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TIPPARAM PRABHAKAR
V.

THE STATE OF ANDHRA PRADESH
Criminal Appeal No. 868 of 2009

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APRIL 29, 2009

(DR. ARIJIT PASAYAT AND ASOK KUMAR
GANGULY, JJ.)

PENAL CODE, 1860:

C s.302 – *Murder – Conviction based on circumstantial evidence of accused last seen with deceased – Held: There being discrepancies in evidence of witnesses, and their evidence having not established accusations against accused, merely because his identity card was found near the dead body, that cannot be a determinative factor to find him guilty – Accused acquitted – Circumstantial evidence.*

D The appellant and two others were prosecuted for commission of the offence punishable u/s 302 r/w s.34 IPC. The prosecution case was that on 20.3.2003 at about 7.00 p.m. the appellant (A.2) and A.3 came to the house of P+W.1 and took her son on a motor cycle. At about 10.30 p.m. A.2 and A.3 again came to the house of PW.1 along with her son and A.2 told that he would send back her son within 10 minutes. At about 11.00 p.m. 'M' came to the house of PW.1 and told her that one motor cycle and a dead body was lying at a particular place. PW.1 alongwith others went to the scene and found her son dead in a pool of blood. From the finger prints on a material object A.2, the friend of A.2 and A.3 and maternal uncle's son of the deceased was also found involved. A.1 to A.3 were said to have confessed the offence. The trial court convicted A.1 and A.2 and acquitted A.3. On appeal, the High Court further acquitted A.1.

E In the appeal filed by A.2, it was contended for the

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appellant that Pws. 1,2 and 6 were stated to have highlighted the last seen aspect, but the testimonies of Pws. 1 and 2 were at great variance, and the prosecution case remained unsupported.

Allowing the appeal, the Court

HELD: 1.1 The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. (Para 8) [148-A-B]

1.2 As per the version of PW1 she was told by PW2 that A2 and A3 came to the house at about 7.30 p.m. and took the deceased on the motorcycle at 11.00 p.m.. PW2 in her cross-examination accepted that she had not stated during investigation that A2 and A3 had come to their house and had taken the deceased. Interestingly, in the first information report the name of the accused was stated unknown person. and PW1 had not stated after she came back again, the deceased and A2 went together. (Para 7) [147-A-B, F-G]

1.3. The evidence of PWs. 1 and 2 did not establish the accusations so far as appellant is concerned. Merely because his identity card was found near the dead body of the deceased, that cannot be a determinative factor to find the accused guilty. (Para 9) [148-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal 868 of 2009

From the Judgement and Order dated 13.12.2007 of the Hon'ble High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 1555 of 2004.

A Gaurav Agrawal, SCI.SC, for the Appellant.

I. Venkatanarayana, D. Bharathi Reddy, V. Prabhakar Rao, with him for the Respondent.

The Judgement of the Court was delivered by

B DR. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Andhra Pradesh High Court upholding the conviction of the appellant for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC'). Three persons faced trial for alleged commission of death of one Damera Shiva Kumar (hereinafter referred to as the 'deceased') on 20.3.2003. Trial court directed acquittal of Telukrishna (A3).

D High Court by the impugned dismissed the appeal filed by the present appellant A2 while directing acquittal of A1.

3. Prosecution version as unfolded during trial is as follows:

A1 is the maternal uncle's son of Damera Shiva Kumar

E (hereinafter referred to as 'deceased'). A2 and A3 are the friends of A1. On 20.03.2003 at about 5:00 p.m., the mother of the deceased Smt. Damera Lingamma (PW-1) and her daughter went to her younger sister's house at Malkajrige to attend a betrothal ceremony. While leaving the house she gave Rs.10/- to the deceased Shiva Kumar. The sister in law of the deceased Smt. Lalitha (PW-2) and the deceased were alone in the house. At about 7:00 p.m., A2 and A3 came to the house of the deceased. A3 was standing outside the house. A2 came inside the house. A2 and A3 took the deceased Shiva Kumar on his motorcycle. PW1 and her daughter returned home at about 10:00 p.m., and enquired with PW2 about the deceased Shiva Kumar. PW2 informed PW1 that A2 and A3 took the deceased Shiva Kumar on his motorcycle. At about 10:30 p.m., A2 and A3 again came to the house of the deceased, alongwith the deceased. On hearing the sound of the motorcycle of the

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deceased, PW2 came out of the house and asked the deceased to come inside the house, as PW1 was calling him. Thereupon A2 stated to PW2 that he will send back the deceased within 10 minutes. At about 11:00 p.m., one Mallesh, Councilor of the Malkajgiri came to the house of the deceased and informed PW1 that one motorcycle with the inscription of Yadav was lying near Anandbagh Cross Road and that one dead body was also lying near the spot. Thereupon, PW1 and others went to the scene of offence. PW1 found her son lying dead in a pool of blood with bleeding injuries at Anandbagh Cross Roads. PW1 gave Ex.P1 complaint to PW11, the Sub Inspector of Police of Malkajgiri Police Station. PW11 registered Ex.P1 as Crime No.90 of 2003, under Section 302 IPC and submitted a copy of the FIR to all concerned. After registration of the case, PW15 took up investigation from PW11. PW15 rushed to the scene of offence, got the scene of offence photographed, prepared rough sketch under Ex.P5 for the scene of offence, conducted scene observation panchanama on 21.03.2003 at about 1:50 hours under Ex.P4 in the presence of PW7 and Panduri Ravi. He found MO4 knife in the stomach of the deceased and MO5 lying beside the deceased. He also found MOs 1 to 3 and 6 to 11 at the scene of offence. He seized MOs 1 to 13 under Ex.P4 in the presence of PW7 and Panduri Ravi. He held inquest over the dead body of the deceased in Gandhi Hospital Mortuary on 21.03.2003 from 10:00 a.m. to 12:30 noon. After the inquest, the dead body was sent to Postmortem examination. On the requisition given by PW11 under Ex.P9, the Finger Prints Expert Shri Md. Khursheed (PW13) visited Malkajgiri Police Station and examined the material objects seized by PW15 in this case for developing the chance prints. He found one Finger Print on MO6 and he lifted the chance print and got photographed the chance print. He compared the Finger Print, sent by the police with the chance print marked as "A", and found it as identical with the left finger prints marked as "S1", which belongs to Suresh Kumar Yadav (AI). The Finger Prints expert gave his opinion under Ex.P11. On 22.03.2003 at 9:00 a.m. AI to A3 were arrested by I.D. party and were produced before PW15, who

- A interrogated A1 to A3 separately and individually in the presence of PWs 9 and 10. A1 to A3 confessed the offence leading to recovery. The admissible portion of the confessional statements of A1 to A3 is marked as Exs. P23 to P25 respectively. In pursuance of his confession, A1 led the police and panchayatdars to the house of A2, went inside the house of A2 and produced MO14. He also produced his bloodstained clothes MOs 15 and 16. MOs 17 and 18 were seized at the instance of A2 from his house. MOs 19 and 20 were seized at the instance of A3 from the house of A2. PW12, the doctor who conducted autopsy over the dead body of the deceased opined that injuries 4 to 6, 11 and 12 are fatal injuries and they are sufficient to cause death in the ordinary course of nature either cumulatively or individually. After the receipt of the postmortem certificate and F.S.L. Chargesheet was filed and the accused persons faced trial for commission of offence punishable under Section 302 read with Section 34 IPC.

As the accused persons pleaded innocence trial was held. To substantiate the accusations, 15 witnesses were examined. The case rested on circumstantial evidence. It was the prosecution version that the accused and the deceased were last seen together and dead body of the deceased was identified. MO1 was found at the scene of occurrence. The trial Court as noted above, found the evidence to be inadequate and acquitted A3. But convicted A1 and A2. The appeal was filed by A1 and A2. The conviction was confirmed so far as F appellant is concerned.

- 5. Learned counsel for the appellant submitted that the prosecution version is clearly unsupportable. PWs 1, 2 and 6 are stated to have highlighted the last scene aspect. The evidence of PWs. 1 and 2 i.e. mother and sister-in-law are at G great variance. Merely because the identity card of the accused was found near the dead body that cannot be a ground to hold the appellant guilty. Additionally, fingerprint of the accused-appellant was not found on the articles seized. Only the fingerprints of A1 were collected. As noted above A1 has been H acquitted by the High Court.

6. Learned counsel for the respondent-State supported the judgment of the High Court. A

7. As per the version of PW1 she was told by PW2 that A2 and A3 came to the house at about 7.30 p.m. and took the deceased on the motorcycle at 11.00 p.m. Thereafter councilor Mallesh came to his house and informed that the deceased was lying at Anand Bagh X-roads and his motorcycle was lying near the dead body. Contrary to what she stated, PW2 stated that the appellant and PW1 and her daughter have gone to attend the function. She and the deceased were alone in the house. A2 and A3 came into the house. A3 was outside the house and A2 was inside the house. A2 and A3 took the deceased on his motorcycle. PW1 and her sister-in-law returned at about 10.00 p.m. PW1 enquired about deceased. She was informed that A2 and A3 had taken the deceased on his motorcycle. After a few minutes she left. They took the deceased at about 10.30 p.m. After hearing the sound of the motorcycle she came out of the house and noticed A2 and the deceased on the motorcycle. She asked the deceased to come inside the house stating that PW1 was calling him. Thereupon A2 stated that he will send back the deceased within a short time. The deceased also stated that he will come within a short time. She claimed to have seen A2 entering into the toddy shop which is located near their house. At about 11.00 p.m. the councilor came and informed that the motorcycle was lying near Anand Bagh Cross-roads and that the deceased was lying there. On hearing PW1 went out. PW2 went to the scene of offence. In her cross-examination she accepted that she had not stated during investigation that A2 and A3 had come to their house and had taken the deceased. Interestingly, in the first information report the name of the accused was stated unknown person and PW1 had not stated after she came back again, the deceased and A2 went together. B C D E F G H

8. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found

- A dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists.
- B In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.

9. Above being the position, the evidence of PWs. 1 and 2 did not establish the accusations so far as appellant is concerned. Merely because his identity card was found near the dead body of the deceased, that cannot be a determinative factor to find the accused guilty.

10. The conviction is set aside. The appellant be set at liberty forthwith unless required to be in custody in any other case.

11. The appeal is allowed.

R.P.

Appeal allowed.