
(2011) 01 AP CK 0041
In the Andhra Pradesh High Court
Case No : Criminal Appeal No. 933 of 2007

Gellela Thirupalu

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 18-01-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2)
Evidence Act, 1872 — Section 24
Penal Code, 1860 (IPC) — Section 302

Citation : (2011) 1 ALD(Cri) 659 : (2011) 2 Crimes 418

Hon'ble Judges : N.R.L. Nageswara, J; K.C. Bhanu, J

Bench : Division Bench

Advocate : P. Veera Reddy, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

K.C. Bhanu, J.—This Criminal Appeal, u/s 374(2) of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C."), is directed against the judgment, dated 11.06.2007, in Sessions Case No. 557 of 2005 on the file of the Sessions Judge, Anantapur, whereunder and whereby, the Appellant/sole accused was found guilty of the offence punishable u/s 302 of the Indian Penal Code, 1860 (for short, "I.P.C.") and accordingly, convicted and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 1,000/-.

2. The brief facts that are necessary for disposal of the prosecution case may be stated as follows:

The deceased, Gellela Durgaiah, was an Auto Driver by profession and he was residing in Sundaraiah Colony, Anantapur Rural Mandal. The accused and PW 4 were also Auto Drivers. On 14.11.2004 at about 5:30 PM, the accused and PW. 4 went to witness a movie by name "Apparao Driving School" in Triveni theatre at Anantapur. At 9:30 PM, after witnessing the movie, they both went to a Wine shop situated near Bellari by-pass road, Anantapur and consumed liquor. After

consuming the liquor, they came to Gangamma Temple at 5th road in the auto of PW. 4 and from there, they went to Bellari by-pass road at about 09:45 PM. They again went to the Power Wine shop and consumed liquor. Thereafter, when they were going in Auto of PW. 4, the deceased came there and the accused asked PW. 4 to go to his house, and thereafter, the deceased and accused went in the auto of PW. 4, which was seen by PW. 4. On the next day morning, PW. 1, who is the junior paternal uncle of the deceased, came to know that a dead body was lying on National Highway No. 7 near Ayyavaripalli cross road at Anantapur. He along with PW. 2, who is his brother, went there and saw the dead body and identified the same as that of the deceased. Later, PW. 1 lodged a complaint with PW. 11 - Sub-Inspector of Police, Rapthadu, who registered a case in Crime No. 85 of 2004 for the offence punishable u/s 302 I.P.C. He sent the original First Information Report to the Court and copies of the express First Information Report to all the concerned. He informed about the registration of case to PW. 12 - Inspector of Police, who rushed to the Rapthadu Police Station and took up investigation. Thereafter, PW. 12 proceeded to the scene of occurrence and found Police Constables guarding the scene of occurrence. He also found Auto bearing No. AP-02 U 0063, which was parked towards Western side of the National Highway No. 7. He found the dead body of the deceased in a sitting posture in between the driver's seat and back seat. He conducted inquest on the dead body of the deceased under Ex. P6 and seized the incriminating material objects from the scene of occurrence. He sent the dead body of the deceased to post-mortem examination. PW. 7 is the doctor who conducted Autopsy on the dead body of the deceased on 15.11.2004 from 03:15 PM to 4:45 PM and found ligature mark of 41 x 1 cm, encircling around the neck. On 24.11.2004, the accused went to the office of Mandal Revenue Office, Rapthadu, and gave extra judicial confession about the incident before PWs. 9 and 10 - Deputy Mandal Revenue Officer and Mandal Revenue Officer respectively, of Rapthadu Mandal. To the narration of the accused, the Assistant of PW. 10 scribed Ex. P 7 - confessional statement of the accused. Along with Ex. P. 7, he prepared a covering letter, Ex. P. 8, and handed over them along with the accused to the Station House Officer, Rapthadu Police Station, which is located by the side of the office of PW-10. Then the Inspector of Police, PW-12, arrested the accused and sent him to the Court for remand. The material objects were sent to the Forensic Science Laboratory. After receipt of relevant documents and completion of investigation, police filed charge sheet.

3. The trial Court framed the following charge against the accused:

That you the accused on the 14th day of NOVEMBER, 2004 at mid night near Ayyavaripalli cross, did commit murder of G. Durgaiah, S/o. Late Kondaiah, aged 30 Yrs, auto driver of Sundaraiah Colony, Anantapur Rural Mandal, intentionally and knowingly causing the death of the said G. Durgaiah, S/o. Late Kondaiah, by strangulating him with a rope, in the auto and that you thereby committed an offence punishable u/s 302 of Indian Penal Code and within my cognizance.

When the above charge was read over and explained to the accused in Telugu,

he pleaded not guilty and claimed to be tried.

4. To substantiate the charge, the prosecution examined PWs. 1 to 12 and got marked Exs.P. 1 to P10 besides case properties M. Os.1 to 10.

5. After closure of the prosecution evidence, the accused was examined u/s 313 Code of Criminal Procedure with reference to the incriminating circumstances appearing against him in the evidence of prosecution witnesses. He denied the same and no evidence either oral or documentary was adduced on his behalf.

6. The trial Court, placing reliance on the evidence of PWs. 9 and 10 coupled with the recitals in Ex. P 7, extra judicial confession said to have been given by the accused to PW. 10, found the accused guilty of the offence punishable u/s 302 I.P.C. and accordingly, convicted and sentenced him as stated above. Challenging the same, the present Criminal Appeal is filed.

7. Now the point for determination is whether the prosecution proved its case against the accused for the offence punishable u/s 302 I.P.C beyond all reasonable doubt and whether the judgment of the trial Court is correct, legal and proper?

8. Learned Counsel appearing for the Appellant contended that except the evidence of P Ws.9 and 10, the Deputy Mandal Revenue Officer and the Mandal Revenue Officer respectively, of Rapthadu Mandal, who deposed about the extra-judicial confession i.e., Ex. P. 7, there is no other evidence to show that the accused is the assailant of the deceased; that the accused is residing in Anantapur town and if really, the accused has committed the offence as alleged, he would have gone to any one of the Officials of various Government Officers in Anantapur Town, but he went all the way to the office of PW. 10 to give a statement; that any number of suspicious circumstances exist in recording Ex. P 7 statement; that even as per the evidence of PWs. 9 and 10, Ex.P.7 was not actually scribed to the narration of the accused; that the office of PW. 10 and Police Station are located side by side and in view of such fact, fabrication of Ex. P7 at the instance of police cannot be ruled out; there is no immediate impetus for the accused to give confessional statement to PW. 10; that Ex. P7 was fabricated and pressed into service at the instance of police and in view of those suspicious circumstances, it is not safe to place an implicit reliance on Ex.P.7, so as to base a conviction; and therefore, he prays to set aside the impugned judgment.

9. On the other hand, learned Counsel representing the learned Public Prosecutor contended that there is absolutely no reason for PWs. 9 and 10 to speak false against the accused; that unless the accused gave the statement as in Ex.P.7, it would not be possible for PWs. 9 and 10 to scribe such a lengthy statement as in Ex.P.7; that the trial Court rightly placed implicit reliance on the evidence of PWs. 9 and 10 and also the recitals in Ex.P.7; that the said finding cannot be shown to be improper or incorrect and hence, he prays to dismiss the Criminal Appeal.

10. PW.12 is the Investigating Officer, who conducted inquest on the dead body of the deceased in the presence of PW.8, who is the Village Secretary of Rappthadu Village, under Ex.P6 - Inquest Report. The opinion, as to the cause of death of the deceased, is incorporated in Ex.P6, which is as a result of throttling.

11. PW.7 is the doctor, who conducted Autopsy on the dead body of the deceased on 15.11.2004 from 03:15 PM to 4:45 PM and found the following injuries:

A pressure abrasion ligature mark of 41 x 1 cm. present encircling around the neck 6 cm. below the chin at the level of thyroid cartilage transversely up to the nape of neck. The margins of the ligature mark are abraded and contused.

The base of the ligature mark is brown, hard and parchment like. On reflection of skin over the neck the underlying soft tissues and the muscles under the ligature mark are ecchymosed. The hyoid bone, thyroid, cricoids laryngeal cartilages and tracheal rings are intact. Patchily hemorrhages are present over esophagus and vocal cords. Approximate time of death about 12 hours prior to P.M. examination.

He issued Ex.P5 - Post-mortem Certificate. The doctor opined that the deceased died due to asphyxia as a result of ligature strangulation. Nothing has been elicited to discredit the testimony of PW.7 and the recitals in Ex.P5. Therefore, the homicidal nature of death of the deceased is established beyond all reasonable doubt.

12. The entire case rests upon the circumstantial evidence, as there is no direct evidence to show that the accused is the assailant of the deceased. When a case rests upon circumstantial evidence, the law is well settled that the following ingredients are to be satisfied as laid down in the decision of the Honourable Supreme Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, wherein it is held thus:

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, 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.

Bearing the above relevant principles in mind, it has to be seen whether the accused is the assailant of the deceased.

13. PWs. 1 and 2 are the junior paternal uncles of the deceased and admittedly they were not present at the time of incident. They did not speak about any incriminating circumstances against the accused. Their evidence is almost formal in nature. They went to the scene of occurrence and identified the dead body as that of the deceased. Their evidence is not at all relevant to the facts in issue.

14. PW.3 was examined to speak that the deceased was last seen in the company of the accused, but he did not support the case of the prosecution. Even after cross-examination by the learned Public Prosecutor in the trial court, nothing has been elicited to connect the accused with the crime. His evidence would go to show that he returned to his house in the Auto of the deceased. The presence of the accused with the deceased is not spoken to by this witness.

15. PW.4 is examined to speak about his presence along with the deceased and the accused at about 9:30 PM on the date of incident. He stated that he along with the accused went to Triveni theatre at about 5:30 PM to witness a movie by name "Apparao Driving School"; that after witnessing the movie, at about 9:30 PM, they went to Power Wine shop and consumed liquor; that thereafter, while they were going in his Auto, the deceased came there and then the accused asked him to go away to his house; that the deceased and the accused went in his auto and that on the next day morning, he came to know about the incident. But in the cross-examination, he admits that he alone went to the cinema hall to witness a movie, and that he cannot definitely say that the deceased went in the Auto of the accused and he saw them in an Auto. He admitted that he did not state before the police that the deceased and accused were going in the Auto on the date of incident. Even PW.12 admitted that PW. 4 did not state before him that the accused and deceased boarded in the Auto and traveled together. The evidence of a witness will have to be assessed by its intrinsic worth. The entire evidence of a witness has to be evaluated to ferret out the ring of truth. Innocuous omission is inconsequential. Omission amounting to contradiction that militate against the core of the prosecution is alone material. This part of evidence of PW.4 is clearly an improvement, and considering the fact that it can be said to be a vital omission, it cannot be acted upon. Therefore, no reliance can be placed upon the evidence of PW.4.

16. The other evidence remains on record is the evidence of PWs. 9 and 10 and Ex.P.7, which is the extra-judicial confession. On this aspect, the learned Counsel for the Appellant placed reliance on a decision of the Honourable Supreme Court in *Sakharam Shankar Bansode v. State of Maharastra* AIR 1994 SCC 1594 wherein it is held thus:

It is well-settled now that a retracted extra-judicial confession, though a piece of evidence on which reliance can be placed, but the same has to be corroborated by independent evidence. That apart, the Court must be satisfied that the confession alleged to have been made to PW. 11 was true and voluntary one

The learned Counsel also relied on a decision of the Honourable Supreme Court in *Jagta Vs. State of Haryana*, wherein it is held thus:

So far as the alleged extra judicial confession of the accused is concerned, the prosecution has relied upon the evidence on Ram Singh (PW-4). After having been taken through the evidence of that witness, we find the same to be lacking in credence and devoid of any ring of truth. The police was admittedly present in the office of the co-operative society in village Farmana on the morning of January 15, 1972. We find no reason as to why the accused, instead of surrendering himself before the police, should go to the house of Ram Singh in village Farmana, blurt out a confession before him and ask him to produce the accused before the police. Nothing has been shown to us as to why the accused could not himself go and appear before the police. We have mentioned above that an attempt has been made in this case to introduce the story of the recovery of ornaments belonging to Phul Pati deceased from the accused. The attempt of the investigating agency to introduce a false story about the removal of the ornaments of the deceased and their recovery from the accused would in our opinion, also affect the credibility of the evidence regarding the extra judicial confession alleged to have been made to Ram Singh PW. The evidence about an extra judicial confession is in the nature of things a weak piece of evidence. If the same is lacking in probability as it is in the present case, there would be no difficulty in rejecting the same. We are, therefore, not prepared to place any reliance upon the evidence regarding the extra judicial confession of the accused.

The learned Counsel also relied upon a decision of the Honourable Supreme Court in *Makhan Singh Vs. State of Punjab*, wherein it is held thus:

On 10 August, 1985 FIR was lodged by Nihal Singh (PW-2) and on 13-8-85 the Appellant went to Amrik Singh (PW-3) to make an extra judicial confession. Amrik Singh says that the Appellant told him that as the Police was after him he had come and confessed the fact so that he might not be unnecessarily harassed. There is nothing to indicate that this Amrik Singh was a person having some influence with the Police or a person of some status to protect the Appellant from harassment. In his cross-examination he admits that he is neither the Lumbardar or Sarpanch nor a person who is frequently visiting the Police Station. He further admits that when he produced the Appellant there was a

crowd of 10 to 12 persons. There is no other corroborative evidence about the extra judicial confession. As rightly conceded by the learned Counsel for the State that extra judicial confession is a very weak piece of evidence and is hardly of any consequence. The counsel however, mainly relied on motive, the evidence of last seen, the evidence of recovery of dead bodies and the conduct of the Appellant in not making a report about the missing father and son.

17. Extra-judicial confessions are those which are made by the party elsewhere than before a Judicial Magistrate or in a Court; this term embracing not only express confessions of crime, but all those admissions and the acts of the accused from which guilt may be implied. Evidentiary value of it depends on reliability of witness, who gives the evidence. When a witness, who gave evidence about extra-judicial confession, is reliable and the words spoken by him are clear and unambiguous, such evidence can be relied upon. It should be taken as a whole. It must be credible, cogent and believable. On this aspect, it is pertinent to refer to a decision of the Honourable Supreme Court in *Thimma and Thimma Raju Vs. State of Mysore*, wherein it is held thus:

Before us it was contended that the extra-judicial confession said to have been made to P.W.4 is inadmissible and in any event without corroboration in material particulars from independent source it is unsafe to act upon it. It was emphasized that P.W.4 was at one stage of the investigation suspected of complicity in this murder and, therefore, he should be treated no better than an accomplice. In our opinion, this criticism is not justified. An unambiguous confession, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possesses a high probative force because it emanates directly from the person committing the offence. But in the process of proof of an alleged confession the court has to be satisfied that, it is voluntary, it does not appear to be the result of inducement, threat or promise as contemplated by Section 24. Indian Evidence Act and the surrounding circumstances do not indicate that it is inspired by some improper or collateral consideration suggesting that it may not be true. For this purpose, the court must scrutinize all the relevant factors, such as, the person to whom the confession is made, the time and place of making it, the circumstances in which it is made and finally the actual words used.

From the above decisions, it is clear that, extra judicial confession would depend on the nature of the circumstances, the time and place where the confession was made, actual words spoken to by the accused, its voluntary character, and the credibility of the witness who speak to such confession. If the extra-judicial confession is found to be true, voluntary and convincing, it can be acted upon so as to base a conviction, as law does not require that it should be corroborated on material particulars. But, at the same time, it has to be scrutinized carefully and cautiously.

18. Admittedly, PWs. 9 and 10 were working as Deputy Mandal Revenue Officer and Mandal Revenue Officer respectively, of Rappthadu Mandal, which is about

nine kilometers away from the place of residence of the accused. Though PWs. 9 and 10 are official witnesses, at the same time, their evidence has to be evaluated and accepted like that of evidence of any other witness. It is not in dispute before this Court that in Anantapur Town number of various Government officers including the Mandal Revenue Officer, Deputy Mandal Revenue Officer, are readily available. This town is the headquarter of the District. It is in the evidence of PWs. 9 and 10 that they are totally strangers to, and had no prior acquaintance with, the accused so as to repose confidence in them. Therefore, in all probability the accused would not have gone to the office of PW.10, so as to give a statement. The reason as stated in Ex.P.7 and according to the evidence of PWs. 9 and 10, the police were vigorously hunting the accused and apprehending that the police may kill him, he wanted to give a statement to PW.10, so that he could save him from the case. Admittedly, the police station is located by the side of the office of PW.10 and it is not the evidence of PW.12 that he was searching for the whereabouts of the accused. As a matter of fact, when PW.12 conducted inquest, the accused was examined as a witness during the course of inquest. Such is the case, at that point of time, there was no suspicion against the accused with regard to his complicity in the crime and he was a free man and his movements are not controlled by police. Therefore, in such circumstances, it is highly improbable for the accused to rush to the office of PW.10, so as to give a statement as in Ex.P.7. Furthermore, the actual words as narrated by the accused were not being incorporated, because even according to PW.10, the scribe did not write the contents in Ex.P.7 to the actual narration of the accused.

19. According to PW.9, one Senior Assistant, namely, Sreedhar, prepared the extra-judicial confession of the accused on the instructions and dictation of PW.10. He also admitted that they were not having prior acquaintance with the accused and they only knew him on the date of Ex.P.7. He also admitted that he could not say the conversation that took place between the accused and PW.10. According to him, first the Mandal Revenue Officer heard the accused and then dictated the contents to his Senior Assistant for preparation of Ex.P.7 from stage to stage, and that the Mandal Revenue Officer first questioned the accused and after hearing the answer from the accused, he dictated the contents of the answer of the accused to the scribe of Ex.P.7. Ex.P.7 was not in the form of question and answers. It was a continuous statement said to have been prepared at one and the same time.

20. Coming to the evidence of PW.10, he admitted that he knew the accused only on the date of scribing of Ex.P.7; that the relatives of the accused are not known to him; that his office is situated by the side of the Police Station; that during his entire tenure as Mandal Revenue Officer, it is the only document prepared; that there is no certification on Ex.P.7 that the contents in Ex.P.7 were read over and explained to the accused and the accused admitted the same as true and correct.

21. No doubt, PWs. 9 and 10 are disinterested witnesses, but, at the same time, Ex. P. 7 is not shown to be written by the scribe to the narration of the accused

so as to infer that there was a clarity of words spoken to by the accused. The accused in the first instance allegedly narrated the incident to PW. 10 and thereafter, PW. 10 narrated the incident to the scribe to write Ex. P. 7. So, in those circumstances, it cannot be said that it is a true and correct version of the accused. Furthermore, there is no need for the accused to go to the office of PW.10 to give such a lengthy statement, especially when several other Government officers are available in and around the place, where the accused was residing. If really the accused wants to give a confessional statement apprehending that he may be killed by police, he would have gone to any one of Government Officers available in the district headquarters and confessed about his guilt. This creates any amount of doubt with regard to the truthful and correct nature of the statement of the accused. Barring Ex.P.7, there is no other evidence to show that the accused is the assailant of the deceased. In view of these infirmities in Ex.P.7, we are unable to place any implicit reliance on this document, so as to base a conviction on the accused. Therefore, if Ex.P.7 is eschewed from consideration, there is no other evidence to show that the accused is the assailant of the deceased. The true and voluntary nature of Ex.P.7 statement is doubtful in the facts and circumstances of the case. This aspect of the case has not been considered by the trial court in a right perspective. Therefore, the prosecution cannot be said to be proved its case against the accused beyond all reasonable doubt for the charge u/s 302 IPC. Hence, the accused is entitled for acquittal.

22. In the result, the conviction and sentence recorded in Judgment, dated 11.06.2007, in Sessions Case No. 557 of 2005, on the file of the Sessions Judge, Anantapur, against the Appellant/accused for the charge u/s 302 I.P.C., are set aside. The Appellant/accused is found not guilty of the charge u/s 302 I.P.C. and accordingly, he is acquitted of the said charge. The Appellant/accused shall be released forthwith, if he is not required to be detained in any other crime. The fine amount, if any, paid by the Appellant/accused shall be refunded to him.

23. Accordingly, the Criminal Appeal is allowed.