

IN THE HIGH COURT OF KARNATAKA,  
KALABURAGI BENCH

ON THE 14<sup>TH</sup> DAY OF JUNE 2018

PRESENT

THE HON'BLE MR.JUSTICE RAVI MALIMATH

**AND**

THE HON'BLE MR.JUSTICE SREENIVAS HARISH KUMAR

CRIMINAL APPEAL NO.3636/2013 AND  
CRIMINAL REFERENCE CASE NO.200002/2017

**IN CRIMINAL APPEAL NO.3636/2013**

**Between:**

Mohammed Sultan  
S/o Mohammed Jafar Ali,  
Age: about 33 years, Occ: Auto driver,  
R/o Mannaekheli, Dist: Bidar.

...Appellant

(By Sri, Liyaqat Fareed Ustad, Advocate)

**And:**

The State of Karnataka through the Police Mannaekheli,  
Rep. By Public Prosecutor

...Respondent

(By Sri, Prakash Yeli, Addl. SPP)

This Criminal Appeal is filed under Section 374 of the Code of Criminal Procedure, praying to set-aside the judgment and order of Sentence dated 23<sup>rd</sup> day of October 2013 passed by the Principal District & Sessions Judge, at Bidar in SC No.82/2012.

**IN CRIMINAL REFERENCE CASE NO.200002/2017**

**Between:**

The State of Karnataka, through the Police,  
Mannaekhelli, represented by Public Prosecutor Bidar.

...Appellant

(By Sri, Prakash Yeli, Addl. SPP)

**And:**

1. Mohamed Sultan S/o Mohd. Jafar Ali,  
Age: 33 years, Caste: Muslim, Occupation: Auto driver,  
R/o Mannaekhelli.

...Respondent

(By Sri, Liyaqat Fareed Ustad, Advocate)

This Criminal Reference Case is filed under Section 366(1) Cr.P.C, by the Principal District & Sessions Judge, Bidar for confirming the death sentence imposed on accused No.1 by her judgment dated 23.10.2013 in S.C.No.82/2012 for the offence under Section 302 of IPC.

These Criminal Reference Case and Criminal Appeal being heard together and reserved for judgment on 30.05.2018 and

coming on for pronouncement of Judgment this day, Sreenivas Harish Kumar J, delivered the following:

### **JUDGMENT**

The Principal District & Sessions Judge, Bidar, in S.C.No.82/2012, by her judgment dated 23.10.2013, held accused No.1 guilty of offences punishable under Section 302, 394 and 201 IPC while acquitting him of offence punishable under Section 376 IPC; and also acquitted accused No.2 and accused No.3 of the offences punishable under Section 376, 302, 394 and 201 R/w Section 34 IPC. The learned Principal District & Sessions Judge (referred to as Sessions Judge hereafter) sentenced the first accused to death in connection with offence punishable under Section 302 IPC besides imposing fine of Rs.10,000/- with a default sentence of two years and further sentenced him to rigorous imprisonment for 6 years and 3 years respectively for the offences punishable under Section 394 and 201 IPC besides imposing fine of Rs.10,000/- for each of the offences with default sentence of simple

imprisonment for one year each. Having imposed death sentence for the offence under Section 302 IPC, the Sessions Judge submitted the proceedings to this Court under Section 366 of Criminal Procedure Code for confirmation. The first accused has also preferred an appeal challenging the judgment of conviction for the offences as mentioned above.

2. Precisely stated, the prosecution case is as follows:

On 15.08.2011 at about 11.00 AM, when PW.5-Prabhu was standing near B.S.S.K. Office at Mangali village, PW.11 Tajoddin came running towards him and told him of having seen a dead body of a woman near a cenotaph in his agricultural land when he went there for bringing grass. Thereafter Prabhu went to that place with Tajoddin and two others viz, Vaijinath and Jagannath and saw a dead body of an unknown woman aged around 35 to 38 years and whose face had been covered with the saree she was wearing. He suspected murder and made a report

to police who registered an FIR against unknown persons. On 30.08.2011, the first accused was produced before PW.21, Basaveshwar, a Police Inspector, in connection with another crime registered in Crime No.94/2012. It is stated that the first accused gave a confession statement disclosing his involvement in the death of the deceased of this case and also revealed the involvement of accused No.2 and 3. This confession statement led to seizure of some jewellery said to be belonging to the deceased and thus all the three accused stood charge sheeted.

3. The Sessions Judge, for convicting the first accused has mainly relied on the oral testimonies of PW4, PW10 and PW14 and recovery of jewellery based on the confession statement of first accused. The main findings given by the Sessions Judge are as below:

"The case is based on circumstantial evidence. PW.13 who was examined to prove last seen theory has not supported the prosecution. The deceased was an

unknown woman, her identity was not traced and it is immaterial also. In spite of last seen theory being unproved, the recovery of jewellery of the deceased from accused No.1 based on his confession statement is enough to connect him with crime. His failure to explain as to how he could possess the jewellery of the deceased, when he was examined under Section 313 of CrPC, provides a missing link. Further, the recovery is also proved by PW4 and PW14 and there is no reason to disbelieve them. The evidence of PW.7, the doctor establishes that the death was due to strangulation, and MO.5 – a rope seized from the possession of first accused further strengthens the prosecution case. There were series of murders of women mysteriously and the cases were being investigated by one police officer before whom accused made a disclosure by giving a confession statement. It was not just a narration, but it led to recovery for which there is corroborative evidence of PW.4 and PW.14 and the narration made by the first accused before police finds corroboration from PW10. The argument of defence counsel that the

confession of first accused is hit by Section 25 of the Indian Evidence Act is not acceptable, as Ex.P25, a part of confession statement led to discovery of incriminating materials and therefore that portion is admissible according to Section 27 of the Indian Evidence Act. Recovery shows special knowledge of the accused and Doctrine of confirmation as held by the Supreme Court in **Harivadan Babubhai Patel V/s State of Gujarath (2013) 17 SCC 45** can be applied to hold that the circumstances are proved against first accused”.

4. For sentencing the first accused to death punishment, the Sessions Judge has held that rarest of rare case should not be examined only on the footing of overt act attributable to an accused or how the crime is committed, but it should also be examined by taking totality of circumstances in a given case. It is held further that the first accused committed murder of three women within a short span of time without any remorse and he is a danger to entire women folk in the society. The first

accused is a stranger to the deceased; he is an autorikshaw driver also. The fiduciary relationship exists between a driver and a passenger and if such a situation, especially when a woman travels in a autorikshaw, is exploited, it can not be excused. It is held further that the acquittal of first accused in another case is no ground, as in that case he was acquitted not for the reason that he was innocent, but the case was not proved. Therefore a rarest of rare case is made out".

5. The learned Additional State Public Prosecutor argued in support of reference. His submission is that the Sessions Judge has arrived at right conclusions based on testimonies of PW4, PW10, PW14. The hostility of PW13, who was examined to prove last seen theory, has no adverse impact as the other three witnesses, PW.4, 10 and 14 have clearly established the prosecution case with regard to seizure of incriminating materials. The appellant did not give explanation as to how he could possess the jewellery of the deceased; and his conduct of denying the



incriminating materials, goes against him besides providing a missing link. Therefore it was his argument that the Sessions Judge has thoroughly appreciated the evidence to find accused guilty of the offences. He further argued that the conclusion of the Sessions Judge that a rarest of rare case has been made out for imposition of death sentence is well reasoned and therefore death sentence should be confirmed.

6. The learned counsel for the first accused argued that the Sessions Judge has grossly erred in placing reliance on seizure of jewellery from the possession of the accused. Recovery was based on confession statement said to have been given by the first accused; mere seizure of jewellery and some other material objects does not lead to involvement of first accused, there is no proof that the seized jewellery belonged to the deceased. The last seen theory has failed. The Sessions Judge has relied upon entire confession statement which can not be proved against the accused. Prosecution has failed to

establish its case. There is no evidence at all for convicting the accused. It was his further argument that the Sessions Judge has been swayed away by extraneous reasons for holding that a rarest of the rare case has been made out for sentencing the accused to death. Therefore he argued for rejecting the reference under Section 366 Cr.PC, allowing the appeal and acquitting the accused.

7. From the above arguments, the following points do arise for discussion:

- (i) Has the Sessions Judge rightly based conviction relying upon evidence of PW4, PW.10 and PW13?
- (ii) Is the seizure of jewellery and other articles at the instance of accused enough when last seen theory fails, to hold that the circumstances are proved?
- (iii) Is this a rarest of rare case?
- (iv) What order?

**Points (i) and (ii)**

8. These two points can be discussed together. Before that, if the evidence brought on record by the prosecution is perused, it appears apparently that the case rests on circumstantial evidence. The identity of the deceased is not established; it is not always relevant also as has been held by the Sessions Judge. The prosecution seeks to prove its case on two circumstances - (1) Accused seen lastly with the deceased and (2) Seizure of jewellery and other incriminating articles at the instance of the first accused. If the oral evidence of the witnesses is perused, the picture that is obtained is as follows.

9. PW5 is the first informant, Ex.P6 is the complaint made by him. He has stated that PW.11-Tajoddin told him about seeing a dead body in the agricultural land, and coming to know this, he went there with PW.11, PW8 - Vaijinath and PW.9-Jagannath Reddy. They all saw the dead body and he then gave a complaint

to police, as he suspected murder. He also speaks about panchanama conducted by police as per Ex.P5, seizing thereunder a steel box and a bag marked MO.3 and MO.4 respectively. PW.11 – Tajoddin corroborates the testimony of PW.5 to the extent of telling him about seeing dead body and going again with him and Vaijinath and Jagannath to the place where the dead body was lying. PW.8 – Vaijinath and PW.9-Jagannath Reddy also state that they went and saw the dead body, but they do not say that they went to that place with PW.5 and PW.9. What they have stated is that all the villagers were talking about a murder and therefore they went to see the dead body.

10. PW.20 Srikanth testifies the fact of receiving the complaint Ex.P6 from PW.5. PW.21 is the FIR registered by him.

11. The first accused was arrested on 30.10.2011, and this is evidenced by PW.20. Before the arrest of the first accused, PW.21, the police inspector, having taken

over investigation from PW.20, conducted inquest as per Ex.P1. He has deposed that on 16.08.2011, he conducted spot panchanama as Ex.P2 and at that time, he seized some bangle pieces, which belonged to the deceased. These bangle pieces are marked as MO.1. PW1 is examined to establish the inquest panchanama and the spot panchanama besides seizure of bangle pieces. He has supported the prosecution. PW.21 has stated that he seized the clothes of the deceased and also some jewellery found on the dead body. They are MO.7 to MO.12. But the witnesses PW3 and PW6, examined to prove the seizure of these articles by drawing a panchanama as per Ex.P3, have turned hostile. There is another panchanama marked Ex.P4, about which PW.21 speaks. This was in connection with burying the dead body as no body claimed it. PW.3 speaks about Ex.P4.

12. After the arrest of the accused, PW.21 recovered some gold and silver items said to be belonging to the deceased and also a rope said to have been used for

strangulating the deceased. PW.21 has stated that this recovery was pursuant to disclosure made by the first accused while giving confession statement before him. Ex.P25 is the portion of the confession statement. PW4 and PW14 are the independent witnesses to prove this recovery. Though PW4 turned hostile to some extent; he admitted all the suggestions given to him when he was subjected to cross examination by public prosecutor and thereby supported the prosecution case. PW.14, has supported the prosecution case in this regard.

13. PW.12 is examined for the purpose of proving that his elder brother, i.e, the first accused and two other accused took his autoriksha bearing No.KA-39-2193 on the night of 14.08.2011 and thereafter when the police seized the said autoricksha, he got it released. He has not supported the prosecution.

14. PW.13 is an important witness. According to the prosecution, he saw all the accused firstly speaking

with the deceased at about 9 PM on 14.08.2011 when she was alighting from a lorry and then following her in an autoricksha when she got into another lorry to go towards a place called 'Nirna Cross'. Prosecution also sought to establish through this witness that all the accused came to know that the deceased was a free woman (Awara), and they followed her to have sex with her. But PW.13 turned hostile to prosecution and the public prosecutor's efforts to discredit her went in vain.

15. Another important witness is PW.7. He was the doctor who conducted post mortem. Ex.P7 is the post mortem report given by him. He is of the opinion that death was due to strangulation. Ex.P8 is another report given by him and another doctor after seeing the ligature, MO.5. He has stated that ligature mark was antemortem and the ligature shown to him might have been used for strangulating the deceased.

16. PW.10 has deposed that he went to the land of one Gosayi and saw the dead body of a woman. He came to know that some autoricksha driver of Mannaekheli village had committed murder. He identified the accused in the Court and very importantly, he stated he heard accused narrating the manner in which he killed the deceased after raping her.

17. It is not necessary to refer to the oral testimonies of other witness.

18. On reassessment of evidence, it can be said by concurring with the findings of the Sessions Judge that the death of the deceased woman was a clear case of culpable homicide amounting to murder, as in case of strangulation, what is apparently noticeable is intention to cause death falling within the meaning of firstly of S.300 IPC. Having regard to the circumstances such as place and time of death and traces of semen being detected on the clothes of the deceased, it is possible to conclude that it was a



murder. But the question is whether the first accused can be connected with it, that too when the other accused are acquitted by the Trial Court. The Sessions Judge has held that the last seen theory has failed as PW.13 turned hostile. This finding of the Sessions Judge needs to be upheld. If the cross examination of PW.13 is perused, it appears that the public prosecutor did nothing but giving suggestions which were all denied by the witness. The other circumstance that the Sessions Judge has held proved is recovery of MO.5 to MO.10 at the instance of the first accused based on his confession statement. Ex.P25 is that portion of confession statement that led to recovery; and the testimonies of PW4 and PW14 to the extent of recovery in their presence cannot be disbelieved. The finding of the Sessions Judge on this aspect needs to be concurred with, but there are certain other findings which are not convincing. The Sessions Judge holds that confession statement of first accused is hit by S.25 of the Evidence Act and what can be considered is only that part leading to discovery; but at the same time it is held that

the testimony of PW10 that he saw the accused narrating the incident provides corroboration. It is held that recovery can be believed by applying the doctrine of confirmation by subsequent events. We are afraid that these findings are acceptable. Though recovery can be held to have been proved, the same still suffers from infirmity. It is not proved that those jewellery belonged to the deceased. The Sessions Judge has made an attempt to draw an inference that the jewellery belonged to the deceased by picking a few sentences found in the inquest panchanama as per Ex.P1 and juxtaposing them with what is written in page No.4 of Ex.P.25, the voluntary or confession statement. This is not permitted as nothing other than a statement leading to discovery of fact is relevant according to Sec.27 of Evidence Act. Therefore in the absence of independent proof that the seized jewellery belonged to the deceased, the recovery under Ex.P5 based on Ex.P25 cannot be considered as a proof. The Sessions Judge has placed reliance on the judgment of Supreme Court in the case of **Harivadan Babubhai Patel V/s**

**State of Gujarath [(2013) 17 SCC 45]** to arrive at a conclusion that seizure of jewellery is a circumstance that can be believed in the background of special knowledge attributable to accused and therefore doctrine of confirmation is attracted. There cannot be a second word with regard to the principles laid down in this decision. In this case, apart from recovery of incriminating articles, last seen theory was also one of the circumstances and the Hon'ble Supreme Court came to conclusion that the last seen theory deserved acceptance and therefore held that all the circumstances, including recovery, were proved. Same is not the position in the case before us. Last theory has failed, and therefore recovery alone does not prove the prosecution case.

19. Now with regard to testimony of PW.10 lending corroboration to narration of incident by the accused, what requires to be stated is that the Sessions Judge should not have accepted that part evidence of PW10 in as much as it amounts to proving the confession against the accused.

The clear evidence of PW.21 is that the first accused gave voluntary statement before him and Ex.P.25 is a part of that statement that led to discovery. As has been observed already, except Ex.P25, no other part of voluntary or confession statement of accused can be made use of against the accused. Sec.25 and Sec.26 of the Evidence prohibit such proof. If Sec.25 states that no confession of an offence made to a police officer can be proved against an accused, Sec.26 further prohibits proof of such confession made before others also if at the time of making such statement accused is in police custody, and only exception to this Section is confession made before Magistrate. The evidence of PW.10 shows that in his presence, the accused stated as to how they committed murder of a woman. This statement of PW10, if considered, is nothing but an attempt to proving a confession against accused while he was in police custody and therefore inadmissible. It is held by the Sessions Judge that a missing link in the circumstance is provided when the first accused failed to account for the jewellery of

the deceased being in his possession. It is here that the Sessions Judge has erred. Though jewellery was recovered from the first accused, it is not proved that they belonged to her. A missing link still exists. Therefore we come to conclusion that the Sessions Judge has erred in convicting accused and answer points (i) and (ii) raised for discussion in negative.

20. **Point No.(iii)** - This point does not require discussion in view of points (i) and (ii) being answered in negative.

21. **Point No.(iv)** - In view of the above discussion, the criminal reference under Section 366 Cr.PC has to be rejected as the accused No.1 is entitled to be acquitted. The appeal preferred by the first accused requires to be allowed and judgment of the Sessions Judge set aside. Hence the following..

**ORDER**

- (i) Criminal Reference Case No.200002/2017 under Section 366 Cr.PC is rejected.

- (ii) Criminal Appeal No.3636/2013 is allowed. The judgement dated 23.10.2013 passed by Principal District & Sessions Judge, Bidar in SC No.82/2012 convicting the first accused for the offence punishable under Sections 302, 394 and 201 IPC is set aside. The first accused, Mohamed Sultan S/o Syed Mahamood Ali is acquitted of the offences punishable under Sections 302, 394 and 201 IPC. He shall be released from imprisonment forthwith if his presence is not necessary in any other case. The registry of this Court is directed to communicate this judgment to the Jail Superintendent.

Sd/-  
JUDGE

Sd/-  
JUDGE

SMP