

CASE NO.:
Appeal (crl.) 101 of 2006

PETITIONER:
Malleshappa

RESPONDENT:
State of Karnataka

DATE OF JUDGMENT: 21/09/2007

BENCH:
R.V. Raveendran & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 101 OF 2006

B.Sudershan Reddy, J.

1. The appellant along with six others was tried by the Court of Sessions for the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to undergo life imprisonment and to pay a fine of Rs. 2,000/-. He was also convicted for the offence punishable under Section 364 IPC and sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs. 1,000/- and in default of payment of fine, to undergo rigorous imprisonment for 3 months. Further, he was convicted for the offence punishable under Section 201 IPC and sentenced to undergo rigorous imprisonment for 1 year and to pay a fine of Rs. 1,000/- and in default of payment, to undergo rigorous imprisonment for 3 months. All sentences were directed to run concurrently. The Sessions Court acquitted accused Nos. 2, 3, 4 and 5. The appeal of the appellant was dismissed by the High Court of Karnataka by the impugned judgment, however, accused Nos. 6 and 7 were acquitted by the High Court of all the charges leveled against them. In this case we are concerned with the sole appellant (Accused No. 1).

2. The conviction of the appellant is based on circumstantial evidence.

3. In brief, the case of the prosecution is that the deceased-Yankanna Balakannavar had illicit intimacy with the wife of the appellant Smt. Hanamawwa (PW\02619). Deceased was working as the driver of the tractor of the appellant during 2001. The appellant's suspicion about the deceased having illicit intimacy with his wife led to serious misunderstanding between them because of which, deceased left his job as the tractor driver. On 12.7.2001 at about 8.00 p.m., the appellant and accused Nos. 6 and 7 went in the car of the appellant to the house of the deceased. He was not at home. The appellant and accused Nos.6 and 7 told deceased Yankanna's mother Yallawwa (PW-10) that they required the services of her son in connection with digging of a borewell in the land of the appellant. When deceased Yankanna returned home within half an hour, he was immediately taken by the appellant and accused Nos. 6 and 7 with them. On that night, deceased-

Yankanna did not return home. On the next day, Yallawwa (PW-10) went in search of her son but could not find him. On questioning, the appellant informed PW-10 that he had brought back deceased Yankanna at about 11.00 p.m. on the same night and had left him in the village. Not satisfied with the answer given by the appellant, PW-10 went to accused Nos. 6 and 7 and inquired about the whereabouts of her son but they also did not give any satisfactory answer. Thereafter, PW-10 and her nephew-Kamanna Parameshwar (PW-18) went in search of the deceased Yankanna and in the process, made inquiries in nearby villages namely Dadanatti, Rugi, Chabbi etc. but could not find him.

4. On 21.7.2001, Inspector of Bilagi Police Station (PW-29) received information that there was a dead body found floating in the Ghataprabha river. Immediately, he rushed to the place and found the dead body of a person near the pump house. The dead body was taken out from the river. It was found that the head and rest of the portion of the body had been severed. The body was highly decomposed and the bones were exposed. The legs of the dead body were found folded and tied with a rope. The body was tied by another rope at the place of neck also. Inspector of police (PW-29) lodged information with regard to the same and the same was registered as Crime No. 91/2001 of Bilagi Police Station for the offences punishable under Section 302 and 201 of the IPC. The First Information Report is exhibit P-23 dated 21.7.2001. Thereafter, PW-29 conducted inquest in the presence of PW-1 and 2 and sent for the medical officer to conduct the post mortem examination. Dr. Sabu Satihal, Medical Officer, KIMS, Hubli (PW-21) conducted the post mortem examination. The Medical Officer could not confirm as to whether the body was that of a male or female since the genital portion had been highly decomposed. However, there was underwear found on the body which was taken out and the body was preserved for two days for identification.

5. In the meanwhile, PW-10 along with PW-18 had gone to Kaladgi police station and lodged a complaint on 22.7.2001 inter alia alleging that her son was working as a tractor driver for about 3-4 years with the appellant and about 3 months back, her deceased son left the job on account of some disputes between them. She suspected that there was some dispute between her son and the appellant, accused Nos. 6 and 7 since they were frequently roaming around her house, making inquiries about her son. She made inquiries with her deceased son in that regard who did not respond. She apprehended that the appellant may cause harm to her son. It is further alleged that about 11 days back i.e. on 12.7.2001, herself, the deceased and Lacchavva-wife of the deceased (PW-11) were sitting in their house and at that time the appellant, accused Nos. 6 and 7 came to her and stated that they required her son in connection with digging of a borewell in the land of the appellant. The deceased refused to go but they took her son forcibly and the same was noticed by her neighbours. It was about 8.00 p.m. Thereafter, her son did not return to home. She made inquiries with the appellant who stated that he had dropped her son in the village at 11.00 p.m. Other accused also did not give any satisfactory explanation. She suspected that the said three persons might have killed her son. On the basis of the said information a case was registered by sub-Inspector(PW-28),

Kaladgi Police Station as Crime no. 50/01 for the offence under Section 364 read with 34 IPC. Intimation of detection of dead body in Ghataprabha river was flashed to the neighbouring police stations and the same was received by Kaladgi police station and in furtherance of the same, PW\02610 and PW-11 were taken to the place. PW-10 identified the body as that of her son Yankanna on the basis of the underwear found on the body. On 26.7.2001, appellant and accused Nos. 2 and 3 were arrested. In furtherance of the voluntary information given by the appellant, PW \02629 could ascertain the places where the deceased had been taken by the appellant and other accused, who were involved in the incident as well as the place where the dead body of Yankanna had been thrown into river. Weapons of offence were also recovered on the basis of the voluntary information furnished by the appellant. As it was revealed that the incident occurred within Kaladgi limits, PW-29 submitted the entire papers on 8.8.2001 to Kaladgi Police Station for further investigation. Police Inspector of Bagalkot police station (PW-26) took up further investigation on 9.8.2001 and filed charge sheet against the appellant and accused Nos. 2 to 7 for offences punishable under Sections 143, 147, 148, 354, 302, 201 read with 149 of the IPC.

6. The accused pleaded not guilty of the charges and claimed to be tried. The prosecution, in order to establish the case, examined in all 30 witnesses. No witness was examined on behalf of the accused. The learned Sessions Judge found that the materials were not sufficient and no case was made out as against accused Nos. 2 to 5 and consequently, acquitted them of all the charges. The remaining accused namely appellant and Accused Nos. 6 and 7 were convicted for the offences punishable under Section 302, 364, and 201 of the IPC. On appeal, the High Court allowed the appeal of accused Nos. 6 and 7 and acquitted them. The High Court dismissed the appeal of the appellant and confirmed the conviction and sentences imposed as against the appellant.

7. We have elaborately heard the learned counsel appearing for the appellant as well as for the State.

8. Shri Sushil Kumar, learned senior counsel for the appellant contended that the High Court committed a serious error in holding that the burden shifted to the appellant to show what happened to the deceased in view of the evidence of PW-10 and PW-11 that he took the deceased and this amounts to requiring the accused to prove his innocence. He pointed out another error committed by the High Court in coming to the conclusion that the appellant with the help of some others (not the other accused who had been acquitted) were responsible for committing the murder of the deceased-Yankanna. The learned counsel submitted that the chain of circumstances is not complete and, therefore, the conviction of the appellant cannot be sustained. Further contention of the learned counsel was that assuming that the prosecution has been able to establish the circumstance of being last seen together, namely, the deceased having left with the appellant on 12th July, 2001, that by itself, could not connect the appellant with the commission of crime in the circumstances of the case.

9. On the other hand, the learned counsel for the State submitted that the evidence of PW-10 and 11 which is

consistent and the circumstances in which the dead body was found in the river clearly indicated that the dead body had been thrown into Ghataprabha river after committing murder of the person and the identification by PW-10 that the dead body was that of Yankanna, the chain of events is complete and in the absence of any explanation by the appellant, only conclusion to be arrived at is that the appellant was responsible and liable for the murder of the deceased-Yankanna.

10. Having heard learned counsel for the parties and on perusal of the record, we find that the prosecution miserably failed to establish the charge against the appellant.

11. It is required to notice that most of the witnesses namely, PW Nos. 1 to 9, 13, 14, 15, 6, 17, 19, 23 and 30 had turned hostile and did not support the prosecution case. The whole case of the prosecution rests on the evidence of the mother and wife of the deceased (PW Nos. 10 and 11) and the police officers (PW Nos. 28 and 29). We may proceed now to consider the evidence of PW Nos. 10 and 11 in somewhat detail.

12. PW-10, in her evidence, stated that the appellant along with accused Nos. 6 and 7 came to her house at about 8.00 p.m. and took her son Yankanna as his assistance was required in connection with digging of a borewell in the land of the appellant. Thereafter, her son has not returned. She had searched for her son in neighbouring villages but could not find him. The appellant and accused No. 6 came along with her and also searched for the deceased-Yankanna. Thereafter she and her relatives demanded the appellant to produce the deceased Yankanna. Having waited for about 5-6 days, she filed a written complaint, written through PW-18 addressed to Kaladagi Police Station marked as exhibit P-6. The police traced the dead body of Yankanna. It was found in Anagwadi river. She specifically states that "I saw the body and his head was chopped off and hands and legs were cut-off and the rope was tied to the body. I saw and identified the underwear (M.O.1) and identified the body as it belongs to my son." she suspected the appellant had committed the murder of her son. She further stated that when she insisted the appellant to produce her son, the appellant told her deceased Yankanna had illicit connection with his wife - Hanamawwa (PW-19) - "because of that he killed my son".

13. In the cross-examination, she stated in categorical terms that at the time of arrival of the appellant at her house, her son Yankanna was not present at home and only half an hour later he returned home and immediately the appellant took him away. Prior to the arrival of the deceased, she and the appellant and PW-11 were present in the house. The appellant took the deceased and went away. She accepted that on receipt of information about floating of a dead body in the Ghataprabha river, she went there and identified the dead body as that of her son. She did not file any complaint to the Bilagi Police Station. Bilagi Police Station took her to Kaladgi Police Station in the police jeep where she lodged Exhibit P-6.

14. In Exhibit P-6 (FIR), it is stated by PW-10 that her deceased son Yankanna left his job about 3 months prior to the date of the incident. It is further stated in the Exhibit P-6 that on 12.7.2001 in the evening she was sitting in her

house along with the deceased and his wife-Lacchavva (PW-11) and that time the appellant, accused nos. 6 and 7 came to her house and she invited them inside. She did not state that her son was not present when the appellant along with other accused came to her house and her son returned home only after half an hour. In exhibit P-6 there is no mention of her coming to the Ghataprabha river and anything about the identification of the dead body of her son. Had she really identified the dead body of her son on 21.7.2001 nothing prevented her from referring to it in exhibit P-6. In her evidence, she stated that she did not claim the dead body of her son nor the police told her to take away the body of the deceased. She did not attend the funeral of her son.

15. PW-11 is none other than the wife of the deceased. She stated in her evidence that about 3 years ago at 8.00 p.m., appellant with two others came to her house and took away her husband with them. Thereafter, her husband did not return home. That after 7-8 days having received the information about a dead body floating in the Ghataprabha river, PW-10 and herself went and saw the dead body and found it to be of her husband. PW-10 filed the complaint to the police. According to her, appellant suspected that her deceased husband had illicit intimacy with his wife because of that, appellant and accused No.2 took her husband and committed the murder. Looking at M.O.1 first time in the court, she identified the same as underwear of her husband. It is admitted by her in the cross-examination while she was waiting in Bilagi police station, her mother-in-law (PW-10) went and saw the dead body of her husband and she came and told her that it was the dead body of her husband Yankanna. On the next day, she along with PW-10 went to Kaladagi police station where PW-10 filed the complaint Exhibit P-6. She did not see the body of her husband. She did not perform the funeral. She further stated in her evidence, it is the police who told her that there was illicit relationship between deceased and Hanamawwa, wife of the appellant.

16. PW-29, Inspector of Police, Bilagi police station stated in his evidence that on receiving information on 21st July, 2001 about floating a dead body at the Northern bank of Ghataprabha river near the pump house, went there and found one unknown dead body was floating in the Ghataprabha river near the pump house. He returned to the Bilagi police station and lodged information exhibit P-22. On that basis he registered the case as Crime No. 91/01 for the offence under Section 302 & 201 IPC and dispatched the first information report to the court at 1430 hours and again proceeded to the spot where the dead body was found. The dead body was taken out of the river. It was in a highly decomposed condition. He summoned the Medical Officer (PW-21) to conduct post mortem examination at the spot and thereafter buried the body there itself. He also says that he got the photos of the body taken prior to 'cremation'. Post mortem examination was conducted at the spot itself by PW-21 between 4.45 p.m. to 6.15 p.m. It is on 24th July, 2001, PW-10 to 12 came to the police station Bilagi and he had shown M.O. 1 (underwear), M.O. 6 (Waist thread) and photos to PW-10 to 12 based on which they identified the dead body as that of Yankanna. He undertook further investigation and arrested the accused. He claims to have made certain recoveries. It is on 8th August, 2001 he made over the case for further investigation to the C.P.I of

Bagalkot, Rural Circle through Kaladgi police station.

17. The evidence of PW-10 is full of contradictions apart from being at variance with exhibit P-6 (FIR) lodged by her before the Kaladgi police station and the evidence of the Investigating Officer (PW-29). In Exhibit P-6 she stated that her deceased son was taken away forcibly by the appellant, accused nos. 6 and 7. In the FIR, PW-10 does not say that the deceased-Yankanna was working with the appellant as tractor driver but in her evidence she stated that deceased-Yankanna was working with the appellant. In the first information report she does not say anything about the illicit relationship of deceased-Yankanna and appellant's wife-Hanamawwa(PW-19). She merely stated that there was some dispute between the appellant and the deceased but in evidence, she stated that the appellant told her that deceased-Yanakanna had illicit connection with his wife-Hanamawwa (PW-19) because of that he killed her son. PW-11, Lacchawa-wife of the deceased admitted in her cross-examination that she learnt that there was illicit relationship between the deceased and the wife of the appellant only when the police told her. She asserted that PW-10 filed a complaint to the police "as we came to know about the illicit relationship between the deceased and Hanamawwa-wife of the appellant through police."

18. On an analysis of the evidence referred to herein above, we find it very difficult to believe the evidence of PW-10 and PW-11. They are not trustworthy witnesses. It is doubtful as to how and in what circumstances exhibit P-6 came into existence. If PW-10 had seen the dead body and identified it as that of her son there is no reason why she could not have stated about it in exhibit P-6. If one goes by the contents of exhibit P-6 it becomes clear that she knew nothing about the dead body found in the Ghataprabha river. The question of identifying the dead body as that of her son does not arise. PW-29, in his evidence, stated that PW-10 to 12 identified the body as that of deceased-Yankanna only on the basis of M.O. 1 (underwear) and M.O. 6 (Waist thread) and some photos on 24.7.2001. No photographs are marked as material objects. It is difficult to believe that one could identify the highly decomposed and mutilated dead body as that of deceased-Yankanna when the Medical Officer (PW-21) was not even in a position to say whether the dead body was that of a male or female. It is only the Forensic Expert (PW-22) who stated the body as that of a male after examining the bones. PW-10 and 11 assert that dead body was identified by PW-10 even on 21st July, 2001 but PW-29 says that dead body was buried immediately after the post mortem examination. Exhibit P-6 is obviously got into existence may be after prolonged consultation with the police. The dead body remained unidentified.

19. PW-11's evidence is also not trustworthy. She states, in her evidence, that Bilagi police came in a jeep and informed her and PW-10 that a dead body was found in the river and thereafter, she and PW-10 went to Bilagi police station but she did not see the dead body of her husband. She was waiting in Bilagi police station but PW-10 and her father-in-law went to see the dead body of her husband. But her father-in-law (PW-12) does not say that he saw the body of his son. Next day they went in police jeep to Kaladagi police station where PW-10 lodged first information report (exhibit P-6). The version given by PW-11 is also highly artificial and

cannot be accepted. It is difficult to believe that she did not go to the spot where the body was found. It is difficult to reconcile the statements of PW-10 and PW-29. It is doubtful that PW-10 at all had seen the dead body of her son. PW-29, in his evidence, stated that he could not trace the relatives of the dead person since it was highly decomposed and had therefore got buried the body on 21.7.2001 itself. Thus in effect no one identified the body buried on 21.7.2001 as that of Yankanna.

20. Yet another aspect of the matter is that there is no explanation as to why no complaint has been made ever since 12th July, 2001 when Yankanna was forcibly taken away till lodging the first information report on 22nd July, 2001 at 1900 hours.

21. There is no convincing evidence placed by the prosecution to show that there was motive and that the deceased Yankanna had illicit relationship with Hanamawwa (PW-19) wife of the appellant. Be it noted, PW-19 also turned hostile and did not support the prosecution case. In this regard, the evidence of PW-11 gains some significance wherein she admitted that the complaint was filed only after they were informed by the police about the illicit relationship of the deceased-Yankanna and Hanamawwa (PW-19). No witness has spoken about the alleged illicit relationship between the deceased and PW-19 except PW-10 and 11 who got the information from the police.

22. Next, we shall refer to the evidence of PW-21 who conducted the post mortem examination. It is in his evidence that the body was highly decomposed, head was missing, both legs were flexed and tied with rope over the abdomen. Hands were missing. Survival bone was exposed, external genitalia was highly decomposed and unable to make out sex organs. He could not make out as to whether the body was of a male or female, age and cause of death, time of death, he accordingly preserved the samples and sent to the Forensic Expert. The Forensic Expert examined as PW-22 stated that he received a sealed box containing bones from PW-21 and on opening the box, he found 8 human bones as mentioned in his report. They were of male body. He admitted that by examining the bones, exact age of the deceased cannot be given. Even the time of death cannot be given exactly.

23. In the light of the evidence available on record, can it be said that the circumstances of last seen together by itself and necessarily lead to the inference that it was the appellant who committed the crime? The High Court took the view that accused Nos. 6 and 7 are entitled to the benefit of doubt though, PW-10 stated in her evidence that the appellant, accused Nos. 6 and 7 took her son Yankanna on the fateful day. No motive was shown with regard to accused Nos. 6 and 7 for their involvement in the crime. It is under those circumstances, the High Court said that the burden shifts to the appellant to show as to what happened to the deceased-Yankanna. In our considered opinion, the High Court committed serious error in arriving at such conclusion. The first information report lodged by PW-10 itself is highly doubtful. PW-10's evidence itself does not reveal any circumstances to hold that the prosecution has established the charge against the appellant. The appellant's failure to offer any explanation in his statement under Section 313 Cr.P.C. is not a circumstance to hold

appellant guilty of the charge. The prosecution has failed to establish as to when the death of Yankanna took place, it could be at any time between 12th July, 2001 to 21st July, 2001. There is nothing on record to show as to what transpired between 12th July, 2001 to 21st July, 2001. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant. Learned counsel for the State relied upon the decision in Mohibur Rahman & Anr. Vs. State of Assam [(2002) 6 SCC 715] which in fact is in support of the defence and not the prosecution.

"The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place. As already noted the death body has been recovered about 14 days after the date on which the deceased was last seen in the company of the accused. The distance between the two places is about 30-40 kms. The event of the two accused persons having departed with the deceased and thus last seen together (by Lilima Rajbongshi, PW6) does not bear such close proximity with the death of victim by reference to time or place. According to Dr. Ratan Ch. Das the death occurred 5 to 10 days before 9.2.1991. The medical evidence does not establish, and there is no other evidence available to hold, that the deceased had died on 24.1.1991 or soon thereafter. So far as the accused Mohibur Rahman is concerned this is the singular piece of circumstantial evidence available against him. We have already discussed the evidence as to recovery and held that he cannot be connected with any recovery. Merely because he was last seen with the deceased a few unascertainable number of days before his death, he cannot be held liable for the offence of having caused the death of the deceased. So far as the offence under Section 201 IPC is concerned there is no evidence worth the name available against him. He is entitled to an acquittal."

24. In the present case also, there is no proximity of time

and place. We have already noted that the dead body, even if it is to be accepted, was that of the deceased-Yankanna, had been recovered after 10 days after the date of which the deceased was last seen in the company of the appellant. This singular piece of circumstantial evidence available against the appellant, even if the version of PW-10 is to be accepted, is not enough. It is fairly well settled that the circumstantial evidence in order to sustain the conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. It is true as has been held by this Court in *Lakshmi & Ors. Vs. State of U.P.* [(2002) 7 SCC 198] that it is not an inflexible rule that the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased though are factors to be established by the prosecution but it cannot be held as a general rule and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all eventualities, it ought to result in acquittal of those who may be charged with the offence of murder provided the charges against the accused otherwise can be established on the basis of the other reliable and trustworthy evidence.

25. There is no reliable and trustworthy evidence in the present case. The High Court in the present case took the view that as to what happened to the deceased-Yankanna was within the knowledge of the appellant and he having failed to explain, and mutilated body of Yankanna having been found, having shown that Yankanna had been murdered, the only conclusion one can arrive at is that the appellant with the help of some others committed the murder of Yankanna, cut off head and some part of the body and threw the body in Ghataprabha river. Too many surmises and conjectures! it is highly dangerous to convict any accused on the basis of which the High Court has chosen to do so.

26. It is not the case of the prosecution that the appellant together with some unidentified persons kidnapped the deceased-Yankanna and killed him. The specific case of the prosecution is that the appellant along with accused Nos. 2 to 7 committed the crime of kidnapping and murder of the deceased. The trial court as well as the High Court gave the benefit of doubt to the rest of the accused. The High Court in the circumstances could not have propounded a new theory that the appellant with the help of some others may have committed the murder of Yankanna. Neither there are any circumstances nor any evidence available on record to take such a view in the matter in order to convict the appellant. The decision of this Court in *Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh* [(1991) 3 SCC 627] upon which, the reliance has been placed by the learned counsel for the State to sustain the conviction of the appellant has no application whatsoever to the facts and situation in the present case. It was the case where this Court on an independent appreciation of the evidence of the three eye-witnesses came to the conclusion that several persons had participated in the commission of the crime including the appellant but for some reasons all other accused except the appellant therein were acquitted of the charge under Section 302 read with 149 IPC. This Court took the view that in the absence of the State appeal, it is not possible to interfere with their acquittal but this Court was not bound by the facts found proved on the appreciation of evidence by the courts

below and is, in law, entitled to reach its own conclusion different from the one recorded by the courts below on a review of the evidence. It is under those circumstances, this Court sustained the conviction of the appellant under Section 302 IPC with the aid of Section 34 and 149 IPC and maintained the sentence awarded to him. In the present case, there is no evidence available on record to arrive at any conclusion that accused Nos. 2 to 7 were also involved in the commission of the crime though they were acquitted by the trial court. We, accordingly, hold that the judgment have no application to the present case in hand.

27. For all the aforesaid reasons, we hold that the prosecution did not establish the charges framed against the appellant under Sections 302, 364 and 201 IPC. The conviction and sentence awarded against the appellant is, accordingly, set aside and he is acquitted of all the charges. He is ordered to be released forthwith unless required in any other case.

28. The appeal is, accordingly, allowed.