10.2012 at 8.00 a.m. he apprehended the accused at New Gunj, Nawabpet, recorded his confessional statement (Ex.P.4) in the presence of P.W.8 and L.W.13, recovered one pair of ear studs-MO.1

and silver leg anklets-MO.2 from the possession of the accused, and remanded the accused to judicial custody. After completion of all the formalities, P.W.11-C.I. of Police has filed charge sheet before the learned Judicial Magistrate of First Class, Mahabubnagar, for the offence under Sections 302 and 380 of IPC against the sole accused.

5. Learned Magistrate had taken cognizance against the sole accused for the offence under Sections 302 and 380 IPC, registered the same as P.R.C.No.21 of 2013 and committed the case to the Sessions Court under Section 209 of Cr.P.C., since the offence under Section 302 of IPC is exclusively triable by the Court of Sessions. On committal, the Court of Sessions numbered the case as S.C.No.376 of 2013 and made over the case to the trial Court for disposal, in accordance with law.

6. On appearance of the accused, the trial Court framed charges against him for the offence under Sections 302 and 380 IPC, read over and explained the same to him, for which, the accused pleaded not guilty and claimed for trial.

7. To prove the guilt of the accused, the prosecution got examined PWs.1 to 11 and got marked Exs.P1 to P8, besides MOs 1 and 2. On behalf of the accused, no oral and documentary evidence was adduced.

8. P.W.1-Mekala Goverdhan is the complainant and son of the deceased; P.W.2-Sugnamma and P.W.3-Lingamaiah are the neighbours of the deceased; P.W.4-Lavanya is the daughter of the deceased; P.W.5-Anjaiah is the panch witness for inquest panchanama; P.W.6-Kethavath Babu is the circumstantial witness; P.W.7-Gundu Chennaiah is the panch witness for scene of offence; P.W.8-Sailu is the panch witness for the confession of the accused; P.W.9-Ramachandraiah is the panch witness for identification panchanama dated 22.12.2012; P.W.10-Dr.Soma Shekar is the doctor, who conducted autopsy over the dead body of the deceased; Ex.P.11-Giribabu is the investigating officer. Ex.P.1 is the complaint lodged by P.W.1; Ex.P.2 is the inquest report; Ex.P.3 is the crime detail form; Ex.P.4 is the Confessional panchanama, Ex.P.5 is the seizure panchanama, Ex.P.6 is the identification panchanama, Ex.P.7 is the post mortem examination and Ex.P.8 is the F.I.R.; M.O.1 is pair of golden ear studs and M.O.2 is one pair of silver anklets.

9. When the appellant-accused was confronted with the incriminating material appearing against him when examined under Section 313 of Cr.P.C., he denied the same.

10. The trial Court, having considered the submissions made and the evidence available on record, *vide* the impugned judgment, dated

01.05.2014, has convicted the appellant/accused, as stated supra. Aggrieved by the same, the present appeal has been preferred.

11. Learned counsel for the appellant has contended that the trial Court without properly appreciating the evidence on record has grossly erred in convicting the accused. That the impugned judgment is passed based on surmises and conjectures and contrary to the evidence on record. Learned counsel has drawn the attention of the Court to the evidence adduced by the prosecution to show that the accused was not present at the scene of offence at the time of commission of offence. Learned counsel has also contended that the evidence let in by the prosecution, more particularly, the evidence of P.Ws.1 to 3 and P.W.6, clearly establishes the fact that the accused was not present at the scene of offence and based only on circumstantial evidence, the trial Court has wrongly convicted the accused. That as a matter of fact, the post-mortem report and also the evidence of P.W.6 clearly established that the accused was not present at the scene of offence at the time of death of the deceased. Learned counsel has relied on the following judgments in support of his arguments:

1) ***Manthuri Laxmi Narsaiah v. State of Andhra Pradesh***[1];

2) ***Janardhan Murasingh vs. State of Tripura***[2];

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[1] (2011) 14 SCC 117
[2] 2022 LawSuit(TR) 2012

3) ***Chandrapal v. State of Chattisgarh*** [Criminal Appeal No.378 of 2015, decided on 27.05.2022 by Hon'ble Supreme Court];

4) ***Bhadva v. State of M.P.*** [Criminal Appeal No.890 of 2007 decided on 13.07.2011 by the Hon'ble Supreme Court].

12. On the other hand, the learned Public Prosecutor has vehemently supported the impugned judgment passed by the trial Court and contended that the evidence on record, more particularly of P.Ws.1 to 3 and P.W.6, clearly established beyond reasonable doubt that the appellant was last seen with the deceased and as per Section 106 of the Indian Evidence Act, the burden is on the accused to prove that he was not present at the relevant point of time, but the appellant has failed to discharge the said burden by not letting in any evidence to prove his innocence. Moreover, based on the confession made by the accused MOs 1 and 2 were recovered, which fact clearly points to the guilt of the accused. Hence, there are no grounds for this Hon'ble Court to interfere with the impugned judgment and prayed to dismiss the appeal.

13. Perused the evidence on record.

14. Admittedly, in the present case, the conviction imposed on the appellant-accused is based on circumstantial evidence as there are no direct eye witnesses of the crime.

15. As seen from the record and the impugned judgment, the trial Court while convicting the accused has relied heavily on the evidence of PWs 1 to 4 and also P.W.6 to convict the accused. But, a close scrutiny of the evidence of the prosecution witnesses, more particularly PWs 1 to 4, shows that the said witnesses were not present at the time of commission of offence.

(a) The relevant portion of the evidence of P.W.1, who is the son of the deceased, is as follows:

> "... On 24.10.2012 I came to my house in my village from Nellore at about 8.00 a.m. I found my mother dead in kitchen and I found missing of gold ear tops and silver anklets of my mother and that I found throttling marks around the neck of my mother. We suspected the accused responsible for the death of my mother. Then I gave complaint to Police, Nawabpet."

(b) P.W.2, who is the neighbour of the deceased, has stated as under:

> "... One day prior to her death the accused came to the house of Sathyamma to take rice while I was standing infront of my house. Accused came to Sathyamma's house in the evening time and that the said Sathyamma brought toddy to her house and that both Sathyamma and accused were present inside the house of Sathyamma. On to the next day, P.W.1 and his wife returned to their house of Sathyamma and that they were weeping and that they informed me that the said Sathyamma died in kitchen. Then I went and saw the deadbody of Sathyamma and found missing of M.Os.1 and 2 from her body and found ligature marks on neck of the deceased."

In cross-examination, P.W.2 has admitted that on the date of incident i.e.23.10.2012, the accused had come to the house of the deceased between 8.30 to 9.00 in the morning and that the doors of the house of the deceased were open and the accused was inside the house of the deceased. That the deceased bought toddy and both the accused and the deceased consumed toddy in the evening time. As per evidence of P.W.2, the accused was last seen with the deceased in the evening of 23.10.2012.

(c) P.W.3-Lingamaiah, another neighbour of deceased, has deposed as follows:

> "….. The accused worked as Carpenter while constructing the house of P.W.1. Sathyamma died on 24.10.2012. My house is situated by the side of house of Sathyamma. One day prior to her death the accused came to the house of Sathyamma in the evening time, while I was standing infront of my house and that the said Sathyamma brought toddy to her house and that both Sathyamma and accused were present inside the house of Sathyamma. On the next day, P.W.1 and his wife returned to their house of Sathyamma and that they were weeping and that they informed me that the said Sathyamma died in kitchen."

In the cross-examination, he has stated that one day prior to the date of death of the deceased, the accused had come to the house of the deceased during the morning time to take rice and thereafter in the evening of 23.10.2012 they consumed toddy together.

(d) P.W.4-Lavanya, daughter of the deceased, has stated as under:

> "... I received a phone call from P.W.1 about the death of my mother on 23.10.2012. I went to Dayapanthulapalli vg., and found my mother died in her house with a throttling injury around her neck and we found missing of MOs.1 and 2... I came to know through neighbours that my mother was killed by the accused. About 2 months after the incident I was called to identify the ornaments among 4 or 5 items shown by M.R.O., Nawabpet."

In the cross examination, she has stated that the accused has attended carpentry work in the house of the deceased one year prior to the date of incident.

(e) It is pertinent to note that neither P.W.1-son of the deceased nor PWs 2 to 4 have given the descriptive particulars of the ornaments worn by the deceased either in the complaint or in their statements under Section 161 Cr.P.C.

(f) P.W.5-M.Anjaiah is the panch witness for the inquest and he has admitted in his cross examination that he has acted as panch witness in another case and that he has deposed in five to six cases on behalf of the Police.

(g) P.W.6-Kethavath Babu is the Milk Vendor and resident of Hajilapur Village. He has deposed as under:

> "...About 1 year 4 months back I was going from my village to Nawabpet on my motor bike at about 7.30 or 8.00 p.m., the

> accused asked me to give lift. I gave him lift upto Auto stand where the accused got down."

In cross-examination, P.W.6 has stated that the distance between his Village and Nawabpet is 6 kms and except on the date of giving lift, he has not seen the accused previously and that at the time of giving lift, the accused was running and he was in fear and tension.

(h) P.W.8-B.Sailu is the panch witness for the confession statement of accused and he has deposed as under:

> "... on 31.10.2012 Police called me to Nawabpet P.S., I went there. By then L.W.13 Musti Gopal was already there in the police station. CI of Police other police personnel and the accused present in the court hall were present in the P.S. Then the accused came out side the P.S. The accused confessed that about 8 days back he has killed one Sathyamma and prior to that he attended carpentary work in the house of Sathyamma and that he took away ear studs, and silver anklets of the deceased..... Ex.P.4 is confessional panchanama of accused Dt:31-10-2012. In pursuance of the said confession, the accused took us to his house and that the accused went inside his house and brought ear studs and silver anklets of the deceased. Police seized the said ornaments M.Os.1 and 2 under another panchanama. Ex.P5 is seizure panchanama Dt:31-10-2012...."

(i) P.W.9-Ramachandraiah is the Village Revenue Officer, Nawabpet. He has deposed that MOs 1 and 2 were mixed up with other ornaments and they were identified by P.W.4 in their presence. Ex.P.6 is the identification panchanama dated 22.12.2012 wherein

himself and L.W.17 have signed. It is pertinent to note that another panch witness L.W.17 was not examined by the Prosecution.

(j) P.W.10-Dr.M.Soma Shekar, who has conducted post-mortem examination, has deposed that he commenced autopsy at 3.00 p.m. on 24.10.2012 and found fracture of hyoid bone on both sides of the dead body. Ex.P.7 is the PME report issued by P.W.10 opining that the cause of death of the deceased is due to Cardio respiratory failure due to throttling and also fracture of Hyoid bone.

(k) P.W.11-G.Giribabu is the investigating officer. He deposed that on receipt of the complaint-Ex.P.1, he registered FIR-Ex.P.8 in crime No.14 of 2012. He deposed about the investigation done by him and filing of charge sheet.

16. Ex.P.1 is the complaint lodged by P.W.1, who is the son of the deceased, wherein he has stated that on 24.10.2012 he visited the house of the deceased at around 8.00 in the morning along with his wife and found that the deceased was lying dead on the floor of the kitchen and that her ear studs and silver anklets were missing. In his complaint, P.W.1 has also stated that the accused had visited the house of the deceased on 23.10.2012 and expressed his suspension against the accused.

17. Based on the above evidence, the trial Court has convicted the appellant, as stated above, and the same is the subject matter of the present appeal.

18. Now, the issue for consideration before this Court is whether the conviction and sentence rendered by the trial Court is justified or liable to be set aside?

19. Section 374 Cr.P.C. confers 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.

20. The entire case of the prosecution rests on circumstantial evidence as there are no direct eye witnesses to the crime that has taken place. The Hon'ble Supreme Court in a number of cases has time and again reiterated the principles on which the accused can be convicted solely based on circumstantial evidence.

21. The five golden principles enumerated in case of ***Sharad Birdhichand Sarda v. State of Maharashtra***[3], at para 152, may be reproduced herein for ready reference:

> "152. 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

[3] (1984) 4 SCC 116

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 (Crl) 1033 : 1973 CrlLJ 1783] where the following observations were made:

> "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 the innocence of the accused and must show that in all human probability the act must have been done by the accused."

22. In ***Padala Veera Reddy v. State of A.P.***,[4] the Hon'ble Supreme Court, at para 10, has held as under:

> "(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

[4] AIR 1990 Supreme Court 79

(3) 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

(4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

23. In ***Chandmal v. State of Rajasthan***[5], the Hon'ble Supreme Court has held as under:

"14. It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and none else. That is to say, the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilty."

24. The Hon'ble Supreme Court in State of ***Rajasthan v. Mukesh Kumar***[6], has held as under:

"10. It is well settled that in the cases of circumstantial evidence, 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 guilt of the accused. The circumstances should be of a conclusive nature and

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[5] (1976) 1 SCC 621
[6] (2019) 7 SCC 678

> should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a complete chain of evidence 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 and none else.
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> 12. It has been further relied on by this Court in Sujit Biswas v. State of Assam [Sujit Biswas v. State of Assam, (2013) 12 SCC 406 : (2014) 1 SCC (Crl) 677] and Raja v. State of Haryana [Raja v. State of Haryana, (2015) 11 SCC 43 : (2015) 4 SCC (Crl) 267] and has been propounded that while scrutinizing the circumstantial evidence, it is the duty of the Court to evaluate it to ensure the chain of events clearly established and completely to rule out any reasonable likelihood of innocence of the accused. It is true that the underlying principle whether the chain is complete or not, indeed would depend on the facts of each case emanating from the evidence and there cannot be a straitjacket formula which can be laid down for the purpose. It is always to be kept in mind that the circumstances adduced when considered collectively, must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused."

25. In ***Jaswant Gir v. State of Punjab***[7] the Hon'ble Supreme Court has held that in the absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "Last seen together", even if version of the prosecution witness in this regard is believed.

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[7] (2005) 12 SCC 438

26. In ***Arjun Marik v. State of Bihar***[8], it was observed by the Hon'ble Supreme Court that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused, and therefore no conviction on that basis alone can be founded.

27. In ***Manthuri Laxmi Narsaiah (referred supra)***, the Hon'ble Supreme Court has held that "*It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof.*"

28. In this case, it is pertinent to note that both PWs 2 and 3, who are the neighbours of the deceased and independent witnesses, have stated in their deposition that they have seen the accused on the morning of 23.10.2012 and also in the evening hours and both the accused and the deceased have consumed toddy. The evidence of P.W.6 gains significance because he has specifically deposed that on 23.10.2012 while going from Hajilapur Village to Nawabpet on his motor bike, he had given lift to the accused between 7.30 pm. to 8.00 p.m. and that he dropped him at the auto stand. This piece of evidence of P.W.6 clearly shows that the accused had left the house of the deceased around at 7.00 p.m. on 23.10.2012. In order to

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[8] 1994 Supp (2) SCC 372

attribute the crime on the accused-appellant, it is necessary for the Prosecution to prove beyond reasonable doubt that at the relevant point of time i.e. at the time of death of the deceased, the appellant was in the vicinity or seen in the company of the deceased. The Post-Mortem Examination (PME) Report, which is marked as Ex.P.7, gains much significance in this case. The PME report reveals that autopsy had commenced at around 3.00 p.m. and concluded at 5.00 p.m. on 24.10.2012 and the requisition was received around at 5.30 p.m. The cause of death of the deceased is shown as Cardio Respiratory failure due to throttling. As per the evidence of the Doctor (P.W.10) and Ex.P.7-PME report, the approximate time of the death of the deceased is shown as 6-8 hours prior to post-mortem examination. Admittedly, the post-mortem examination has taken place at 3.00 p.m. on 24.10.2012 and as per Ex.P.7-PME report, the approximate time of death of the deceased is around 6-8 hours prior to the time of conducting autopsy. Therefore, the approximate time of death of the deceased can be calculated at around 7.00 a.m. on the morning of 24.10.2012. The evidence on record i.e. the depositions of PWs 2 and 3 shows that the accused was last seen in the company of the deceased on the evening of 23.10.2012, which leaves a gap of about 12 hours between the approximate time of death of the deceased and the time the appellant was last seen by PWs 2 and 3. This time gap of 12 hours has not been explained by the Prosecution. The evidence

of P.W.6 unerringly points out to the fact that the accused had left the house of the deceased at around 7.00 p.m. and was given lift by P.W.6 on his motor bike between 7.30 and 8.00 p.m. and he was dropped at the Auto Stand of Nawabpet. Therefore, the presence of the accused at the scene of offence on the morning of 24.10.2012 has to be ruled out and is highly improbable. There is no other evidence to prove that the accused was either seen by anybody returning to the scene of offence after he was dropped by P.W.6 at the Auto Stand, Nawabpet, or seen him in the presence of the deceased in the morning hours of 24.10.2012. It is also pertinent to note that the scene of offence panchanama/inquest panchanama (Ex.P.2) was done on 24.10.2012 and as per the said report the panchanama was commenced at around 1600 hours and ended at around 1730 hours. Both the scene of offence panchanam and the Post-Mortem Examination could not have been held at the same time. Even the complaint lodged by P.W.1 on 24.10.2012 was at around 3.00 p.m. Admittedly, PW.1 in his cross-examination has stated that he came to know about death of his mother at about 8.00 a.m. There is no explanation whatsoever by P.W.1 for the delay of almost 7 hours in lodging the complaint.

29. In this context, it is pertinent to note the following observations made by the Hon'ble Supreme Court in Meharaj Singh (L/Nk.) v. State of Uttar Pradesh[9]:

> "12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often result in embellishment, which is a creature of an after thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR, was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr.P.C., is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in embryo state and had not been given any shape and

[9] (1994) 5 SCC 188

> that the FIR came to be recorded later on after due deliberations and consultations and was then ante timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante timed and had not been recorded till the inquest proceedings were over at the spot by PW8."

The trial Court has erred in convicting the accused solely based on the evidence of PWs 2 and 3 who have stated that they have seen the accused on the evening of 23.10.2012 whereas the approximate time of death of the deceased, as per Ex.P.7-PME report, is around 7.00 a.m. in the morning, which leaves a gap of around 12 hours between the approximate time of death of the deceased and the time the accused was last seen in the company of the deceased.

30. Even though the learned Additional Public Prosecutor has argued that the accused has confessed to have committed the crime before the mediators i.e. P.W.8 and L.W.13-Misto Gopal on 31.10.2012 and MOs 1 and 2 were recovered, the confession panchanama is marked as Ex.P.4, recovery panchanama is marked as Ex.P.5, but much credence cannot be given for the following reasons:

1) Firstly, the prosecution got examined only one panch witness i.e.P.W.8 and failed to examine the other panch witness i.e. L.W.13 to prove the confession and recovery panchanamas.

2) Secondly, P.W.8 is the resident of Kondapur and there is no explanation forthcoming either from the witness or the Prosecution as to what P.W.8, who is the resident of Kondapur, was doing at Nawabpet Police Station at the relevant point of time.

3) Thirdly, the descriptive particulars of the ornaments worn by the deceased were not given by the complainant or by PWs 2 to 4.

4) Lastly, a comparison of the handwriting on Exs.P.4 and P.5 reveals that the scribe of both the exhibits is one and the same. But, the scribe of Exs.P.4 and P.5 was not examined by the Prosecution.

Therefore, much credence cannot be given to the said Exhibits i.e. Exs.P4 and P.5. The conclusion arrived by the trial Court, based on the evidence of PWs 2 and 3 and also P.W.6, is contrary to the post-mortem examination.

31. In ***State of U.P. v. M.K. Anthony***[10], the Supreme Court held as under:

> "There is neither any rule of law nor of prudence that evidence furnished by extra judicial confession cannot be relied upon unless corroborated by some other credible evidence. The Courts have considered the evidence of extra-judicial confession a weak piece of evidence. If the evidence about extra-judicial confession comes from the mouth of

[10] AIR 1985 SC 48

> witness/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, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. In such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra-judicial confession is reliable, trustworthy and beyond reproach the same can be relief upon and a conviction can be founded thereon."

32. In a conviction based on circumstantial evidence or last seen theory, the Prosecution should prove beyond reasonable doubt that the accused was last seen in the company of the deceased as proximate as possible to the time of death of the deceased. The entire chain of events should be such that it shall form a complete circle without leaving any gaps or missing links and should not leave an iota of doubt in the mind of the Court with regard to the guilt of the accused. But, in this particular case, the accused was seen in the company of the deceased on the evening of 23.10.2012 and given lift by P.W.6 at around 7.30 to 8.00 pm. and dropped at Auto Stand, Nawabpet. Whereas the death of the deceased as per Ex.P.7-PME report is on the morning of 24.10.2012 which leaves a gap of 12 hours between the time of death of the deceased and the last seen

presence of the accused in the company of the deceased. Therefore, we are of the opinion that there is no evidence on record which connects the accused to the scene of offence at the time of murder i.e. morning of 24.10.2012.

33. In ***Gargi v. State of Haryana***[11], the Hon'ble Supreme Court has dealt with the conviction based upon circumstantial evidence. In the aforesaid case, there was a gap between point of time when the accused and the deceased were last seen together. Paragraphs 33.1 and 33.3 of the aforesaid judgment read as under:

> "33.1 Insofar as the "last seen theory" is concerned, there is no doubt that the appellant being none other than the wife of the deceased and staying under the same roof, was the last person the deceased was seen with. However, such companionship of the deceased and the appellant, by itself, does not mean that a presumption of guilt of the appellant is to be drawn. The trial court and the High Court have proceeded on the assumption that Section 106 of the Evidence Act [**"106. Burden of proving fact especially within knowledge**-When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."] directly operates against the appellant. In our view, such an approach has also not been free from error where it was omitted to be considered that Section 106 f the Evidence Act does not absolve the prosecution of its primary burden. This Court has explained the principle in Sawal Das [Sawal Das v. State of Bihar, (1974) 4 SCC 193 : 1974 SCC (Crl) 362] in the following : (SCC p.197, para 10)
>
> > "10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused."

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[11] (2019) 9 SCC 738

> 33.3 In the given set of circumstances, the last seen theory cannot be operated against the appellant only because she was the wife of the deceased and was living with him. The gap between the point of time when the appellant and the deceased were last seen together and when the deceased was found dead had not been that small that possibility of any other person being the author of the crime is rendered totally improbable. In Sk. Yusuf [Sk. Yusuf v. State of W.B., (2011) 11 SCC 754 : (2011) 3 SCC (Crl) 620, this Court has said : (SCC pp. 760-61, para 21)
>
> > "21. 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."

34. In ***Bodhraj v. State of Jammu and Kashmir***[12], the Hon'ble Supreme Court has held that *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 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.*

35. The Court is obliged to assess the evidence on the test of probability. Though wide discretion is given to the Court to consider the "matters before it", such an evidence has to be sifted carefully before recording satisfaction. It is not the quantum, but what matters is the quality. The Court below found the evidence of PWs 1 to 4 and P.W.6 acceptable. The seriously inherent contradictions in the statements made by PWs 1 to 4 with that of P.W.6 juxtaposed with Ex.P.7-PME report have not been duly taken note of by the trial

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[12] (2002) 8 SCC 45

Courts. When the offence is heinous, the Court is required to put the material evidence under a higher scrutiny. On a careful consideration of the reasoning given by the trial Court, we find that sufficient care has not been taken in the assessment of the statements made by PWs 1 to 4 and P.W.6. The case of the prosecution was fraught with inconsistencies and weaknesses, the fundamental defect being its failure to present the origin and genesis of the occurrence in its full and true form. The trial Court, based on mere suspicion, convicted the appellant without there being any credible evidence. Benefit of doubt would therefore have to be extended to the appellant as the prosecution failed to establish beyond reasonable doubt that the appellant-accused is responsible for the death of the deceased. It is now well-settled that benefit of doubt belonged to the accused. It is further trite that suspicion, however grave may be, cannot take place of a proof. It is equally well-settled that there is a long distance between 'may be' and 'must be'.

36. For the afore-stated reasons and in view of the ratio laid down by the Hon'ble Supreme Court as well as this Court, in the above referred judgments, the conviction and sentence rendered by the trial Court cannot be sustained and the same is accordingly set aside.

37. In the result, the Criminal Appeal is allowed. The conviction and sentence imposed on the appellant-accused *vide* judgment, dated 01.05.2014, passed in Sessions Case No.376 of 2013 by the learned Judge, Family Court-cum-VIII Additional District and Sessions Judge, Mahabubnagar, for the offence punishable under Sections 302 and 380 of Indian Penal Code are hereby set aside and he is acquitted for the said offence. Appellant-accused be set at liberty forthwith, if he is not required in any other case. The fine amount paid by the appellant, if any, shall be returned to him.

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

A.ABHISHEK REDDY, J

NAMAVARAPU RAJESHWAR RAO, J

20th January, 2023
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