

# SUPREME COURT OF INDIA

Navaneetha krishnan

Vs.

The State by Inspector of Police

CrI.A.No.1134 of 2013

(A.K.Sikri and R.K.Agrawal, JJ.,)

16.04.2018

## JUDGMENT

### **R.K. Agrawal, J.,**

1. The above appeals are directed against the common judgment and order dated 23.11.2009 passed by the High Court of Judicature at Madras in Criminal Appeal Nos. 639 and 688 of 2009 whereby the Division Bench of the High Court dismissed the appeals filed by the appellants herein against the order dated 18.09.2009 passed by the Fast Track Court No. II, Salem, in Sessions Case No. 21 of 2009 wherein learned Additional District & Sessions Judge convicted the appellants herein under Sections 302 read with Section 34, Section 364 and Section 379 of the Indian Penal Code, 1860 (in short 'the IPC') and sentenced to undergo imprisonment for life with substantive sentences under the IPC.

### 2. Brief facts:

“(a) A First Information Report (FIR) bearing No. 41 of 2008 at PS Yercaud, District Salem dated 16.02.2008 got registered by Mahimaidoss (PW-8) stating that on 14.02.2008, John Bosco (since deceased), who was employed as the driver in his travel agency, along with one Madhan (since deceased), took a Maruti Van from him but did not return for two days.

(b) On the very next date, i.e., on 17.02.2008, one more FIR got registered by one Asokan bearing No. 88 of 2008 stating that when he went to irrigate his fields, he found a white colour sack floating in the well. He immediately informed the same to the local police and when the sack was opened, a male body with hands tied at the back was found.

(c) On the basis of FIR dated 16.02.2008, Crime No. 41 of 2008 was registered at Yercaud Police Station and during the pendency of investigation, FIR No. 88 of 2008 got registered and a body was found which was identified as of John Bosco.

(d) During investigation, Sivashankar (A-1 therein) was apprehended and he confessed about committing the crime along with (A-2 and A-3) appellants herein stating that they abducted John Bosco and his friend Madhan and taken them in the Maruti Van being driven by John Bosco to one of the relatives of Accused No. 2 therein where they caused death of John Bosco and Madhan by strangulating them one by one using a rope and drowned their bodies in water streams using gunny bags. A-1 also took the investigation officer to the place where the body of Madhan was found in a gunny bag.

(e) After following the due procedure, a charge sheet was filed in the Court of Judicial Magistrate No. 5, Salem and the case was committed to the Court of Additional District & Sessions Judge, Fast Track Court No. II, Salem and numbered as Sessions Case No. 21 of 2009. The Court framed charges under Sections 364, 302 read with Section 34, 201 read with Section 302 and 379 of the IPC.

(f) Learned Additional District & Sessions Judge, vide judgment and order dated 18.09.2009, convicted all the accused for the commission of crime under the charging Sections and sentenced them to undergo imprisonment for life.

(g) Being aggrieved by the judgment and order date 18.09.2009, the appellants-accused preferred Criminal Appeal Nos. 639 and 688 of 2009 before the High Court. The Division Bench of the High Court, vide judgment and order dated 23.11.2009, dismissed the appeals preferred by the appellants herein.

(h) Being aggrieved by the judgment and order dated 23.11.2009, the appellants herein have preferred these appeals by way of special leave before this Court.

3. Heard Mr. K.K. Mani, learned counsel for the appellants-accused and Mr. M. Yogesh Kanna, learned counsel for the respondent-State and perused the records.

Point(s) for consideration:-

4. The only point for consideration before this Court in the present facts and circumstances of the case is whether the High Court was right in dismissing the appeals preferred by the appellants-accused?

Rival contentions :-

5. Learned counsel appearing for the appellants contended that the courts below failed to appreciate that the conviction cannot be based upon a retracted confession and it can be used only in support of other evidence. He further contended that the courts below erred in convicting the appellants where the cause of death is not known.

6. Learned counsel further contended that there are several lacunas in the prosecution version. In support of the same, he contended that the lower courts failed to appreciate that

the owner of the phone recovered from Accused No. 1 therein is not PW-8 and some other person and the said person was never examined by the prosecution. Further, on 14.02.2008, at about 10.30 a.m., PW-11 has seen the accused along with the deceased whereas the dead bodies have been found after a gap of several days and the possibility of intervention of some other person cannot be ignored.

7. Learned counsel appearing for the appellants finally contended that the High Court ought to have appreciated the fact that there was no complete chain of circumstantial evidence in the prosecution case and there are various discrepancies inherent in it, hence, the benefit of doubt should be given in favour of the appellants while setting aside the judgment and order passed by the High Court.

8. Per contra, learned counsel appearing on the behalf of Respondent-State submitted that the judgment and order passed by the Division Bench of the High Court upholding the decision of the Sessions Court is as per the terms and dictates of law and should not be inferred with and the evidence against the appellants-accused are sufficient enough to bring home the guilt.

Discussion:-

9. It is the case of the prosecution that the appellants-accused planned to earn quick money by robbing a car and selling the same and for that purpose on 14.2.2008 they went to Yercaud and engaged the taxi of the John Bosco (since deceased) under the guise of sightseeing. John Bosco (since deceased) also took one Madhan (since deceased) on the way. The appellants-accused asked the driver-John Bosco to drop them at Periyar Nagar, Salem at the house of the grandfather of one of the accused. After reaching there, the appellant-accused found that the grandfather was not available. The appellants-accused invited John Bosco into the house for taking liquor and they killed both of them by strangulating their necks with a rope. Accused No. 1 therein took the mobile phone and the Accused No. 3 therein took the Yashika Camera of one John Bosco. Accused No. 2 therein concealed the said van in the house of his grandfather. The number plate of van was changed with a sticker. Thereafter, they wrapped the dead bodies into separate gunny bags and threw the gunny bag containing the dead body of John Bosco into the well of PW-1 and threw away the dead body of Madhan to some other place.

10. The appellants-accused were charged and prosecuted under Sections 302 read with 34, 364, 201 read with Section 379 of the IPC. As in the given case no direct evidence of the incident is available, the prosecution heavily relied upon the circumstantial evidences. To prove the case, the prosecution has examined as much as 27 witnesses and produced different relevant documents.

11. In the FIR, bearing No. 41 of 2008, lodged by PW-8, at Yercaud Police Station, he had specifically mentioned that he bought a mobile phone in the name of some other person and handed over the same to John Bosco. PW-8 is the owner of the vehicle which was being driven by John Bosco at the time of the incident, and also happens to be his maternal uncle.

He further deposed that John Bosco was working as a driver on the said vehicle at that time and on the fateful day i.e., on 14.02.2008, he told him that he is going to drop one of his friends at Salem and left the place at about 11:30 and when he did not return for two days he filed a missing complaint on 16.02.2008. PW-8 also tried to contact John Bosco over the mobile phone but it was switched off. Mr. Asaithambi (PW-26), the investigation officer, stated in his deposition that on 25.02.2008, PW-8 handed over the bill of the said mobile phone to him. During investigation and while tracing the IMEI number of the mobile phone, it was revealed that the said phone was being used by Accused No. 1-Sivasankaran. On 01.03.2008, Accused No. 1 was apprehended by PW-26 and he voluntarily gave a confessional statement which was witnessed by PW-13. Based on his confessional statement, PW-26 found the dead body of Madhan as well as the mobile phone of John Bosco and a rope was also recovered with which they alleged to have murdered the deceased. The dead body was identified by his mother and the same was further proved by skull imposition test. He further informed the whereabouts of other accused persons on the basis of which they were arrested from Yercaud junction. However, he retracted from the given statement in the court.

12. Accused No. 2-Suresh was apprehended by PW-20 at Salem Railway Station based on the information given by Accused No. 1 and on the basis of his information, the recovery of the alleged Omni Van was affected by PW-26. Further, Anbalagan (PW-11), who was a Taxi driver at Yercaud Taxi stand had deposed that the appellants-accused had spoken to John Bosco on 14.02.2008 for hiring a taxi for sightseeing. Thereafter, he noticed that the appellants-accused boarded the vehicle of John Bosco and Madhan also boarded the same vehicle from a short distance. In fact, PW-11 had identified the appellants-accused in the court as the persons who had accompanied John Bosco and Madhan on 14.02.2008.

13. Accused No.-3-Navaneethakrishnan was apprehended by PW-20 from Salem Railway Station based on the information given by Accused No. 1. PW-26 deposed that on the basis of the confession of Accused No. 3, Yashika Camera was recovered. The dead body of John Bosco was recovered from the farm of PW-1 on 17.02.2008 on his information and the same was identified by the mother and father of the deceased and was further proved by skull imposition test. But it is also relevant to mention here that in the present case, the prosecution has no direct evidence to offer. The entire case rests upon the circumstantial evidence as there is no witness directly to speak about the occurrence.

14. In the present case, there is no witness of the occurrence and it is only based on circumstantial evidence. Before moving further, it would be apposite to refer the law regarding reliability of circumstantial evidence to acquit or convict an accused. The law regarding circumstantial evidence was aptly dealt with by this Court in *Padala Veera Reddy vs. State of Andhra Pradesh and Others*<sup>1</sup> wherein this Court has observed as under:-

“10. x x x x

(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;

(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 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.”

15. The prosecution placed reliance before the Court mainly on three circumstances, firstly, the last seen theory, secondly, the recovery of material objects which belonged to both the deceased from the appellants-accused and thirdly, the identification of the dead body of Madhan from the river bed as pointed out by the first accused, however, the appellant herein has raised certain doubts regarding the same.

16. The pivotal evidence in the given case is the testimony of PW-11 who is believed to have lastly seen the appellants-accused with the deceased. Learned counsel appearing for the appellants-accused has contended that all the accused were unknown to PW-11 but no identification parade was conducted and the said witness has identified the said accused directly in court after a lapse of about 50 days’ and hence his evidence should not be relied upon.

17. It is a settled proposition of law that the identification parade of the accused before the court of law is not the only main and substantive piece of evidence, but it is only a corroborative piece of evidence. Regarding this, reliance can be safely placed on *Rafikul Alam & Others vs. The State of West Bengal*<sup>2</sup> wherein it was held as under:-

“32 It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades do not constitute substantive evidence. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting upon corroboration”

18. PW-11 was able to identify all the three accused in the Court itself by recapitulating his memory as those persons who came at the time when he was washing his car along with John Bosco and further that he had last seen all of them sitting in the Omni van on that day and his testimony to that effect remains intact even during the cross examination in the light of the

fact that the said witness has no enmity whatsoever against the appellants herein and he is an independent witness. Once the testimony of PW-11 is established and inspires full confidence, it is well established that it is the accused who were last seen with the deceased specially in the circumstances when there is nothing on record to show that they parted from the accused and since then no activity of the deceased can be traced and their dead bodies were recovered later on. It is a settled legal position that the law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused to prove that they had departed. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone can't discharge the burden of establishing the guilt of accused beyond reasonable doubt and requires corroboration.

19. Learned counsel for the appellants-accused contended that the statements given by the appellants-accused are previous statements made before the police and cannot be therefore relied upon by both the appellant-accused as well as the prosecution. In this view of the matter, it is pertinent to mention here the following decision of this Court in *Selvi and Others vs. State of Karnataka*<sup>3</sup> wherein it was held as under:-

“133. We have already referred to the language of Section 161 CrPC which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the “theory of confirmation by subsequent facts” i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which “furnish a link in the chain of evidence” needed for a successful prosecution. This provision reads as follows:

“27. How much of information received from accused may be proved.—Provided that, when any fact is proved to be discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

134. This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of Miranda warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).”

20. In this view, the information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible under Section 27 of the Evidence Act, 1872. Further, in *Selvi* (supra), this Court held as under:-

“264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872.”

21. In *Madhu vs. State of Kerala*<sup>4</sup>, this Court while discussing the mandate of Section 27 of the Evidence Act held as under:-

“49. As an exception, Section 27 of the Evidence Act provides that a confessional statement made to a police officer or while an accused is in police custody, can be proved against him, if the same leads to the discovery of an unknown fact. The rationale of Sections 25 and 26 of the Evidence Act is, that police may procure a confession by coercion or threat. The exception postulated under Section 27 of the Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance under the exception postulated by Section 27 aforesaid, is limited “... as relates distinctly to the fact thereby discovered..”. The rationale behind Section 27 of the Evidence Act is, that the facts in question would have remained unknown but for the disclosure of the same by the accused. The discovery of facts itself, therefore, substantiates the truth of the confessional statement. And since it is truth that a court must endeavour to search, Section 27 aforesaid has been incorporated as an exception to the mandate contained in Sections 25 and 26 of the Evidence Act.”

22. Section 27 of the Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance is limited as relates distinctly to the fact thereby discovered. In the case at hand, the Yashika Camera which was recovered at the instance of Accused No. 3 was not identified by the father as well as the mother of the deceased. In fact, the prosecution is unable to prove that the said camera actually belongs to the deceased-John Bosco. Though the mobile phone is recovered from A-1, but there is no evidence on record establishing the fact that the cell phone belongs to the deceased-John Bosco or to PW-8 as the same was not purchased in their name. Further, the prosecution failed to examine the person on whose name the cell phone was purchased to show that it

originally belongs to PW-8 to prove the theory of PW-8 that he had purchased and given it to the deceased John-Bosco. Further, the material objects, viz., Nokia phone and Motor Bike do not have any bearing on the case itself. The Nokia phone was recovered from Accused No. 1 and it is not the case that it was used for the commission of crime and similarly the motor cycle so recovered was of the father of Accused No. 3 and no evidence has been adduced or produced by the prosecution as to how these objects have a bearing on the case. In fact, none of the witnesses have identified the camera or stated the belongings of John Bosco. The said statements are inadmissible in spite of the mandate contained in Section 27 for the simple reason that it cannot be stated to have resulted in the discovery of some new fact. The material objects which the police is claimed to have recovered from the accused may well have been planted by the police. Hence, in the absence of any connecting link between the crime and the things recovered, their recovery on the behest of accused will not have any material bearing on the facts of the case.

23. The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove.

Conclusion :-

24. In view of the foregoing discussion, we are of the considered opinion that both the courts below have erred in relying that part of the statement which can be termed as confession which were given to the police officer while they were in custody and it will be hit by Section 26 of the Indian Evidence Act, 1872 and only that part of the statement which led to the discovery of various materials would be permissible. Hence, in the absence of any other material evidence against the appellants-accused, they cannot be convicted solely on the basis of evidence of last seen together with the deceased.

25. In the light of the above discussion, the judgment and order dated 23.11.2009 passed by the High Court is set aside. The appeals are allowed. The appellants who are in custody shall be set at liberty forthwith, if they are not required in any other criminal case.

Judgment Referred.

<sup>1</sup>(1989) Supp. 2 SCC 0706

<sup>2</sup>(2008) CrL. L.J. 2005

<sup>3</sup>(2010) 7 SCC 0263

<sup>4</sup>(2012) 2 SCC 0399