R

IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

DATED THIS THE 16TH DAY OF OCTOBER, 2020

PRESENT

THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV

AND

THE HON'BLE MR JUSTICE P.KRISHNA BHAT

CRIMINAL APPEAL NO.200020/2015

BETWEEN:

1. Yankappa

... **Appellants**

(By Sri R. S. Lagali, Advocate)

AND:

The State of Karnataka
Represented by the Public Prosecutor
High Court of Karnataka
At: Gulbarga Bench

... **Respondent**

(By Sri Prakash Yeli,Addl. SPP)

This Criminal Appeal is filed under Section 374(2) of Cr.P.C. praying to call for the records in S.C.No.191/2013 on the file of II Addl. Sessions Judge Bijapur and examined the legality, propriety of the proceedings of the impugned judgment, after hearing the prosecution and appellants kindly set aside the judgment of conviction and sentence dated 31.12.2014 in S.C.No.191/2013 and set the appellants in the interest of justice and equity.

This appeal having been heard, reserved for judgment on 05.10.2020 and coming on for pronouncement of judgment this day, ***P.Krishna Bhat J.***, delivered the following:-

JUDGMENT

Moral conviction bondering on strong suspicion is not an option with the Courts and cases should be proved beyond reasonable doubt is a salutary warning given by the Hon'ble Supreme Court of India in ***Mousam Singha Roy and Others vs. State of W.B. – (2003) 12 SCC 377*** and it is apt to refer to the following observation:

> "27. *Before we conclude, we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular, by the fact that a heinous crime like this goes unpunished, but then*

the law does not permit the courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in a criminal trial never shifts, and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence. ....."

2. The appellants are brothers and they along with their parents were charge sheeted for the offences punishable under Sections 323, 498-A, 302, 506 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC') and they took their trial before the learned Second Additional Sessions Judge at Vijayapur.

3. The allegation against the present appellants and their parents was to the effect that deceased Laxmi was the wife of appellant No.1 and appellant No.2 being the younger brother of appellant No.1 and their parents who were co-accused with them before the Trial Court were residing together in Honawad village within the limits of Tikota police station of Vijayapur district. The

present appellants and their parents were constantly humiliating deceased Laxmi stating that she was not good looking and she was not knowing to do household chores and, in sum, they were mentally and physically harassing her. On 02.07.2013 at about 4.00 p.m. the appellants and their parents quarreled with the deceased and when she was weeping, appellant No.1 directed her to go and cook and when she did not stir from the place, appellant No.1 hit her on her back. Further, appellant No.2 started abusing her and went to hit her and when PW.3 intervened, he was felled to the ground and at that time the parents of the appellants who were accused before the Trial Court threatened him by showing stones. In the mean while, the present appellants went on hitting the deceased and dragged her and threw her into a well which was in the land being cultivated by them. Further allegation is that they had threatened PW.3 from disclosing this fact to anybody.

4. The trial was duly held before the learned Second Additional Sessions Judge at Vijayapur and on conclusion of the same, by the impugned judgment dated 31.12.2014 in S.C.No.191/2013, the present appellants were convicted for the offences punishable under Sections 302, 498-A read with Section 34 of IPC and their parents were acquitted. The present appeal is against the said judgment of conviction and sentence against the appellants herein.

5. After hearing the learned counsel for the appellants and the learned Additional SPP, we are wholly convinced that this is a fit case for acquittal of present appellants by allowing the appeal.

6. The main witnesses examined in support of the case of the prosecution are PW.1 to PW.5. PW.1 – Bharamakka and PW.2 – Jatteppa are the parents of deceased Laxmi. PW.3 – Kareppa is the son-in-law of PW.1 and PW.2 and husband of PW.4 - Jayashri. PW.5

is a neighbour of the accused. The prosecution has also examined other material witnesses like, PW.8 - Medical Officer who conducted autopsy on the dead body of the deceased, PW.7 – H.K.Nanavati, the Taluka Executive Magistrate who held inquest over the dead body of the deceased and other two witnesses being PW.9 and PW.10, the PSI who registered the case and CPI who held the investigation and filed charge sheet in this case.

7. PW.1 to PW.5 have completely turned hostile to the case of the prosecution. They have not supported the case of the prosecution in its essential features namely, that, the accused were treating the deceased with cruelty and further that on 02.07.2013 at about 4.00 p.m. the appellants herein had assaulted her, abused her and thereafter dragged her to a nearby well and thrown her into the same intentionally causing her death.

8. Closer examination of evidence of PW.8 - Medical Officer who conducted the postmortem examination shows that even he was not very certain about the death of the deceased being due to homicidal assaults. He had noticed the following external injuries on the dead body:

> *"1. Laceration over the occipital region irregular in shape measuring 6cm x 3cm x 2cm x skull cavity deep.*
>
> *2. Contusion behind the right ear measuring 2cm x 1½cm.*
>
> *3. Grazed abrasion over right forearm measuring 4cm x 3cm.*
>
> *4. Grazed abrasion over right shoulder extending upto right forearm measuring 9.5cm x 5 cm.*
>
> *5. Grazed abrasion over right thigh measuring 4cm x 3cm.*
>
> *6. Contused abrasion over right leg measuring 4cm x 5cm.*

7. Cut laceration over the right ankle measuring 9cm x 3cm x bone deep."

9. The postmortem examination was conducted in Al-ameen Medical College, Vijayapur. The inquest panchanama Ex.P3 was held by the Taluka Executive Magistrate (PW.7) in the mortuary of Al-ameen Medical College, Vijayapur. PW.8 has stated that cause of death was due to hemorrhagic shock as a result of injuries sustained to the head. It is the consistent case of the prosecution that dead body was found on the pit of an open well which was about 60 feet deep. As already noticed, no witnesses have supported the case of prosecution and the medical evidence also does not conclusively point to the death of the deceased having been caused only due to homicidal assaults.

10. One feature of evidence of PW.8 calls for special remark. Even though he has held the autopsy on the dead body of the deceased in Al-ameen Medical College, Vijayapur, he states that he had visited the

scene of occurrence and he had observed the depth of the well and even he had noticed that the well was covered with shrubs and herbs - this keenness of observation of this medical witness on the inside features of the well which is not his field of domain expertise has escaped the trained eye of the investigating officer and the panchas who had participated in the panchanama held inside the well as per Ex.P5. This remark becomes relevant on account of another unique feature of this case which is not of everyday occurrence namely, PW.10 the CPI hailing from the native place of the accused namely, Aratal village. This, we may notice, had led the learned Sessions Judge to make a caustic observation that:

> "these witnesses have been systematically won-over by defence to depose in such a way contrary to the prosecution case and given clean chit to the accused, but unfortunately in their one point program of suppressing the prosecution case, at the instance of accused, they have not stick up to one version, thereby though they have been treated as

> hostile, they could not hid some of the true facts which are not only come to the fore, which is not noticed by the defence and the defence did not feel it necessary to cross-examine these witnesses".

We feel constrained to observe that on the extant evidence it is impossible to conclude which of the parties had this "one point program" regard being had to the evidential lacuna on the aspect of death being solely due to homicidal assaults.

11. Then, we come to the next question as to why the learned Sessions Judge has entered a finding of guilt against the appellants for such heinous offences as under Sections 302, 498-A read with Section 34 of IPC?

12. Reading of the impugned judgment shows that learned Sessions Judge was swayed by the fact that a woman who was heavily pregnant had to meet a tragic end for no discernible reason and due to the same, subconsciously, perhaps on account of ghastly nature of the death, permitted himself to be provoked to

connect, what appeared to his mind, the several links in the chain of evidence, albeit, non-existent ones resulting in his getting an impression that case was proved beyond reasonable doubt.

13. It is necessary to recall to our mind the prophetic observation of Hon'ble Mr. Justice *Vivian Bose* in the case of ***Kashmira vs. State of Madhya Pradesh – AIR 1952 SC 159*** as follows:

> *"2. The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law."*

14. Unless a judge trying a heinous offence does not administer a caution to himself, especially, when his moral sense of justice is seriously disturbed, he is likely to fall into an error inducing in him "an instinctive

reaction against a dispassionate judicial scrutiny of the facts and law".

15. *Baron Alderson* in his address to the jury in Reg. vs. Hodge entered a warning as follows:

> *"10. The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." (Vide* ***Hanumant, Son of Govind Nargundkar vs. State of Madhya Pradesh (AIR 1952 SC 1952 – para 10)***

16. A judge is required to be dispassionate. It may be a tall order; nevertheless, it is, and, should be his first creed. It is difficult to remain uninfluenced by impressions, passions, inclinations, predilections, tides, currents, events and even what is commonly regarded

as "personal baggages" to which human mind is a normal habitat. The percipient and sage observation of *B.N.Cardozo* captures the essence of this problem. Says he:

> *"I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. ..... There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. ..... None the less, if there is anything of reality in my*

analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by. We like to figure to ourselves the processes of justice as coldly objective and impersonal. The law, conceived of as a real existence, dwelling apart and alone, speaks, through the voices of priests and ministers, the words which they have no choice except to utter. That is an ideal of objective truth toward which every system of jurisprudence tends. It is an ideal of which great publicists and judges have spoken as of something possible to attain. "The judges of the nation," says Montesquieu, "are only the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its rigor."[28] *So Marshall, in* Osborne v. Bank of the United States, *9 Wheat. 738, 866: The judicial department "has no will in any case....Judicial power is never exercised for the purpose of giving*

effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law."

(The Nature of the Judicial Process: Benjamin N. Cardozo (Author): Ninth Indian Reprint 2011: Universal Law Publishing Co. Pvt. Ltd.)

17. A judge has no 'will' of his own. In the calling of a judge his only 'will' is, only 'choice' he has is – if that can be called one – to give force to the 'cumulative effect' of the evidence placed before him taking inspiration from the statutes applicable and settled precedents.

18. With due deference to the learned Sessions Judge, we feel it necessary to observe that he has precisely lapsed into the mental mould Baron Alderson so felicitously warned the learned brethren of the judiciary to guard against.

19. We might just as well notice the circumstances which according to the learned Sessions Judge had made up the entire chain of circumstances unerringly pointing to the fact that it was the appellants who had committed the murder of the deceased and none else.

20. First circumstance according to Sessions Judge is deceased Laxmi was married to appellant No.1 about three years prior to her death and during the said short period only, she had died in her husband's house and the appellants did not offer any explanation for the same under Section 313 of Cr.P.C. We may immediately notice that learned Sessions Judge has assumed that the death had taken place in the matrimonial house. The specific case of the prosecution is that the death had taken place in a well outside the house. The second circumstance which finds repeated mention in the body of the impugned judgment is that Laxmi had died in mysterious circumstances having suffered seven

external injuries and all these injuries were on the right side of the body. On this, we have to observe that the cause of death has to be explained by the prosecution like any other circumstance in the case and the burden of proving the same cannot be shifted to the accused especially when the death was not inside the house. The third circumstance which weighed with the learned Sessions Judge was that the injuries on the deceased were all found on the right side of the body and from the same, he has jumped to the conclusion that it could not have been due to accidentally slipping into the well in which event, according to the further reasoning of the learned Sessions Judge, the body would have certainly hurtled down revolving. According to further reasoning on this aspect by the learned Sessions Judge, the deceased was made to slide down in such a way that only right portion has come into contact of surface of hard soil and finally "hold of the body" at the other end appears to have "loosened" and virtually the head

portion has come into contact of hard surface inside the well resulting in comminuted fracture of skull. For arriving at such a convoluted reasoning, the learned Sessions Judge has drawn inspiration from the evidence of PW.8 who had sharply observed the shrubs and herbs on the interiors of the well. Unfortunately, as already noticed, this feature of the inner side of the well has escaped the trained pair of eyes of PW.10 – CPI. Suffice it to say that this reasoning of the learned Sessions Judge cannot bear any legal scrutiny at all.

21. Learned Sessions Judge makes a significant observation to the effect that except the evidence of official witnesses, there is no legal evidence to substantiate the alleged ill-treatment as projected by the prosecution. However, he has made much of the fact that the "Simanth function" held at the house of the parents of the deceased was not disputed by the defence.

22. The prosecution witnesses had stated that deceased was suffering from stomach pain and due to the same she had died. This has raised the ire of the learned Sessions Judge. He holds it against the appellants on the ground that they were not able to prove the same by producing any documentary evidence. He further held it against the appellants that if the deceased had any mental ailment or she had shown any suicidal tendency and without their knowledge Laxmi had jumped into the well and committed suicide, they should have taken specific defence on the said count. The said part of the reasoning of the learned Sessions Judge is arbitrary to say the least. The Court cannot imagine a cause for the death of the deceased and, thereafter, for failure of taking such imaginary cause as a defence, adverse inference against the accused cannot be drawn.

23. Learned Sessions Judge also held it against the accused that no suggestions were put to PW.7 the

Taluk Executive Magistrate and PW.8 the Medical Officer who conducted autopsy and also PW.10 the CPI. Thereafter, he has concluded that there is no reason for the Taluk Executive Magistrate PW.7 to create any statement of the witnesses as he had nothing against the accused. We notice that the witnesses whose statements PW.7 had recorded had completely turned hostile. It is trite to say that the statements recorded by the Taluka Executive Magistrate while holding inquest panchanama cannot be raised to the pedestal of a deposition before the Court. In other words if the witnesses whose statements PW.7 had recorded did not support the same during the trial, the same cannot be legitimised to the status of the evidence before the Court on the sole ground that it was recorded by a Taluka Executive Magistrate and he had nothing against the accused and thereafter use the same to draw adverse inference against accused some way or the other. Needless to say, there is no discharge of burden of proof

by omission, even by prosecution, where the cases under trial are for extremely heinous offences. It has been repeatedly held by superior Courts that 'fouler the crime, higher the proof' ***[Sharad Birdhichand vs. State of Maharashtra – 1984 (4) SCC 116*** – paragraph No.180].

24. Learned Sessions Judge has come to the conclusion that appellants were absconding till they were arrested on 10.07.2013. According to him -

> "absolutely no explanation is offered in 313 statement, more particularly, by accused No.1 and 2, as definitely the cause of death is within their knowledge and they have tried to hid it by keeping themselves away from the house. Their conduct in absconding themselves from the scene of occurrence speaks volume about their misdeed in committing murder of this Laxmi, that too, when she was in helpless condition and carrying 7 months pregnancy."

25. For one thing, there is absolutely no evidence to support the said conclusion that the cause

of death of the deceased was within the knowledge of the appellants. For another, the prosecution has completely failed to prove that the appellants were absconding. The only material we find in the entire evidence of the prosecution is that deceased had died on 02.07.2013 and the appellants were arrested near Tikota cross on 10.07.2013. Neither PW.9 and nor PW.10 had said that the appellants were not available at their normal place of residence during the entire period or that in spite of making hectic efforts by the police they could not be traced till 10.07.2013, when they chose to arrest them. The material on record shows that it was entirely possible that since by 10.07.2013 the investigating officer had recorded the statements of all material witnesses, he decided to arrest the appellants only on that day and accordingly he took them into custody. This conclusion of the learned Sessions Judge is a classic instance of what *Baron Alderson* had observed:

> *"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole".*

26. The next question is even if we are to assume for a moment that appellants were absconding, can the Court, merely on account of such abscondence, draw an adverse inference against them? Answer is a resounding no. Says Hon'ble Supreme Court of India in ***(2011) 11 SCC 754 (SK. YUSUF VS. STATE OF WEST BENGAL)***:

> *"31. Both the Courts below have considered the circumstance of abscondence of the appellant as a circumstance on the basis of which an adverse inference could be drawn against him. It is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. It is quite possible that he may be running away*

merely on being suspected, out of fear of police arrest and harassment. (vide Matru vs. State of U.P., Paramjeet Singh vs. State of Uttarakand and Dara Singh vs. Republic of India) Thus, in view of the law referred to hereinabove, mere abscondence of the appellant cannot be taken as a circumstance which gives rise to draw an adverse inference against him."

27. We cannot also fail to notice another glaring observation of the learned Sessions Judge which wholly lacks any evidential basis. The said observation is as follows:.

"The reason for ill-treatment may be silly one, but that itself is made much by accused Nos.1 and 2, more particularly, on the date of incident, who have gone to such a level to take the life of deceased without showing any mercy for the fact that she was carrying pregnancy of 7 months with a hope of getting a child to the family of accused. It is not that life of one lady has been taken away, but the life yet to come on the earth is also taken away by these accused Nos.1 and 2."

28. Yet another circumstance which weighed with the learned Sessions Judge – which according to us is evidentially non-existing – was as follows:

> *"If really accused No.1 and 2 were not culprits and had any love and affection towards deceased Laxmi, they would have made hue and cry and run pillar to post to save the life of Laxmi either by themselves getting into the well to lift her or sought the help of villagers of Honawad which is admittedly at the distance of ½ km from the scene of occurrence."*

29. There is no witness who has spoken about the physical presence of the appellants either in the house or near the well at the time when the unfortunate death of the deceased took place. We need say no more on the conclusion of the learned Sessions Judge on this circumstance.

30. We also need to observe that learned Sessions Judge made another grievous error by drawing an adverse inference against the accused only on

account of the fact that PW.2 and PW.4 had, according to him, deposed falsehood regarding the incident (paragraph No.17 of the impugned judgment). Learned Sessions Judge has further concluded that PW.1 to PW.4 were made to depose falsehood for some extraneous reason either due to threat perception or due to "may be" for gratification which again is not supported by any legal evidence and thereupon he had persuaded himself to hold that the appellants were guilty of the offences alleged against them.

31. To sum up, the material witnesses have completely turned hostile. Prosecution entirely rests its case on circumstantial evidence. Trial Courts should always bear in mind the correct principles of law while deciding whether the evidence placed before it passes muster on the touchstone of proof beyond reasonable doubt. The principles of law on this aspect is precisely stated in ***(1991) 3 SCC 27 – Jaharlal Das vs. State of Orissa*** as follows:

"8. As already mentioned this case rests purely on circumstantial evidence. It is well-settled that the circumstantial evidence in order to sustain the conviction must satisfy three conditions:

1) 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.

In the leading case Hanumant and Another v. The State of Madhya Pradesh, [1952] SCR 1090 it is also cautioned thus:

"In dealing with circumstantial evidence there is always the danger that conjecture or suspicion may take the place of legal proof. It is

therefore right 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 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."

32. On a re-appreciation of the evidence on record, we are satisfied that there is nothing to support the conclusion arrived at by the learned Sessions Judge and he has entirely acted on hunches, instincts and conjectures which is impermissible in law. Therefore, the impugned judgment dated 31.12.2014 convicting the appellants for the offences punishable under

Sections 302, 498-A read with Section 34 of IPC is liable to be set aside. Hence, the following:

ORDER

The above appeal is allowed. The judgment of conviction passed by learned Second Additional Sessions Judge in S.C.No.191/2013 dated 31.12.2014 is set aside. The appellants are acquitted of the offences punishable under Sections 302, 498-A read with Section 34 of IPC. They shall be set at liberty forthwith unless their presence is required for the purpose of any other case.

Sd/-
JUDGE

Sd/-
JUDGE

Srt