THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

CRIMINAL APPEAL No. 430 OF 2012

J U D G M E N T: *(per Hon'ble Sri Justice Challa Kodanda Ram)*

Questioning the conviction handed down to the appellant – accused in Sessions Case No. 327 of 2011 on the file of the VII Additional District & Sessions Judge (Fast Track Court) at Vijayawada, for the offences punishable under Sections 302, 364 and 201 of the Indian Penal Code (for short, 'IPC'), *vide* judgment dated 30.03.2012, this Criminal Appeal is filed.

Through the judgment under Appeal, the learned Judge sentenced the appellant to undergo imprisonment for life and pay a fine of Rs.500/-, in default to suffer simple imprisonment for three months, for the offence punishable under Section 302 of the IPC and rigorous imprisonment for ten years and fine of Rs.500/- in default to suffer simple imprisonment for three months for the offence punishable under Section 364 of the IPC. Both the sentences were directed to be run concurrently.

The case of the prosecution, in brief, is that: while the appellant and his wife were residing at Vombay Colony, Vijayawada, one Chigatapu Prasad, who is the cousin of the appellant, used to visit their house and that the appellant, under the presumption that the said Prasad tutored his wife to discard him, and heeding to his words, his wife left the matrimonial home, bore grudge against the said Prasad and waiting for an opportunity to wreak vengeance.

While so, on 09.07.2011, at about 05.00 p.m., while the second son of the said Prasad viz. Tarun (hereinafter be referred to as 'the deceased') was playing in front of the house at B-Block, Plot

No. 184, Vombay Colony, the appellant had taken away the said boy on a bicycle to the shop of one Kotari Srinu, from there to Annapurna Bar side to Prakash Nagar to P. Nynavaram Village *via* Nunna and in the darkness, he pushed him into Polavaram canal water, where the boy drowned and died. Thereafter, the appellant returned to Vijayawada. When the searches made for the boy turned futile, his parents gave a report to the police on 11.07.2011 which was registered as a case in Crime No. 543 of 2011.

On 12.07.2011, the Village Revenue Officer, P. Nynavaram gave a written report to the Sub-Inspector of Police, II Town Police Station stating that on the information furnished by one Lingam Sambasivarao about lying of dead body of a boy of ten-year age in Polavaram canal, he went there and found the body. The said report was registered as a case in Crime No. 478 of 2011 under Section 174 of the Code of Criminal Procedure. On 18.07.2011, at about 03.30 p.m., the appellant confessed the offence, on his volition, to Ganji Sowry and others, who brought him to Nunna Police Station. On the basis of the report and confession statement, the section of law was altered to Sections 364, 302 and 201 of the IPC.

In support of its case, the prosecution examined P.Ws.1 to 23 and marked Exs.P1 to P23 and M.Os.1 to 4.

After analysis of the entire evidence, the learned Judge came to the conclusion that the prosecution has established the motive on the part of the appellant to kill the deceased and as the deceased boy was last seen in the company of the appellant, as per the evidence of P.Ws. 5 to 9, the appellant is liable for punishment for the offences under Sections 302 and 364 of the IPC. Insofar as the offence under Section 201 of the IPC is concerned, the same

was answered in negative and against the prosecution, for, there was nothing on record to show that the appellant screened the offence.

Learned counsel appearing for the appellant contends that the learned Judge erred in holding the appellant guilty since there is no direct eye witness to the commission of offence. The learned Judge failed to consider the fact that P.W.13 is the wife of the appellant who left the matrimonial home and hence, there would be every possibility for her to be a of biased or interested witness.

Heard learned Public Prosecutor (Andhra Pradesh) on behalf of the State.

The entire case of the prosecution rests on the evidence of P.Ws.5 to 9 and the confession of the offence by the appellant before P.Ws.3 and 4. While P.Ws.5 to 9 spoke about the deceased boy having been in the company of the appellant, the confession alleged to have been recorded by P.W.3 speaks about the appellant, on the fateful day i.e., on 09.07.2011, having taken the deceased child towards Nunna, pushed him into Polavaram canal and killed him by drowning. There are no eye witnesses or any other evidence to link the accused with the death of the deceased, except the fact that the deceased was last seen along with the appellant by P.Ws.5 to 9 and this 'last seen theory' is the basis for conviction of the appellant. The dead body was first noticed by P.W.10 on 12.07.2011 at about 7.30 a.m. who informed the police, initially, over the phone, thereafter, in writing, under Ex.P.3 at about 8.30 a.m. Likewise, the evidence of P.Ws.11 and 12, who had also informed about noticing a child's dead body in Polavaram canal at the scene of offence.

P.W.14 spoke about the inquest report-Ex.P.4. P.W.15 deposed the confession of the accused before the police leading to discovery and recovery of M.O.4-cycle under the mediators' report-Ex.P.5. P.W.17 is the doctor, who conducted the post-mortem examination under Ex.P.6 and Ex.P.7 is the forensic report/opinion with respect to M.Os.1 to 3. P.W.17 had confirmed about conducting the post-mortem on the dead body and as can be seen from Ex.P.6, the dead body was received at 10 a.m. on 13.07.2011 and he had commenced autopsy at 10.30 a.m., however, in the format attached to Ex.P.6 under the heading the specimen removed for chemical analyses in Serial No.8 under the heading post-mortem concluded at 11.30 p.m. on 13.07.2011 was recorded. The doctor-P.W.17 confirmed the cause of death as "due to drowning" and he had also confirmed that there were no ante-mortem external and internal injuries. In the post-mortem report-Ex.P6, the approximate time of death was mentioned as about 4 days prior thereto and on a close scrutiny of the said report, there is a discrepancy in the time of conclusion of the post-mortem, wherein it is mentioned as 11.30 p.m. This Court was required to construe that post-mortem was conducted over a period of about 12 hours, which looks a bit unbelievable. In those circumstances and particularly considering the state of the corpse, which was swollen and became decomposed, on account of submersion in the water for over a period of about 4 days, the time of conclusion of post-mortem was to be taken as 11.30 a.m. instead of 11.30 p.m. The time of death as recorded in the Post-mortem report was four days prior to the examination. If one goes by the Post-mortem report, the time of death would have to be taken as sometime around 10/11 p.m. on 09.07.2011. In other

words, there is no definiteness of time of death and the same is only an approximation.

There is no evidence on record, whatsoever, linking death of the child directly to the appellant, except the fact that the deceased was last seen with him. P.Ws.5, 7 to 9 deposed that they had seen the child with the appellant at around 5 p.m. and it is P.W.6, who deposed that he had seen the child at around 5.30 p.m. There is a large gap between 5.30 and 11.30 p.m., even assuming that the death could have occurred at around 11.30 p.m. There is no evidence to link the appellant to the death of the child except the circumstantial evidence based on 'last seen theory'.

In **Ganpat Singh Vs. The State of Madhya Pradesh[1],** the Supreme Court held that in a case which rests on circumstantial evidence, the law postulates a two-fold requirement, i.e., 1) every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt; and 2) all the circumstances must be consistent only with the guilt of the accused. The principle has been consistently formulated thus:

> The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; that 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 they should be incapable of explanation on any hypothesis other than that of the guilt of the Accused and inconsistent with his innocence.

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[1] AIR 2017 SC 4839

Yet another aspect that is required to be considered in the present case is the evidence of P.Ws.1 and 2 i.e., mother and father of the deceased child. They had categorically deposed that they do not have any enmity with the appellant and, as a matter of fact, he always treated their child with love and affection. Even P.Ws.5 to 9, who spoke about the deceased being seen with the appellant, deposed that the child was happy and in jovial mood and shown no signs of fear. Except the evidence of P.W.13, the estranged wife, who spoke about the appellant harbouring the child and the alleged confession of the appellant, there is no credible evidence for this Court to come to a conclusion that the appellant had any animosity either with the parents of the deceased or the child. Though she had attributed the death of her two children to the appellant, it was elicited in the cross-examination that there was no case booked against him and no investigation was conducted with respect to the alleged death of her children. Therefore, the evidence of P.W.13-estranged wife of the appellant does not inspire confidence as she has definitely a grouse against her husband as she suspects that the death of her two children was connected to the appellant and / or on account of his negligence.

The cumulative effect of all the above leaves us to understand that there is no motive for the accused to kill the child. In other words, practically there is no evidence, either direct or otherwise, linking him to the death of the child, except the circumstances and based on the 'last seen theory'. In **Dilip Mallick *v* State of West Bengal**[2] case, the Supreme Court repeatedly held that when the conviction is based on 'last seen theory', the chain of evidence should be complete as not to leave

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[2] AIR 2017 SC 1133

any reasonable ground for conclusion consistent with the innocence of the accused and must show that in all probability, the act must have been done by him.

The second circumstance relied upon by the prosecution is the extra-judicial confession made before P.Ws.3 and 4 on 18.07.2011 at 3.30 p.m. P.W.3, in his evidence, deposed that on 18.07.2011 at 3.30 p.m., the appellant told them that the police are searching for him and as such, they took him to Nunna Police Station. P.W.4, in her evidence states that on 18.07.2011 at 3.00 or 3.20 p.m., the appellant revealed that he took away one boy (son of P.W.2) to the bank of the canal and pushed him into the canal. Then, himself along with P.W.3 and one Gulla Siva Sankar took him to the police station.

It is well-established principle that extra-judicial confession is a weak-type of evidence, which requires corroboration in all material particulars. It is also well-established that when an extra-judicial confession is made before a person, the same should be reduced into writing in the words of the maker, prepare a report and then handover the accused in the police station along with the report containing the confession and signed by the persons before whom such a confession was made.

In the instant case, the evidence of PWs. 3 and 4 is inconsistent. Though P.W.4 speaks about the appellant confessing his guilt, the evidence of P.W.3 is silent on this aspect. Further, the alleged confession of the appellant was never reduced into writing. Therefore, the said circumstance relied upon by the prosecution connecting the appellant with the crime cannot be accepted.

The next circumstance relied upon by the prosecution is the evidence of P.W. 6 to show that the deceased was seen in the company of appellant on 07.09.2011 at 5.30 p.m. But the said circumstance does not matter much nor does it, in any manner, connect the appellant with the crime, since the said circumstance was on 07.09.2011, whereas the alleged kidnap was on 09.09.2011.

From the above, it is clear that the circumstances relied upon by the prosecution do not form a chain of events connecting the appellant with the crime.

Last seen by P.Ws.5 and 7:- The evidence of P.W.7 shows that on 09.09.2011, the appellant came to the house of P.W. 2 at 5 p.m. At that time, the children were watching T.V. in the house of P.W.2. The deceased, who is the son of P.W.2, came outside and informed "uncle has come". The appellant, who came on bicycle, lifted the boy and took him to the shop of P.W.5 and from there to Peddaroddu. From the above, it is clear that he took the son of P.W. 2, in the presence of P.W.7 and others. Since the appellant was known to all, no objection was raised when he was taking the boy. Three days later, the dead body was found. None of the witnesses speak of any motive for the appellant to kill the deceased. Now the issue is 'whether the act of the appellant falls within the meaning of the term 'Kidnap' or 'Abduction', as defined in the Penal Code, thereby constituting an offence under Section 364 I.P.C'.

While the appellant gets the benefit of doubt for want of evidence under Section 302 of the I.P.C., this Court, on the close scrutiny of the evidence on record cannot also come to the definite conclusion that the charge under Section 364 of the I.P.C. is

proved beyond reasonable doubt, particularly, in the light of the evidence of P.Ws.1 and 2 and P.Ws.5 to 9, who, in unison, had deposed that the child was happy in the company of the appellant and there was no reason for them to suspect any mal-intentions on his part.

Section 364 of the I.P.C. reads as under----

> ***Section 364:- Kidnapping or abducting in order to murder***
> Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.
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> Illustrations:
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> 1. A kidnaps Z from India, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.
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> 2. A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

As seen from the record, the act of the appellant does not amount to 'abduction', as defined under section 362 of the IPC, since there was no force, or any deceit by him. In view of the findings given above with regard to charge under Section 302 of the I.P.C., even the ingredients constituting an offence punishable under Section 364 of the I.P.C. are not made out.

Now, what remains to be seen is whether a case of 'kidnap' is made out or not.

'Kidnapping from lawful guardianship' is defined in Section 361 of the I.P.C. It reads as under –

> ***Section 361:- Kidnapping from lawful guardianship***
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> Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without

> the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
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> Explanations
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> The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.
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> Exceptions
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> This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

A reading of Section 361 of the I.P.C. makes it clear that an offence of 'kidnap' is made out when a minor is taken away or enticed from the lawful guardianship of the minor, without the consent of such guardian. There is a distinction / marked difference in 'taking away' and 'enticing' a minor. The word 'entice' is an act of the accused by which the person kidnapped is induced on his own to go to the kidnapper. It involves an idea of inducement or allurement by exciting hope or desire. Enticement need not be confined to allurement alone, and it can be in any form.

From the evidence of P.W.7, it came to light that while the deceased boy was watching TV along with other children, the appellant came there, then the deceased came out saying "junior paternal uncle came" and thereafter, the deceased accompanied the appellant on his bicycle. In the evidence of P.W.5, it is stated that the appellant purchased a bingo chips packet and one biscuit packet and left with the deceased. Though it is not made out that there was any enticement, the factum of possibility of enticing a child of five-year age, who was watching TV, promising to buy an eatable, cannot be ruled out, especially when viewed from the

angle of immediate act of the appellant buying a bingo chips packet and a biscuit packet for him.

Further, considering the wider scope of Section 361 of the IPC, as interpreted by the Supreme Court in ***State of Haryana v. Raja Ram***[3]***,*** taking away the boy of the age below 16 years, without the consent of the guardian, would attract the act of 'kidnap'. Here, in this case, the act of the appellant amounts to 'taking away' of the minor from the lawful guardianship. The term 'take' means to cause to go or to get into possession, which need not be by force, actual or constructive. The evidence of P.W. 7, who saw the appellant taking the boy on his cycle, discloses that the appellant never caused the minor to follow him or come into his possession.

There is no evidence with respect to the intention on the part of the appellant to kill the child. However, the fact that the child was 'last seen' with the appellant would squarely fall under the offence punishable under Section 363 read with 361 of the I.P.C. Hence, the appellant is liable to be punished for the charge under Section 363 of the I.P.C.

In the circumstances, the conclusion arrived at by the Sessions Court, particularly trusting the evidence of P.W.13, and based on the same linking the appellant to the murder cannot be sustained and thus, the charge under Section 302 of the I.P.C. cannot be said to be proved. Hence, the accused is entitled to be given the benefit of doubt. Accordingly, he deserves to be acquitted for the charge under Section 302 of the I.P.C.

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[3] AIR 1973 SC 819

In the result, the Criminal Appeal is allowed in part, modifying the conviction and sentence imposed on the appellant by the learned Sessions Judge, as under:

The appellant is acquitted for the offence punishable under Section 302 of the IPC. He is convicted for the offence punishable under Section 363 of the IPC and sentenced to undergo Rigorous Imprisonment for a period of six years. The period of remand and the sentence of imprisonment already undergone by him shall be given set-off.

V. RAMASUBRAMANIAN, J

CHALLA KODANDA RAM, J

30th January, 2018.

ksld/ssv

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Date:30.12.2017