

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 312 of 1998@@
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State of A.P. ..Appellant
Vs.
Shaik Mazhar ..Respondent

O R D E R@@
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The graveyard of Diwane Nawat became the live grave of a 10 year old female child Saida Sadia, as she was killed at the graveyard itself. When her death was discovered to be a case of homicide, the police arrested respondent Sahik Mazhar @ Saleem in connection with it and later the case was charge-sheeted against him. He was tried before a Sessions court and at the end of the trial he was found guilty of the offence under Sections 302 and 376 read with Section 511 of the IPC. He was sentenced to imprisonment for life on the first count and rigorous imprisonment for 10 years on the next count, besides fine.

This appeal was heard by a Division Bench of the High Court of Andhra Pradesh (N.Y. Hanumanthappa and Neelam Sanjiva Reddy, JJ.). From what is minuted by the learned Judges in the judgment the entire arguments would have been over in half an hour time, and the judgment was pronounced ..2/-

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then and there. Learned Judges disposed of the criminal appeal by a short and cryptic judgment as per which the conviction and sentence were upset by the learned Judges in a supercetive manner and the accused was acquitted.

The State of Andhra Pradesh has filed this appeal by special leave. Ms. Sushma Manchanda, learned counsel for the respondent and Ms. T. Anamika, learned counsel for the State of Andhra Pradesh argued at length.

Before proceeding further into the evidence it is of advantage to give a short resume of the facts.

Saida Sadia was one of the nine children of PW-2 Samina Sultana. Out of the nine children eight were female and only one is a male child. Saida Sadia is the fourth among the children. PW-2, Samina Sultana's husband was in a Gulf country during the period of occurrence. Respondent-Saleem was in his late twenties and he was living in the neighbourhood of PW-2's house. He was doing some casual work without any permanent avocation of life.

On the evening of 28.10.1992 accused Saleem coaxed the little child Saida Sadia offering custard apple to her and decoyed her to a graveyard situated behind the Dargah of

Diwane Shaw Nawat of Regadan who perhaps would have been revered as a saint by the local police. Accused Saleem who offered custard apple to the little girl when they reached the graveyard suddenly turned himself into a demon and made a

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forcible attempt to ravish her. But the resistance made by the little girl would have been with all force at her command and hence the ravishment was not accomplished. Yet the little girl was throttled and forcibly pressurised which resulted in her instantaneous death.

When PW-2 mother of the deceased child did not see her little child back home even late in the night she became panicky and went out in search of her. She made hectic enquiries for the child in and around the locality including the houses of some of her relatives. As Saida Sadia was not seen in all the searches made by her she returned home.

It was on the next morning that PW-2 Samina Sultana was told by one of the neighbours that Saida Sadia was seen accompanying the accused on the previous evening and walking towards the Dargah. PW-1 (Syed Toufiq) told PW-2 that dead body of Saida Sadia was lying in the graveyard. PW-2 in the company of PW1 rushed to the Dargah and finally spotted the body of her child.

Prosecution has mainly relied on circumstantial evidence to prove the case against the accused. There can be no doubt that Saida Sadia was killed by somebody. Her dead body was subjected to post-mortem examination by PW-13 (Dr. Hiri Krishna), Asstt. Professor of Forensic Medicines at Osmania Medical College. He noticed as many as 24 ante-mortem injuries on the dead body. We refrain from reproducing

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all the injuries the details of which have been incorporated by the doctor in the post-mortem report. Yet we may point out that a large number of injuries, some of them crescent shaped were on the neck and some of them involved the thyroid cartilage. There were eight such injuries on the neck which are described as injuries Nos. 2 to 8 and 18 in the post-mortem report. One of the injuries was a contusion of 1 cm on the posterial surface of the right ventricle of the heart, and another was a rupture of the right atrium of the heart. 300 ml. of blood was found in the pericardial cavity.

The post-mortem findings recorded by Dr. Hiri Krishna are quite sufficient for any court to reach the conclusion that death of Saida Sadia was homicidal.

Therefore, the only question to be focussed at is, was the accused Saleem the killer of Saida Sadia? As we pointed out earlier the case is built up by the prosecution on circumstantial evidence alone. Out of the circumstances pitted against the accused one item, if believable, is of such a nature that it alone can become the basis for conviction. That is the testimony of PW-1 (Syed Toufiq) who was aged 15 years and he was a close relative of the accused and was living in the same building where the accused was living. His testimony shows that the accused had made a confession to him on the same night about what he did. He told him that the girl died at his hands in so many details.

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The said testimony of PW-1 (Syed Toufiq) was subjected to severe cross-examination at the trial stage. After a detailed scrutiny made by the trial Judge, she came to the

conclusion with cogent reasons that the said item of evidence is above board and could be relied on.

It is very unfortunate that as against the well-reasoned and well detailed judgment written by the trial court the Division Bench of the High Court made an uncharitable and unfair castigation against the judgment in the following lines: "Strict scrutiny of evidence and its critical analysis was not made by the trial court. It moved much by the version of the prosecution. The trial court had taken only the quantitative aspect of evidence of the prosecution in giving its opinion".

When the trial court had meticulously examined the evidence item by item and subjected each item to detailed scrutiny what the High Court did was to make a casual and sweeping approach in a cryptic manner. We deprecate the said practice of showering such uncharitable criticism on the trial court's judgment, particularly when such judgments have been written with adequate care and necessary details. The short cut adopted by the Division Bench in disposing of the appeal against the conviction is reflected in the impugned judgment itself.

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Mr. N.Y. Hanumanthappa, J. who wrote the judgment for the Division Bench pointed out that Smt. P. Raj Kumari, Advocate was appointed as amicus curiae to argue for the accused and papers were handed over to her only on the morning of the date of judgment. The amicus curiae was heard only at 3.30 p.m. After narrating the facts and extracting portions of decisions cited before the Division Bench learned Judges, quite unfortunately, allotted only a brief paragraph for considering the merits of the case. That passage is reproduced hereunder:

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"Keeping in mind the principles laid down by the Supreme Court in the above referred cases, the finding reached by us is that prosecution failed to establish beyond reasonable doubt the involvement of the accused in the offence alleged. Having reached this conclusion, we have to say that the conviction and sentence passed against the accused is incorrect and the appeal deserves to be allowed. The appeal is disposed of accordingly".

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It became a great task for us, in view of the short cut adopted by the High Court, to go through the relevant materials in the evidence for the prosecution. In the light of the detailed arguments addressed by Ms. T. Anamika, learned counsel for the State, the following circumstances are seen pitted against the accused:

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1. The extra-judicial confession spoken to by PW1 (Syed Toufiq) which we discussed earlier;
2. Accused (Saleem) and the deceased were seen together on the evening of the date of occurrence, proceeding to the side of the Dargah by PW-3 (Sabira Begum), PW-4(Irfan Pasha) and PW-5 (Shareef Moizuddin);
3. Accused was seen returning from the graveyard all alone and when he was asked why the child was not seen with him he did not give any answer, though he was seen perplexed at the

query; and

4. As already stated the child was murdered by somebody at the graveyard itself.

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We do not want to repeat the evidence relating to the extra-judicial confession. Ms. Sushma Manchanda, learned counsel for the accused made a bid to assail the said testimony on the ground that PW-1 was taken to the Magistrate for recording the statement under Section 164 of the Code of Criminal Procedure only after an interval of one month from the date of occurrence. Learned counsel contended that it would have been a belated version which came to the fore. Ms. T. Anamika, learned counsel for the State of Andhra Pradesh pointed out that as a matter of fact that statement of PW-1 was recorded by the Magistrate on 11.11.1992 which is only 13

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days after the incident. Be that as it may, the fact remains that PW-1 was interrogated by the Police on the next day of occurrence and he would have stated this fact then and there. PW-1 cannot be blamed for the delay in recording her statement under Section 164 of Criminal Procedure Code, if at all there was any delay in recording her statement under the said section.

As pointed out earlier, the law is that an extra-judicial confession, if found reliable can be made the sole basis of conviction. Nonetheless as a proposition of practice and prudence it is advisable that court may search for assuring circumstances, so that, there can be no room for doubt regarding the reliability of the extra-judicial confession.

It is for the aforesaid purpose that we have perused the evidence of PW-3, PW-4 and PW-5. It is unnecessary to reproduce the entire testimony of those witnesses except saying that all of them said that they saw the accused with the girl child proceeding towards the Dargah on the evening of the day of occurrence. In fact PW4 (Irfan Pasha), a child, who was playing with the deceased girl also wanted to accompany the girl as the offer of custard apple allured him also. PW-4 said that he was brushed aside by the accused and as he wanted to keep him away. PW-5 said that he wanted to take his child to a Unani Physician, PW-6 who was residing

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very close to the Dargah. It was on his way that Physician that he happened to see the accused with girl child. PW-6 when examined by the prosecution gave evidence which lends credence to the version of PW5. It is pertinent in this context to point out that PW5 had seen the accused returning from the graveyard when he was all alone. He asked the accused why the child was not with him then.

Ms. Sushma Manchanda, learned counsel used this opportunity to make an attack on the testimony of PW5. She contended that if he did see the child with the accused the natural conduct should have been that he should have communicated this fact to others. Of course if such a conduct was exhibited by PW5 that also could have been accepted as a natural conduct. But here, it is unnecessary for PW5 to presume that some harm would have been inflicted on the child. It is possible for him to think that accused would have left the child at some place and he came back alone. Idea of homicide being inflicted on the child would not have occurred to PW5 at that particular time.

Having scrutinised the evidence of the above witnesses we have no manner of doubt that the learned Sessions Judge had

reached the correct conclusion that the evidence was worthy of acceptance and the circumstances proved were quite sufficient to form the chain leading to the irresistible conclusion that the killer of the little girl was none other than respondent Saleem in this case.

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We, therefore, allow this appeal, set aside the order of acquittal passed by the Division Bench of the High Court and restore the conviction and sentence passed by the trial court. We direct the respondent - Saleem to surrender to his bail. We also direct the trial Judge to take immediate steps to get the respondent back in jail for undergoing the remaining portion of the sentence imposed on him.

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PART HEARD
ITEM NO. 101

COURT NO. 5

SECTION II

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G

Criminal Appeal No. 312/1998

State of A.P.

Appellant

VERSUS

Shaik Mazhar

Respondent

Date : 06/02/2001 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE K.T. THOMAS
HON'BLE MR. JUSTICE R.P. SETHI

For Appellant

Ms. T. Anamika, Adv.

For Respondent

Mr. Sushma Manchanda, Adv.

UPON hearing counsel the Court made the following

O R D E R

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Appeal is allowed in terms of the signed order.
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(N.K. GOEL) (H.K. BHATIA) @@
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COURT MASTER COURT MASTER@@
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(Signed order is placed on the file)

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