



HIGH COURT OF ANDHRA PRADESH
THURSDAY ,THE TENTH DAY OF NOVEMBER
TWO THOUSAND AND TWENTY TWO

PRESENT

THE HONOURABLE SRI JUSTICE C.PRAVEEN KUMAR
THE HONOURABLE SRI JUSTICE B V L N CHAKRAVARTHI
CRIMINAL APPEAL NO: 136 OF 2015

Between:

1. CHEKURI RAJA RAO (A-2), GUNTUR DIST. S/o. late Yagappa,
Chenchulu, Reddipalem,
H/o. Mellavagu Village, Bollapalli (M),
Guntur District

...PETITIONER(S)

AND:

1. P.P., HYD Rep. by its Public Prosecutor, High Court of Judicature At
Hyderabad

...RESPONDENTS

Counsel for the Petitioner(s): A GAYATRI REDDY

Counsel for the Respondents: PUBLIC PROSECUTOR (AP)

The Court made the following: ORDER



HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

Crl.Appeal Nos.136 & 274 OF 2015

Crl.Appeal No.136 of 2015

Between:

Chekuri Raja Rao (A2),
S/o (late) Yagappa, aged 30 years,
Chenchulu, Reddipalem,
H/o Mellavagu Village, Bollapalli Mandal,
Guntur District.

....Appellant/A2.

Versus

The State of Andhra Pradesh, Rep. By its
Public Prosecutor, High Court of Judicature
At Hyderabad.

....Respondent/Complainant.

Crl.Appeal No.274 of 2015

Between:

Akkem Ramesh Kumar @ Babu,
S/o Sowraiah, M/33 years, Chenchu,
D.No.29-2563, Palnadu Road,
Kalyanapuri colony, Vinukonda,
Guntur District.

....Appellant/A1.

Versus

The State Represented By the
Inspector of Police, Challapalli Circle,
Rep. By Public Prosecutor, High Court,
Hyderabad.

....Respondent/Complainant.

DATE OF JUDGMENT PRONOUNCED : 10.11.2022



SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

HON'BLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI

1. Whether Reporters of Local Newspapers
may be allowed to see the Judgment? Yes/No
2. Whether the copy of Judgment may be
marked to Law Reporters/Journals? Yes/No
3. Whether His Lordship wish to see the
fair copy of the Judgment? Yes/No

C.PRAVEEN KUMAR, J

B.V.L.N.CHAKRAVARTHI, J



***HON'BLE SRI JUSTICE C.PRAVEEN KUMAR
AND
* HON'BLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI
+ Crl.Appeal Nos.136 & 274 OF 2015**

% 10.11.2022

+ Crl.Appeal No.136 of 2015

Between:

Chekuri Raja Rao (A2),
S/o (late) Yagappa, aged 30 years,
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H/o Mellavagu Village, Bollapalli Mandal,
Guntur District.

....Appellant/A2.

Versus

The State of Andhra Pradesh, Rep. By its
Public Prosecutor, High Court of Judicature
At Hyderabad.

....Respondent/Complainant.

! Counsel for the Appellant : Smt. A.Gayatri Reddy

**^ Counsel for the
Respondent : Public Prosecutor**

+ Crl.Appeal No.274 of 2015

Between:

Akkem Ramesh Kumar @ Babu,
S/o Sowraiah, M/33 years, Chenchu,
D.No.29-2563, Palnadu Road,
Kalyanapuri colony, Vinukonda,
Guntur District.

....Appellant/A1.



Versus

The State Represented By the
Inspector of Police, Challapalli Circle,
Rep. By Public Prosecutor, High Court,
Hyderabad.

....Respondent/Complainant.

! Counsel for the Appellant : Sri Challa Srinivasa Reddy

**^ Counsel for the
Respondent** : Public Prosecutor

< Gist:

> Head Note:

? Cases referred:

- 1. (2020) 7 Supreme Court Cases 1**
- 2. (2014) 10 SCC 473**

This Court made the following:



**THE HONOURABLE SRI JUSTICE C.PRAVEEN KUMAR
AND
THE HONOURABLE SRI JUSTICE B.V.L.N. CHAKRAVARTHI**

CRIMINAL APPEAL Nos.136 & 274 of 2015

COMMON JUDGMENT: - (Per Hon'ble Sri Justice B.V.L.N.Chakravarthi)

Appellant in Criminal Appeal No.274 of 2015 is Accused No.1 and the appellant in Criminal Appeal No.136 of 2015 is Accused No.2. The appellants along with Accused No.3 (died pending trial) were tried in Sessions Case No.280 of 2008 on the file of the learned X Additional Sessions Judge, Krishna, Machilipatnam.

2. Originally, A2 and A3 were tried for the offences punishable under Sections 457, 397 and 302 I.P.C., and A1 was tried for the offences punishable under Sections 457, 397 and 302 r/w 34 I.P.C., for causing the death of Pitchuka Srinivasa Rao (hereinafter, referred to as "the deceased") by trespassing into his house at the time of committing robbery on the night of 03.02.2008 at 9.30 p.m.,

3. *Vide* judgment dated 19.01.2015, the learned X Additional Sessions Judge, Krishna, Machilipatnam convicted accused No.2 for the offences punishable under Sections 457,



397 and 302 I.P.C., and convicted Accused No.1 for the offence punishable under Sections 457, 397 and 302 r/w 34 IPC and sentenced Accused No.1 to undergo rigorous imprisonment for a period of five years and also to pay a fine of Rs.2,000/-, in default of payment of fine, to undergo simple imprisonment for three months for the offence u/s 457 IPC, he is further sentenced to undergo rigorous imprisonment for a period of one year and also to pay a fine of Rs.2,000/-, in default of payment of fine, to undergo simple imprisonment for three months for the offence u/s 397 IPC and he was also sentenced to undergo life imprisonment and to pay a fine of Rs.3,000/-, in default of payment of fine, to undergo simple imprisonment for a period of one year for the offence u/s 302 IPC. Accused No.2 was sentenced to undergo rigorous imprisonment for a period of five years and also to pay a fine of Rs.2,000/-, in default of payment of fine, to undergo simple imprisonment for three months for the offence u/s 457 IPC, he is further sentenced to undergo rigorous imprisonment for a period of seven years and also to pay a fine of Rs.2,000/-, in default of payment of fine, to undergo simple imprisonment for one year for the offence u/s 397 IPC and he was also sentenced to undergo life imprisonment and to pay a fine of Rs.3,000/-, in default of



payment of fine, to undergo simple imprisonment for a period of one year for the offence u/s 302 IPC. Challenging the said conviction and sentence imposed by the learned X Additional Sessions Judge, the accused 1 and 2 preferred these two separate Criminal Appeals under Section 374(2) Cr.P.C.,

4. The facts, as culled out from the evidence of the prosecution witnesses, are as under:

P.W.1 is the wife of the deceased, who was a retired Ayurvedic Medical Officer and after retirement he was practicing at their house at Nidumolu. They both were residing in their own house opposite to Check-post, Nidumolu. Their two daughters and one son were in London.

On 03.02.2008 at 9.30 p.m., while P.W.1 was watching T.V., the deceased went outside to close the door of the compound wall and to lock the mesh of the verandah, which was being used as waiting room of patients and a room to the north of verandah was being used as consultation room/examination room by the deceased.

P.W.1 heard sounds from the consultation room and her husband was shouting as 'dongalu dongalu'. Then she rushed to the consultation room and found two culprits pressing the neck of her husband with a towel and among them



Accused No.3 was sitting on the stomach by laying her husband on the examination table and Accused No.2 was showing a knife to her and her husband and threatened them not to raise alarm, otherwise they will kill them. Accused No.2 caught hold of her 'Mangala Sutram' chain, dragged her up to verandah and she received injury on back of her neck. A2 attempted to remove her gold bangles forcibly, so she removed her four bangles and handed over to him. A2 attempted to remove her gold ring, then she herself removed the same and handed over to him. A2 demanded money and keys of almirah, then she had shown the keys and then A2 opened the almirah and took away the cash from 'marachembu'. A2 also took away Sagem Company cell phone. Thereafter, P.W.1 found missing of her ear studs, children's gold rings and anklets kept in a small bag. A2 has further taken away one Motorola cell phone and one Sony Ericson cell phone. Later, A3 also came to the hall and both A2 and A3 tied her hands and legs towards back with two towels, they disconnected the landline connection and another coin box phone connection and escaped through consultation hall.

P.W.1 herself untied her hands and legs, came to the consultation room, and found that a cloth was gagged into the mouth of her husband and tied his both hands and there



was bleeding from wound caused on front side of neck. She removed the clothes from his mouth and then her husband said that the culprits cut his neck and asked her to call for ambulance. Immediately she informed the incident to her neighbour Ramu, then 5 to 6 persons came there and telephoned to ambulance. P.W.1 also informed about the incident to her relative Dr. Madhava over phone. In the meanwhile, before reaching the Ambulance, they have started to the hospital and at Guduru Ambulance came and shifted her husband to Government Hospital, Machilipatnam. On the same night at 12.30 a.m., Outpost Police at Hospital recorded the statement of P.W.1 and at 1.10 a.m., her husband died.

Basing on the statement of P.W.1, P.W.22, S.I. of Police registered F.I.R., in Cr.No.10/2008 u/s 302 and 380 r/w 34 IPC, P.W.23 took up investigation and after completion of the investigation, he filed charge sheet against accused 1 to 3.

5. On appearance of the accused 1 to 3, copies of the documents as required under Section 207 Cr.P.C., were supplied to them. As the offences are triable by a Court of Sessions, the case was committed to the Court of the Sessions under Section 209 Cr.P.C. Accordingly, the same was made over to the Court of the learned X Additional Sessions Judge,



Krishna, Machilipatnam for trial and disposal in accordance with law.

6. Basing on the material available on record, charges, as referred to earlier, came to be framed, read over, and explained the contents of the charges to the accused in Telugu, to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, the prosecution has examined P.Ws.1 to 25 and got marked Exs.P1 to P62 and M.Os.1 to 17. Exs.D1 and D2 were got marked on behalf of the accused in the evidence of P.Ws.3 and 16. After closure of the prosecution evidence, the accused were examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against them in the evidence of the prosecution witnesses, to which they denied. No oral or documentary evidence was adduced on behalf of the accused.

8. Relying upon the evidence on record, the learned Sessions Judge convicted and sentenced the accused 1 and 2 as mentioned supra. Accused No.3 died pending trial. Challenging the same, the present appeals came to be filed by Accused 1 and 2.



9. The point that arises for consideration is:

“Whether the prosecution is able to prove the guilt of the accused 1 and 2 for the offences punishable under Sections 457, 397 and 302 r/w 34 I.P.C. beyond all reasonable doubt?”

POINT: -

10. Since both the appeals arise out of the judgment in S.C.No.280 of 2008, we feel it appropriate to decide both the appeals by way of a common judgment.

11. Dr.Challa Srinivasa Reddy, learned Counsel appearing for the appellant/accused No.1 contended that learned Sessions Judge erred in believing the prosecution story against the appellant/A1, though there is no independent oral or documentary evidence against him and the theory of recovery of M.Os.1 and 3 from the possession of the A1 under Ex.P31, dt.13.03.2008 has no legs to stand in view of the evidence of P.W.1 that on 05.03.2008 she went to Central Crime Police Station at Machilipatnam and material objects were shown to her and that she came to know about the arrest of the accused in the last week of February and further the evidence of P.Arjuna Rao (P.W.3) shows that P.W.1 told him that culprits were arrested one month after the incident and T.Arjuna Rao



(P.W.4) also deposed that after one month of the incident police asked him to come to Avanigadda Sub-Jail and after one month of the incident he went to Police Station, Machilipatnam and at that time two accused were in the Police Station and he was taken to the Police Station on the ground that he consumed toddy along with strangers and therefore, these admissions of the material witnesses examined by the prosecution show that the case of the prosecution that A1 was arrested on 13.03.2008 at Vinukonda is not true and correct and it probablises the contention of the A1 that he was taken into custody by the police in the last week of February and police planted the material objects i.e., Cell phones as if recovered from the accused on 13.03.2008 and they used the SIM card of the A1 and placed it in the Sony Ericson and Motorola Cell Phones (M.Os.4 and 5) and to create evidence as if A1 used those cell phones on 05.03.2008 soon after the alleged incident and the call data records covered by Exs.P23, P24 and P25 and the evidence of P.W.25, an employee of Vodafone Service Provider does not help the case of the prosecution in any manner as they were not supported by the required certificate under Section 65(4) (b) of the Indian Evidence Act and the investigation officer (P.W.23) in the cross-examination stated that there is no



certification for Ex.P25 and he did not obtain certification as it was not required for computer generated document and he did not know the provision of law under which certificate is not required on the copy generated out of the computer which was informed by the Cellular Phone Company authorities and further P.W.25, who is an employee of the Vodafone Company admitted that Ex.P25 Call particulars is a photo copy and there is no certificate under Ex.P25 call particulars of true copies and police asked to give details only and therefore, in the light of the judgment of the Hon'ble Supreme Court in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others** reported in **2020 (7) SCC 1**, the call data records produced in this case, which are not certified under Section 65 (B)(4) of the Evidence Act cannot be received as evidence to prove the case of the prosecution against the accused and the evidence of P.W.3 P.Arjuna Rao and T.Arjuna Rao/P.W.4 or Smt.M.Kumari/P.W.7 is not established anything against the accused No.1 that A1 went into the house of the deceased along with A2 and A3 on 03.02.2008 and in that view of the matter, the prosecution has miserably failed to prove the guilt against appellant/A1, but the trial Court without considering the above facts and



circumstances erroneously found the appellant/A1 guilty for the offences punishable u/s 457, 397 and 302 r/w 34 of the I.P.C.

12. Smt. A.Gayatri Reddy, learned Counsel appearing for the appellant/accused No.2 submitted that there are a lot of contradictions and variations in the testimonies of the witnesses examined for the prosecution and the evidence of P.W.1 shows that she was not in a position to identify the accused 2 and 3 at the time of incident on 03.02.2008 as the incident occurred in a dark room and therefore, her identification of accused 2 and 3 is doubtful and further Test Identification Parade was conducted after long delay and the evidence of P.W.1 coupled with the evidence of other witnesses shows that the accused were taken into custody much prior to the date of alleged arrest on 13.03.2008 and they were shown to the witnesses prior to the Test Identification Parade and the alleged recovery of Cell Phones and Gold items from the possession of the accused No.2 is also proved to be false and further the evidence of P.Ws.3 and 4 is also not reliable as there are several contradictions in their evidence, therefore their testimony regarding presence of the accused 2 and 3 in front of the house of the deceased on 03.02.2008 i.e., on the date of incident and that they went into the house of the deceased and came back and later they waited



in the shop of P.W.3 till evening watching the house of the deceased etc., are not proved by credible evidence and further the evidence of witnesses shows that at the time of inquest it was opined that due to deceased and P.W.1 belong to different castes and the relatives of P.W.1 did not relish the marriage of P.W.1 and the deceased and further the deceased was having disputes with the partners in connection with accounts of the Petrol Bunk and therefore, it may be one of the reasons for the death of the deceased and in that view of the matter the case of the prosecution cannot be believed that the accused 2 and 3 committed murder of the deceased for the purpose of committing robbery and therefore, the accused 2 and 3 are falsely implicated in the case by the investigation officer to close the case for statistical purpose by leaving the real culprits who were responsible for murder of the deceased.

13. According to Sri S.Dushyantha Reddy, learned Addl. Public Prosecutor, the case of the prosecution is that the deceased was a retired Government Ayurvedic Medical Officer and he was residing in Nidumolu village for the last one year prior to the date of offence and P.W.1 is his wife and on 03.02.2008 the accused 2 and 3 came to Nidumolu and went to the shop of P.Arjuna Rao (P.W.3), which is situated in front of



the house of the deceased at about 10.30 a.m., and introduced themselves on the enquiry made by P.W.3 that they came to Nidumolu to pluck black gram in the fields and they asked about the deceased for some treatment and they visited the house of the deceased and later returned to the shop of P.W.3 and at that time T.Arjuna Rao (P.W.4), who is a neighbor was also present and he also enquired the accused 2 and 3, who enquired him about toddy shop location in the village and that P.W.4 along with the said accused persons visited the toddy shop belonging to Smt.M.Kumari (P.W.7) and they consumed toddy and returned to the shop of P.W.3 and then P.W.4 left the shop for lunch and then one among the accused 2 and 3 informed P.W.3 that he is suffering from stomach pain and they are sitting in the shop for rest and then P.W.3 also left the shop for lunch and later returned to the shop at about 4.00 p.m., and both the accused 2 and 3 were present in the shop and while so at 5.00 p.m., accused No.1 came to the shop and met the accused 2 and 3 and all the accused went to the road and had discussions and then the accused No.1 left the place and thereafter the accused 2 and 3 again came to the shop of P.W.3 and then he questioned them why they came back to his shop and they told him that they would leave within a short time and



at about 5.30 or 6.00 p.m., P.W.3 went to the village to collect amounts from the farmers and returned to his shop by 7.00 p.m., but he did not notice the accused 2 and 3 in the shop and then P.W.3 locked his shop and went away to home.

14. The further case of the prosecution is that, on 03.02.2008 at about 9.30 p.m., P.W.1 and the deceased were in the house and P.W.1 was watching Television and the deceased went outside to close the doors of the compound wall and also to lock the mesh door of the verandah of the house, which was used as waiting hall for the patients, who are visiting the deceased for treatment and all of a sudden P.W.1 heard sound from consultation room and the deceased with a low voice was crying as 'dongalu dongalu' (thieves thieves) and then P.W.1 rushed to the hall anticipating that her husband might have suffered electric shock and there she found the accused 2 and 3 pressing the neck of the deceased and one of the persons among accused 2 and 3 sat on the stomach of the deceased, who was laid on the patient's examination table and another person threatened P.W.1 and the deceased not to raise any cries and among them A3 was the person who was sitting on the stomach of the deceased and A2 was the person wielding the knife threatening the deceased and P.W.1 and then the A2



suddenly came upon P.W.1 and caught hold of her Gold chain having Mangala Sutrams, dragged her to verandah and as a result she sustained injury on the back of her neck and he also attempted to remove the Gold bangles from her hands and thereupon P.W.1 herself removed the bangles and handed over the same to the A2, which are identified as property in the case and the accused also robbed gold ring (M.O.3) from P.W.1 under the threat of knife and he also demanded her to give money available in the house and keys of the almirah and that he opened the almirah and taken away cash available in the almirah and he also took away Sagem Company mobile phone (M.O.3) and also some gold ornaments (M.Os.1 and 2) available in the almirah and he also demanded P.W.1 to handover the Motorola company mobile phone and Sony Ericson Company mobile phone available in the house covered by M.Os.3 to 5 and then both the accused tied the hands and legs of P.W.1 using two towels available in the house (M.Os.6 and 7) and at that time the accused 2 and 3 removed the landline connection in the house and escaped with the booty.

15. The further case of the prosecution is that, later P.W.1 could able to untie her knots of her hands and legs and came to the examination room, where her husband was there



and found that he was gagged with a cloth and his both hands were tied and also noticed that bleeding from the neck on front side and then she removed the clothes from the mouth and then deceased informed her that culprits cut his neck and asked her to call for ambulance immediately and then she immediately rushed to the outside and informed neighbours and somebody called for the ambulance and she also informed her relative Dr.Madhavi and as there was delay for reaching ambulance, they started to the hospital in their car and when they reached Chitti Guduru, Ambulance came to them and then the deceased was shifted in the Ambulance and all of them went to the Government Hospital, Machilipatnam at about 12.30 a.m., in the night the police from Out-post Police Station of the hospital recorded her statement under Ex.P2 and later her husband died in the hospital at about 1.10 a.m., and on the next day i.e., on 04.02.2008 police conducted inquest and recorded her statement.

16. The further case of the prosecution is that, the Sub-Inspector of Police, Kuchipudi P.S., (P.W.22) received information about the incident and he rushed to the scene of offence on 04.02.2008 at about 3.30 p.m., and later he registered Ex.P2 statement as Ex.P43 F.I.R., for the offences



punishable u/s 302 and 380 r/w 34 of the I.P.C., and took up investigation and later P.Soma Sekhar, Inspector of Police, Challapalli P.S., (P.W.23) conducted investigation in the case and on 04.02.2008 Clues Team visited the scene of offence and in the presence of mediators observed the scene of offence and prepared Ex.P1 rough sketch and Ex.P30 scene of offence observation report and also seized a blood stained knife (M.O.13) and two towels (M.Os.6 and 16) and also seized a blade (M.O.17) and a lungi cloth (M.O.11) under the cover of Ex.P30 and photographs were taken on the dead body of the deceased with the help of Hari Krishna Prasad (P.W.13) and with the help of panchayatdars inquest was also conducted under Ex.P29 and dead body was sent to the hospital for post-mortem examination and P.W.1 during examination informed about the cell phones and other gold ornaments robbed by the offenders and he also seized the clothes of P.W.1 under M.Os.8 to 10 and as P.W.1 stated that her husband was using Motorola and Sony Ericson cell phones (M.Os.4 and 5), which were taken away by the offenders, which contained BSNL SIM card with Service Number 9440326869 and 9440217950 and that the deceased was also using Sagem Company cell phone (M.O.3) whenever the above phones were not functioned and it was having a separate SIM



card and then P.W.1 was sent to hospital for medical examination as she sustained injuries, after some time, as immediately she could not attend for medical treatment on account of funeral ceremonies of her husband and later he examined the witnesses residing near the scene of offence and recorded their statements and through Superintendent of Police he addressed a letter to the BSNL Telephone authorities about the Call Data Record relating to the above two numbers of BSNL to find out the IMEI numbers of the said phone numbers and later he received information under Exs.P23, P24 and P25 Call Data Records indicating IMEI numbers of the said mobile phones basing on the calls received and made from those cell phones and then he requested BSNL, Airtel, Idea and Vodafone authorities to provide Call Data Records if any with regard to the above IMEI numbers and on 26.06.2008 he received information from Vodafone Company with IMEI number with Motorola Company mobile phone stated above was used with a SIM card of Vodafone on 05.02.2008 by somebody and the Vodafone Service number used on 05.02.2008 in the Motorola phone is 9966594330 and further intimated that Sony Ericson mobile phone with the above IMEI number was also used with the above SIM card of Vodafone which was activated on



05.02.2008 and thus both the mobile phones were used with the above service number of Vodafone on 05.02.2008 and then he requested the Vodafone company to submit Call Data Record relating to service number 9966594330 and the Vodafone authorities submitted the CDRs., relating to the said SIM intimating that the service was in the name of Akkem Sourayya, Door No.29-2563, Kalyanapuri colony, Vinukonda, Guntur District and then mediators and Inspector of Police, Gudivada (P.W.21) verified the call list of Vodafone SIM card and found that several SMS were received on 05.02.2008 and it was used in M.Os.4 and 5 mobile phones robbed in the case and thereupon he deputed staff to find out the said address location in Vinukonda and P.W.21 also visited Vinukonda and on enquiry the address was traced and therefore, on 13.03.2008 at about 2.00 a.m., in the early hours himself and staff visited Vinukonda village, P.W.21 has also followed them and they reached the house of Akkem Souryya in Vinukonda village at about 9.30 a.m., along with mediators and found two persons aged 60 years and 30 years respectively and they revealed their details as Akkem Sourayya and Akkem Ramesh Kumar (A1) in the case and on enquiry Akkem Sourayya stated that the above Vodafone No.9966594330 is in his name and it is being used by



his son Mr.Akkem Ramesh Kumar (A1) and then they enquired Mr.Akkem Ramesh Kumar, who is A1 in the case and he confessed that he was studying three years degree course in Theology subject in Mount Zion Baptist Bible College, Nidumolu and that he has verified M.Os.4 and 5 mobile phones on 05.02.2008 by inserting the above Vodafone SIM and on enquiry before the mediators, he admitted that he along with the other accused 2 and 3 sold the Golden bangles in Guntur town for Rs.12,000/- and he detained Sagem mobile phone (M.O.3) and M.Os.1 and 5 were given to the accused 2 and 3 and he produced one two rows gold chain and Sagem cell phone M.Os.1 and 3 before them and then they were seized under the cover of mediators report covered by Ex.P44 in the presence of mediators and then he along with mediators, other police officials and the accused No.1 went to Guntur by 4.00 p.m., and then the A1 took them to Door No.25-21-156 in Venkatappa Colony, Guntur and there two persons i.e., A2 and A3 were present and then the police detained them and on interrogation they disclosed about the commission of offence in the case and police seized a Gold ring and Sony Ericson cell phone from A2, which are available in the house and A3 also disclosed about the commission of offence and from his custody Motorola cell phone was recovered



and IMEI numbers were tallied and they were seized under the cover of mediators report in the presence of mediators and then all the accused were brought to the police station at Kuchipudi and produced before the learned Magistrate for remand to judicial custody and later the investigation officer filed requisition before the Mobile Magistrate Court, Machilipatnam for conducting Test Identification Parade for identification of the offenders in the case by P.Ws.1, 3 and 4 and also took the accused for police custody from 26.03.2008 to 28.03.3008 and interrogated them in the presence of mediators under the cover of Ex.P32 mediators report and then the accused disclosed that he has thrown away the knife into the bushes situated near the Petrol bunk at Nidumolu and A2 also disclosed that he has kept his clothes near a place by the road side at Vijayawada R.T.C., bus stand, A3 disclosed that he has left the knife in the scene of offence, which was recovered earlier and A3 further stated that he has thrown away his clothes near APSRTC bus stand, Vijayawada and A1 disclosed that he has been using Sagem cell phone by putting a SIM card with Service No.9908789448 and it is of Motorola company and it was also seized under the cover of a mediators report and the investigation officer has also examined the officials of the Bible College to confirm whether A1



was studying in their College and the Principal of the College Dr.K.Deva Sahayam also furnished records about the same and also data of attendance relating to the Accused No.1 and the police also searched the clothes near RTC bus stand, but could not find them and the above proceedings were recorded under Exs.P33, P34 and P35, dt.27.03.2008 and Test Identification Parade for identification of the stolen property was also conducted with the assistance of P.W.15 and others, where P.W.1 identified the Golden articles and mobile phones under the cover of Ex.P36, dt.30.03.2008 and later on 04.04.2008 the blood stained knife was sent to RFSL, Vijayawada through Special Mobile Magistrate, Machilipatnam and the learned Magistrate also conducted Test Identification Parade on 05.04.2008 for identification of the accused by P.Ws.1, 3 and 4 and they identified the accused 1 to 3 in the said Test Identification Parade and Airtel authorities furnished information that the SIM card with Service No.9908789448 is in the name of Utluri Nageswara Rao and later on the request of police under Ex.P45, the General Manager, BSNL, Vijayawada has furnished information about the Service numbers 9440326869 and 9440217950 pertaining to the deceased and later the Superintendent of Police addressed several letters



under Exs.P46 to P53 to the service providers of BSNL, Airtel, Vodafone, Idea cellular companies to provide information relating to the above Service numbers and a letter was addressed by the Sub-Divisional Police Officer, Machilipatnam to R.F.S.L., Vijayawada regarding examination of knife and he also filed a memo for alteration of section of law under Ex.P56 and later Exs.P37 and P38 RFSL report and wound certificate of P.W.1 were received and Ex.P40 post-mortem certificate of the deceased was also received and later on conclusion of the investigation, he laid the police report (charge sheet) for the offence punishable u/s 457, 397 and 302 r/w 34 of the IPC against accused No.1 and for the offence punishable u/s 457, 397 and 302 of the IPC against accused 2 and 3.

17. The above facts and circumstances are relied upon by the prosecution to prove the charges in the case. The prosecution to bring home the guilt of the accused 1 to 3, has examined as many as 25 witnesses as P.Ws.1 to 25 respectively and filed 62 documents, which were marked as Exs.P1 to P62 respectively, apart from M.Os.1 to 17. A close scrutiny of the prosecution evidence discloses that the prosecution has been relying on certain pieces of evidence/ circumstances to connect the accused No.1 with the charges for the offence's punishable



u/s 457, 397 and 302 of the IPC with the aid of section 34 of the IPC.

18. The prosecution has been relying on certain circumstantial pieces of evidence as well as direct evidence of the eyewitness to prove the charges for the offences punishable u/s 457, 397 and 302 of the IPC against accused 2 and 3.

19. When coming to the facts and circumstances relied upon by the prosecution to prove the charges against accused No.1, the prosecution is contending that on the date of offence i.e., on 03.02.2008 when the accused 2 and 3 were present in the shop of P.Arjuna Rao/P.W.3, which is located in front of the house of the deceased, A1 met the accused 2 and 3 and had discussions with them for some time and left the place and later when the investigation officer received information from BSNL authorities about the IMEI numbers of Motorola mobile phone and Sony Ericson mobile phone robbed from the house of the deceased and then investigation officer addressed letters to the service providers viz., BSNL, Airtel, Idea and Vodafone to furnish information available pertaining to the Call Data Records with them if the above IMEI numbers are found in their records and in response to the said requisition made by the



police, Vodafone authorities intimated that their CDR information shows that the above two IMEI numbers with the mobile phones were used on 05.02.2008 with their service SIM card bearing No.9966594330 and that service was provided to Akkem Sourayya with his particulars available in Vinukonda of Guntur District and then on 13.03.2008 the investigation officer along with other officials of the police and mediators reached Vinukonda during morning hours and went to the house of Akkem Sourayya as per the address particulars provided by the Vodafone authorities and there they found the accused No.1 along with his father Mr.Akkem Sourayya and then on interrogation it was disclosed that the said SIM card of Vodafone company with service number 9966594330 is in the name of father of accused No.1, but it is being used by the accused No.1 and it was activated on 05.02.2008 and then the accused No.1 disclosed about the commission of offence in the case and produced M.O.1 gold property stolen from P.W.1 and also M.O.3 cell phone and later on interrogation informed that he has been using Motorola cell phone with SIM card with service number 9908789448 standing in the name of his brother-in-law Utluri Nageswara Rao and the Airtel authorities confirmed the same and therefore, it is the specific case of the



prosecution that they have arrested the accused No.1 on 13.03.2008 and in pursuance of the statement of the accused No.1 they recovered M.Os.1 and 3 from his possession available in his house at Vinukonda and later basing on his confessional statement they reached the accused 2 and 3 in Venkatappa Colony in Guntur and arrested them and recovered two mobile phones from their possession apart from the other gold ornaments and subsequently during the Test Identification Parade conducted for the property by Village Revenue Officer and others, P.W.1 identified the gold ornaments as well as mobile phones as belonging to them i.e., deceased and P.W.1 and later during the Test Identification Parade conducted for the identification of the offenders by the learned Magistrate (P.W.24) on 05.04.2008 P.Ws.1, 3 and 4 identified the accused.

20. The contention of the accused No.1 is that, the story of arrest and recovery of stolen property alleged by the prosecution is a false story and he was taken into custody much prior to the alleged date of arrest and police planted M.Os.1 and 3 as if they were recovered from his possession and the evidence of P.Ws.1, 3 and 4 discloses the same and as such the theory of arrest put forth by the prosecution is false and the admissions



of P.Ws.1, 3 and 4 in the cross-examination probablises the plea of the accused No.1.

21. P.W.1, who is none other than the wife of the deceased, in her chief-examination reiterated the facts about the accused 2 and 3 committing murder of her husband in their house and robbing the gold ornaments and cell phones from the house on 03.02.2008 and taking her husband to the hospital and death of her husband in the hospital etc., and as per the version deposed by her in the chief-examination after incident happened on 03.02.2008 police recorded her statement under Ex.P2 in the hospital and later on 30.03.2008 Challapalli police asked her to come and identify her property and she identified M.Os.1 to 5 in the presence of mediators and on 05.04.2008 under Ex.P58 she identified the accused 2 and 3. In the cross-examination she deposed that,

“I came to know about arrest of accused in the last week of February. I went to CCS P.S., Machilipatnam on 5-3-08. Material objects were shown to me. I do not know whether the accused were in the P.S. I identified MOs.1 & 2 by informing identification particulars of my gold ornaments.”

She further deposed that,



“It is true that in Eenadu Paper dt.4-3-08 the arrest of accused was published.”

22. When coming to the evidence of P.W.3, in the chief-examination he deposed about the accused 2 and 3 coming to his shop in the morning hours and waiting in the shop till evening and in the middle the said accused and P.W.4 went to Toddy shop and coming back and he also deposed that the accused No.1 coming to his shop and discussing with A2 and A3 etc., and he further deposed that he identified the accused 1 to 3 before the Magistrate. In the cross-examination he deposed that,

“P.W.1 told me that culprits were arrested one month after the incident.”

P.W.4 deposed that on the date of incident he saw the accused 2 and 3 at the shop of P.W.3 and after one-month police asked him to come to Avanigadda and he identified the accused in the Sub-Jail and in the cross-examination he deposed that,

“After one month of incident I went to the Police Station, Bandar, behind the Bus station. After obtaining my signature police left me after obtaining all my particulars. Police took me to the P.S., as I consumed toddy along with stranger. That two culprits were in the P.S.,.....After one month police took me to Avanigadda for T.I.P.”



23. The above facts and circumstances deposed by P.Ws.1, 3 and 4 in the cross-examination show that after one month of the incident which was occurred on 03.02.2008, P.Ws.1, 3 and 4 visited the Police Station and found the accused in the Police Station and in fact P.W.1 went to the extent that she identified the property in the Police Station on 05.03.2008 and she admitted that arrest of the accused was also published in a newspaper on 04.03.2008, which corroborates her evidence that she went to the police station on 05.03.2008 for identification of the property. These circumstances probablise the contention of the accused No.1 that he was detained long prior to the date of alleged arrest on 13.03.2008, creating a reasonable doubt in our mind that the story of arrest and recovery put forth by the prosecution may not be true story and something was happened prior to the date of 13.03.2008 and later for the best reasons known to P.W.23 it was pressed into service on 13.03.2008 as if the accused were arrested on that day and the material objects, including the mobile phones were recovered from them.

24. When coming to the Call Data Records, the prosecution is intending to rely upon the C.D.Rs., provided by BSNL, Vodafone authorities under Exs.P23 to P25 and Ex.P62



covering letter produced by P.W.25 of Vodafone company. Admittedly, the Call Data Records available in the case were not certified under Section 65(B)(4) of the Indian Evidence Act. The investigation officer/P.W.23 was cross-examined on this aspect by the defence. In the cross-examination he deposed that,

“There is no certification in the Ex.P-23 as to who issued the particulars but the witness says that he did not obtain such certification as it is not required for computer generated document. I do not know the provision of law under which the certification is not required on the copies generated out of the computer but, it is so informed by the cellular phone company. I did not record such statement from the furnisher of Ex.P-23. Ex.P-25 contained two pages and it contains certification of the furnisher on the list of calls but not on the other page.”

P.W.25 is an employee from Vodafone Company, Vijayawada. She deposed that as per the request of police under Ex.P53 their company issued Ex.P25 CDR relating to the 9966594330, which was said to be in the name of the father of accused No.1 to say that this number was used in Motorola cell phone (M.O.4) and Sony Ericson cell phone (M.O.5) by the accused No.1 on 05.02.2008 soon after the offence in the case. P.W.25 says that the details covered by Ex.P25 C.D.R., were taken from computer system available in their company and they have provided the



details on the request of police under the covering letter and in the cross-examination she deposed that they have not certified Ex.P25 as true copies and they issued the same on the request of police and the defence contended that this is not copy of the original. This shows that Ex.P25 which is a C.D.R., pertaining to Vodafone service number said to be in the name of the father of accused No.1. Admittedly, the prosecution did not examine the father of the accused No.1. No reason has been assigned for not examining the father of the accused No.1. Further, the prosecution also did not choose to examine Utluri Nageswara Rao to prove that Motorola service number 9908789448 is in his name and that it was used by the accused No.1 at the relevant point in time to support the case of the prosecution that it was used in M.O.3 Sagem mobile phone. The Hon'ble Apex Court in a recent judgment in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others**¹ held that,

“60.It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a ‘responsible official position’ in relation to the operation of the relevant device, as also the person who may otherwise be in the ‘management of relevant activities’ spoken of in Sub-section (4) of Section 65B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65B(4) makes it clear that it is

¹ (2020) 7 Supreme Court Cases 1



sufficient that such person gives the requisite certificate to the “best of his knowledge and belief” (Obviously, the word “and” between knowledge and belief in Section 65B(4) must be read as “or”, as a person cannot testify to the best of his knowledge and belief at the same time).

61. We may reiterate, therefore, that the certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. (supra), and incorrectly “clarified” in Shafhi Mohammed (supra). Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor (1876) 1 Ch.D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose.

62. In view of the above, the decision of the Madras High Court in K. Ramajyam (supra), which states that evidence aliunde can be given through a person who was in-charge of a computer device in the place of the requisite certificate under Section 65B(4) of the Evidence Act is also an incorrect statement of the law and is, accordingly, overruled.”

25. In the light of the principles laid down by the Hon’ble Apex Court, the requirement u/s Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record as held in **Anvar P.V., Vs. Basheer** reported in **(2014) 10 SCC 473** and any amount of oral evidence in the



place of such certificate cannot possibly suffice as Section 65-B (4) is a mandatory requirement of the law and Section 65-B (4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise and to hold otherwise would render Section 65-B (4) otiose and the Hon'ble Supreme Court in the above judgment has observed that the view clarified in **Shafhi Mohammad Vs. State of H.P., reported in (2018) 2 SCC 801** case is incorrect and further held that the decision of the Madras High Court in **K.Ramajayam Vs. State** reported in **2016 Crl.L.J., 1542** that evidence *aliunde* can be given through a person who was in-charge of a computer device in the place of the requisite certificate under Section 65-B (4) of the Evidence Act, is also incorrect statement. In the light of the above law, the evidence of P.W.25 will not improve the case of the prosecution in the absence of requisite certificate under Section 65-B (4) of the Evidence Act in respect of Ex.P25 C.D.Rs., pertaining to service number 9966594330 said to have been used by A1 in M.Os.4 and 5 mobile phones on 05.02.2008 to rope him with the charges in the case with the aid of Section 34 of the I.P.C.,

26. The only circumstance now remained against the accused No.1 in the case is that P.W.3 deposed that on



03.02.2008 the accused No.1 came to his shop at about 5.00 p.m. and had some discussions with A2 and A3. P.W.4 did not depose that he saw the A1 on that day when he came to the shop of P.W.3. Hence, there is no corroboration to the evidence of P.W.3 with regard to the allegation of A1 met A2 and A3 at his shop and had some discussions.

27. The learned Addl. Public Prosecutor relied upon the judgment of the Hon'ble Apex Court in **Geejaganda Somaiah Vs. State of Karnataka** reported in **(2007) Supreme Court Cases 315** in respect of the circumstantial evidence against A1. But we are of the opinion that this judgment will not help the case of the prosecution in the light of the above facts and circumstances in the case on hand as the prosecution story about arrest of the accused No.1 and alleged recovery is proved to be doubtful in view of the evidence of P.Ws.1, 3 and 4 as the arrest was made prior to 13.03.2008.

28. In the light of the above discussion, we are of the considered opinion that, that piece of evidence from the testimony of P.W.3 will not establish the case of the prosecution to rope the accused No.1 for the offences punishable u/s 457, 397 and 302 IPC with the aid of Section 34 of the I.P.C., In that



view of the matter, in our considered opinion the trial Court erred in holding that the prosecution proved the guilt of the accused No.1 beyond reasonable doubt for the offences punishable u/s 457, 397 and 302 r/w 34 of the I.P.C., and consequently, it is liable to be set aside.

29. When coming to the case against the accused 2 and 3, as already stated supra, the case of the prosecution is not only based on circumstantial evidence, but also on the eyewitness testimony to prove that the accused 2 and 3 committed the alleged overt acts as per the story of the prosecution.

30. P.W.1 is the wife of the deceased in the case. In her evidence she categorically deposed that on 03.02.2008 at about 9.30 p.m., while she was watching Television, her husband to lock the doors of the compound wall gate went outside and after some time she heard the cries of her husband from the consultation room in raising alarm as 'thieves' and immediately she rushed to the said room and found A3 sitting on the stomach of the deceased and A2 pressing the neck of the deceased and then A2 came upon her wielding a knife and threatened her to kill the deceased and A2 caught hold of her



gold chain having Mangala Sutrams and pulled her towards verandah and in that process she suffered injuries on the back of neck and then he threatened her with dire consequences and robbed the gold chain, gold bangles and other gold ornaments worn by her at that time and also took her into the house and made her to open the almirah and robbed the cash available in the almirah along with some other gold ornaments found in the almirah and later tied her hands and legs with two towels (M.Os.6 and 16) and then both the accused escaped with the booty and then after some time she could able to untie the towels and went to the consultation room and found that blood was coming from the neck of the deceased and deceased informed her that the accused cut his neck and therefore asked her to call for the ambulance immediately and then she came out and called the neighbours and some of them made phone call to the ambulance, but as blood was oozing out, the deceased was shifted through the car and on the way to the hospital, ambulance came and then the deceased was shifted to the Government Hospital, Machilipatnam in the ambulance and there the deceased succumbed to the injuries at about 1.10 a.m., in the night and the out-post police came there and Head Constable recorded the statement of P.W.1 under Ex.P2 and



later S.I. of Police (P.W.22) basing on Ex.P2 registered F.I.R., under Ex.P43 and subsequently P.W.23 conducted investigation by visiting the scene of offence, prepared a rough sketch of the scene of offence under Ex.P1 and the inquest was also conducted over the dead body of the deceased under Ex.P29 and the dead body was sent for post-mortem examination vide Ex.P40 and later the investigation officer examined the witnesses and recorded their statements and during the course of investigation letters were addressed to the BSNL to find out IMEI numbers of the Motorola phone, Sony Ericson phone and basing on the information provided by BSNL he identified IMEI numbers and then he addressed letters to the service providers of the BSNL, Airtel, Idea and Vodafone to provide CDRs., for said IMEI numbers and Vodafone responded providing Ex.P25 C.D.Rs., saying that the service number 9966594330 was used on 05.02.2008 and it belongs to one Akkem Sourayya, father of A1, who was residing in Vinukonda and accordingly on 13.03.2008 they visited Vinukonda and went to the house of father of the A1 and there they found father of the A1 and on interrogation A1 confessed about the offence and seized M.Os.1 and 3 and later basing on his statement arrested A2 and A3 in Guntur and recovered other mobile phones and gold ornaments



and subsequently P.W.1 identified property in Test Identification Parade and P.Ws.1, 3 and 4 identified A1 to A3 in T.I.P., conducted by the Magistrate on 05.04.2008 and after conclusion of the investigation laid police report (charge sheet) against the accused.

31. P.W.1, who is wife of the deceased in her evidence, without any amount of doubt, has identified the accused 2 and 3 as the thieves who came to her house on 03.02.2008 at about 9.30 p.m., and who committed the overt acts in attacking her husband and robbing the gold ornaments as well as mobile phones and her evidence shows that when A2 asked her by catching hold of gold chain available in her neck, she sustained injury. The evidence of doctor P.W.18 coupled with Ex.P39 wound certificate disclose that he examined P.W.1 on 07.02.2008 at about 2.45 p.m., and found a linear abrasion of 4 x 12 cm., on right side neck and mubril linear abrasion of $\frac{1}{2}$ x $\frac{1}{2}$ present on the back of neck and also found multiple abrasions present on both legs above ankle joint and all the injuries are simple in nature and he issued Ex.P39. Nothing was elicited in his cross-examination or in the cross-examination of P.W.1 to say that this evidence is not reliable, or it was planted to create some piece of evidence. The



investigation officer gave a plausible explanation for delay of examination of P.W.1 stating that she could not attend for medical examination as her husband died in the hospital on the night of 03.02.2008 and immediately she attended for funeral ceremonies. Thus, this piece of medical evidence and the oral testimony of P.W.1 supports the case of the prosecution and probablises the case of the prosecution that these injuries were caused on the neck of P.W.1 when A2 caught hold of her gold chain and pulled her towards verandah and further the abrasions on the legs above the ankle shows that due to tying of the towel she might have sustained the above abrasions. The evidence of P.Ws.3 and 4 further shows that the accused 2 and 3 have spent whole day on 03.02.2008 at the shop of P.W.3, which is located in front of the house of the deceased for the reasons best known to them and they also went into the house of the deceased once and it was noticed by P.W.3 and his evidence further established that the accused 2 and 3 were present there till P.W.3 left the shop in the evening around 5.00 p.m. Therefore, the case of the prosecution probablises that the accused 2 and 3 waited for the time of opportunity during night time to enter the house of the deceased and after entering the house of the deceased they have committed the overt acts,



which are deposed by P.W.1. Hence, the version of P.W.1 is inspiring confidence in our minds to believe the case of the prosecution that the accused 2 and 3 after gaining entry into the house of P.W.1, attacked the deceased before P.W.1 went into the consultation hall and on seeing P.W.1, A2 went to her and caught hold of her gold chain available in the neck and pulled her and as a result she sustained injury on the neck and then as deposed by P.W.1 he robbed all the gold ornaments available on her body and later took her to the almirah and made her to open it and robbed the money and other gold ornaments available in the almirah and later tied her hands and legs with the aid of towels available in the house and then ran away with the booty. No explanation is forth coming from the accused 2 and 3 in their examination u/s 313 of Cr.P.C., as to why they have waited in front of the house of the deceased from the morning till late evening and why they entered into the house of the deceased at one point in time during noon time and further the prosecution in order to support their case also examined one more witness P.W.16. He deposed that on 03.02.2008 two persons came to his shop and purchased knives and two vegetable knives at about 10.00 a.m., and he identified M.Os.13 and 14 as the said knives. It is pertinent to note down



that M.O.13 was recovered from the scene of offence as per the evidence of the mediators and the investigation officer covered by scene offence observation report Ex.P30. It was also sent to RFSL for examination and as per RFSL reports vide Exs.P37 and 38 human blood was found on the said knives. In the cross-examination he deposed that after one-month police came to his shop along with accused and then he has identified them. This piece of evidence will not whittle down his evidence in the chief-examination that A2 and A3 came to his shop on 03.02.2008 and purchased M.Os.13 and 14 knives.

32. K.Rama Mohana Rao/P.W.2 is a neighbor to the house of the deceased. As per his evidence, on 03.02.2008 at about 10.00 p.m., P.W.1 raised cries and he woke up and then she informed them that thieves attacked in the house and beat her husband and at that time P.W.1 and her husband came out and they noticed blood coming from the neck of the deceased. N.China Babu/P.W.5 deposed that on 03.02.2008 at about 9.30 p.m., one Srikanth came to him and told that an attack was made on the doctor by some thieves and they cut his throat and that they all went to the residence of the doctor and called 108 ambulance and the doctor was omitting at that time and then they tried to shift the doctor in the car and on the way to the



hospital, ambulance came and they shifted the doctor to the hospital and from his evidence it is revealed that doctor received cut injury on his throat and the doctor told him that culprits cut his throat with some weapon. So, it is very clear that soon after the incident the deceased informed the neighbours also that the assailants cut his throat with a weapon. P.W.1 evidence established that the said assailants are none other than A2 and A3. P.W.6 is another neighbor, who deposed that on the date of incident he was informed by Srikanth that there was an attack on the doctor and an injury was caused and blood was coming from the neck of the doctor and he went to the house of the doctor and P.W.1 informed him that two thieves came to the house and cut the throat of the doctor and then ambulance was called and in the meanwhile the doctor was shifted in the car of the doctor and on the way to the hospital 108 ambulance came and the doctor was shifted to the hospital in the ambulance. Therefore, the evidence of neighbours of P.W.1 corroborated the evidence of P.W.1 and it also shows that the doctor was alive at that time and informed them that two assailants attacked him and one of them cut his throat with a weapon and the evidence of P.W.1, as already stated supra, established that A3 was sitting on the stomach



and A2 was doing violence on the neck of the deceased. So, it indicates and establishes that the overt acts of A2 and A3 caused death of doctor and the evidence of doctor/ P.W.19, who conducted post-mortem examination corroborated by Ex.P40 post-mortem certificate shows that the cause of the death was due to shock with edema of neck due to multiple injuries around the neck and chest prior to 10 to 20 hours from the time of post-mortem examination and his evidence discloses that ante-mortem injuries were found on the neck showing incised wounds on the neck of the deceased, supporting the case of the prosecution that the death was caused due to cutting the neck with a sharp weapon like M.O.13 knife.

33. The contention of the A2 and A3 that in the inquest report it was stated that the offence might have happened due to disputes between the partners of the Petrol Bunk or due to love marriage of the deceased and P.W.1, which was happened 30 years ago etc., have no legs to stand and nothing was elicited from any of the witnesses probablising the said version.

34. The decision relied upon by the learned counsel for A2 in **Musheer Khan @ Badshah Kham and another V. State of Madhya Pradesh** reported in **2010 (1) ALD (Crl.) 813 (SC)**



will not help the case of the A2 in the light of the evidence of P.Ws.1, 3 and 4 and neighbours which established the overt acts of A2 and A3 in respect of the offences in the case. Motive will not play any vital role when eyewitness's evidence is cogent, convincing, and reliable leading to a conclusion that the accused 2 and 3 have committed murder of the deceased and robbed the property from the house by gaining wrongful entry into the house for committing robbery and murder.

35. The learned counsel for the accused No.2 relied on the decision of Hon'ble Supreme Court in **D.Thamodaran Vs. Kandasamy and another** reported in **(2015) 16 Supreme Court Cases 758** on the aspect of delay in lodging the FIR is fatal to the case of the prosecution. But the facts and circumstances in the case show that immediately after the incident the deceased was taken to the Government Hospital, Machilipatnam and there at about 12.30 a.m., in the night police from Out-Post P.S., Head Constable recorded the statement of P.W.1 under Ex.P2 and it was registered as F.I.R., vide Ex.P43 by the Sub-Inspector of Police/P.W.22 on receipt of Ex.P2 statement and after visiting the scene of offence and in that view of the matter, the contention of the defence that there was a delay in registering the F.I.R., is not tenable and the



judgment of the Hon'ble Apex Court relied upon by A2 will not help the case of the defence.

36. In the light of the above facts and circumstances, we have no hesitation to hold that the prosecution has proved the guilt of the accused 2 and 3 for the offences punishable u/s 457, 397 and 302 of the I.P.C., beyond all reasonable doubt. A3 is no more, and he died pending trial of the case. In that view of the matter, we do not find any merit in the appeal filed by the accused No.2 and consequently the appeal fails, and the conviction and sentence imposed by the learned Sessions Judge for the above-mentioned offences shall be sustained.

37. In the result, we allow the appeal filed by accused No.1 in Crl.A.No.274 of 2015 and therefore, the conviction and sentence imposed against him by the learned Sessions Judge by the judgment dt.19.01.2015 in S.C.No.280 of 2008 on the file of X Addl. Sessions Court, Krishna, Machilipatnam for the offences punishable u/s 457, 397 and 302 r/w 34 of the I.P.C., is set aside and therefore, he shall be released forthwith, if he is not required in any other case, and the fine amount, if any, paid by accused No.1 shall be refunded to him, after expiry of appeal time.



The appeal filed by accused No.2 in CrI.A.No.136 of 2015 is dismissed, confirming the conviction and sentence passed by the learned Sessions Judge by the judgment dt.19.01.2015 in Sessions Case No.280 of 2008 on the file of X Addl. Sessions Court, Krishna, Machilipatnam, for the offences punishable u/s 457, 397 and 302 of I.P.C.,

JUSTICE C. PRAVEEN KUMAR

JUSTICE B.V.L.N. CHAKRAVARTHI

Date : 10.11.2022
dvsn



**THE HONOURABLE SRI JUSTICE C.PRAVEEN KUMAR
AND
THE HONOURABLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI**

CRIMINAL APPEAL Nos.136 & 274 of 2015

Date : 10.11.2022

dvsn