SUPREME COURT OF INDIA

P. Nagesh

Vs.

State of Karnataka

Crl.A.No.887 of 2013

(T.S.Thakur and Sudhansu Jyoti Mukhopadhaya JJ.)

09.07.2013

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

1. This petition has been preferred by the appellants against the judgment dated 19th January, 2010 passed by the Division Bench of the High Court of Karnataka at Bangalore in Criminal Appeal No.968 of 2006. By the impugned judgment, the Division Bench upheld the order of conviction recorded by the trial court based on the circumstantial evidence.

> The Presiding Officer, the Fast Track Court-IX, Bangalore City by its judgment dated 10th April, 2006, relying on circumstantial evidence held the appellants (accused Nos. 1 and 2) guilty and convicted them for the offence punishable under Sections 364, 302, 379, 201 read with Section 34 of the IPC and sentenced them to undergo imprisonment for life and a fine of Rs.2,000/-, in default, simple imprisonment for six months for the offence punishable under Section 302 of the IPC; rigorous imprisonment for seven years and a fine of Rs.2,000/-, in default, simple imprisonment for three months for the offence punishable under Section 364 of the IPC; five years imprisonment and a fine of Rs.1,000/-, in default, simple imprisonment for three months for the offence punishable under Section 201 of the IPC and imprisonment for two years for the offence punishable under Section 379 of the IPC and ordered that above sentences shall run concurrently.

2. The Division Bench noticed the circumstances relied on by the prosecution to prove the guilt of the accused and after much discussion on the relevance of the

evidence produced and on the questions raised on behalf of the appellants dismissed the appeal. For the said reason, on 1st March, 2013, the case was taken up by this Court and a notice was issued to the respondent limited to the question as to whether the matter can be remitted back to the High Court for a fresh disposal in accordance with law.

3. We have heard learned counsel for the parties and on the facts and circumstances of the case, delay of 974 days in filing and 29 days in re- filing the SLP is condoned. Leave is granted.

4. The Division Bench recorded in paragraphs 3 and 4 of the impugned judgment, the circumstances which prosecution relied on to prove the guilt of the accused and the submission on behalf of the appellants. The same is quoted hereunder:

"3. The prosecution has relied upon the following circumstances to prove the guilt:

i) Motive- causing death for robbing motor cycle.

ii) The accused being found in possession of the motor cycle. The number plate of the said motor cycle, although displayed a different registration number, but, the engine and chasis number of the seized vehicle tallies with the motor cycle of the accused bearing N RX KA 02 EF 3103.

iii) The discovery of the dead body at the voluntary instance of the accused persons. The dead body was buried in a land at Bhaktharahlli village, Kunigal Taluk.

iv) In the exhumation proceedings conducted by the TEM in presence of the I.O. and Doctor would lead to discovery of the buried dead body.

v) The identity of the dead body (corpus delecti) is established by the evidence of PW-10 – father of the deceased. PW-11 – brother of the deceased, who identified the dead body on the basis of the clothing found on it.

vi) The dead body, although fully decomposed, the post mortem report and the evidence of the Doctor would show that death is possible by strangulation by rope.

4. Smt. N. Padmavathi, counsel for the appellant submitted the following discrepant circumstances to assail the order of conviction:

> 1) The theory of recovery of motor cycle from the accused by the police is false and concocted.
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> 2) The recovery of the dead body at the voluntary instance of the accused is false and concocted.
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> 3) The evidence of PW-4 discloses that the police had visited the place earlier to the exhumation.
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> 4) The medical evidence does not disclose the cause of death.
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> 5) The doctor has given opinion only on the basis of the attending circumstances."

5. After hearing the counsel for the parties, the Division Bench held that the accused persons have failed to explain the circumstances under which they had come in possession of the motor cycle belonging to PW-1 which had been used by the deceased and, therefore, the presumption would arise against the accused under Section 106 of the Evidence Act.

6. Learned counsel for the appellants submitted as follows:

> (i) The prosecution failed to prove the recovery of motor cycle from the possession of the appellant as the witnesses, who were the Panch had not stood to the test of cross-examination.
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> (ii) PW-40 was examined to prove the alleged seizure of motor cycle (MO5). But the said witness deposed that he reached the place after the seizure. PW-40 could not state the date and time when seizure was made and he signed in Mahazar (Ex.P.23). According to PW.40 he had signed the Mahazar at the cross of Nelagadahalli Village but according to Seizure Mahazar (Ex.P.23), the place of seizure was NITF Cross. In the cross-examination he admitted that he did not remember MO5 vehicle was seized by the police.
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> (iii) PW-2 in his deposition stated that the deceased had informed him that the motor cycle was seized for violation of Traffic Rules. This clearly shows that the motor cycle had already been seized by the Police.

(iv) The prosecution also failed to prove the recovery of Wrist Watch (MO6) of the deceased. To prove the said aspect prosecution examined PW-8 and PW-9. The case of the prosecution was that Wrist Watch (MO6) was seized from PW-8, the brother of accused No.1. But PW-8 turned hostile and stated that nothing has been seized from him. Another witness was PW-9, who in his evidence stated that he had not seen any seizure and also turned hostile. In Ex.P.1, the complainant, PW-17 (mother of the deceased) has not stated anything regarding Wrist Watch of the deceased. Therefore, it is clear that the story of Wrist Watch was subsequently inserted to create evidence against the accused, but the prosecution failed to establish.

(v) The prosecution failed to establish beyond reasonable doubt the allegation that the exhumation of dead body was at the instance of the accused. The Investigation Officer (PW-45) in his cross-examination deposed that he knew the place of burial of dead body prior to the recording of the voluntary statement of the accused. Therefore, it can be said that the dead body has been recovered at the instance of the accused.

(vi) The prosecution also failed to prove the last seen theory. The Poojari who performed the Pooja of motor cycle has categorically stated that he cannot identify the persons who visited the temple, as thousands of people used to visit the temple in a day.

(vii) Once the prosecution has failed to prove the main offence under Section 302 of the IPC, offence under 201 IPC also does not survive for consideration. The evidence of PWs-2, 10, 11, 14 and 45, not at all stood the test of the cross-examination.

7. Having heard the learned counsel for the parties, we are of the opinion that the High Court being the Appellate Court was required to deal with each and every question raised on behalf of the appellants. Though the aforesaid questions were raised before the trial court as well as the High Court, we find that the High Court failed to discuss and decide the questions raised by the appellants.

8. In view of the finding recorded above, we are of the view that the case should be remitted to the High Court for fresh disposal in accordance with law. The impugned judgment dated 19th January, 2010 passed by the Division Bench of the High Court of Karnataka, Bangalore in Criminal Appeal No.968 of 2006 is, accordingly, set aside. The case is remitted back to the High Court for fresh

disposal of the appeal in accordance with law. It will be open to the appellants to raise all the questions and objections as raised in this appeal or as taken before the High Court. The respondents may also contest the case in support of the judgment passed by the trial court. The appeal stands disposed of with the aforesaid observation.