CRL.A No. 100187 of 2017

IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 4TH DAY OF NOVEMBER, 2022

PRESENT

THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ

AND

THE HON'BLE MR JUSTICE G BASAVARAJA

CRIMINAL APPEAL NO. 100187 OF 2017 (C)

BETWEEN:

SHIVAPPA @ SHIVANAND HITTANAGI

…PETITIONER

(BY SRI. KUSHAL V. BOLMAL., ADVOCATE)

AND:

THE STATE OF KARNATAKA
REPRESENTED BY ITS
PUBLIC PROSECUTOR.
HIGH COURT OF KARNATAKA, DHARWAD.

…RESPONDENT

(BY SRI. V. M. BANAKAR, ADDL SPP, ADVOCATE)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374 (2) OF CR.P.C., SEEKING TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE DATED 01.06.2017 PASSED BY THE PRL. SESSIONS JUDGE, BELAGAVI IN S.C.NO.115 OF 2014 AND SET THE ACCUSED/APPELLANT AT LIBERTY.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 18.10.2022, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **SURAJ GOVINDARAJ J**. PRONOUNCED THE FOLLOWING:

JUDGMENT

1. The appellant is accused who has been convicted by the Principal Sessions Judge, Belagavi vide judgment dated 01.06.2017 in Sessions Case No.115/2014 for offences punishable under Sections 302, 201 and 404 of the IPC.

2. The appellant has been sentenced to undergo imprisonment for life for offences punishable under Section 302 of the IPC and to pay fine of Rs.50,000/-, to undergo imprisonment for seven years for offence punishable under Section 201 of the IPC and to undergo imprisonment for three years for offence punishable under Section 404 of the IPC, that all sentences running concurrently.

3. The facts of the case are that:

   3.1. A missing complaint was filed on 04.02.2014 at 2200 hours, a further complaint came to be filed by the son of the deceased on 05.02.2014 at 1530

hours that an offence under Section 302 had been committed.

3.2. In furtherance of the same, a case came to be registered by the Yamakanamaradi Police Station in Crime No.46/2014. The Circle Police Inspector, Hukkeri Circle having completed his investigation laid a charge sheet against the accused for the offences under Section 302, 201 and 404 of the IPC. The accused pleaded not guilty and claimed to be tried.

3.3. The prosecution in all lead evidence of 23 witnesses and marked more than 38 documents. 08 material objects were also marked by the prosecution. The accused did not lead any evidence.

3.4. Upon the trial being completed, the trial Court put across the incriminating evidence against the accused. The accused denied all such incriminating evidence in his statement under Section 313 Cr.P.C. It is after hearing the counsel that the

above order of conviction and sentence came to be passed, which is impugned herein.

4. Sri. K. L. Patil, learned counsel appearing for the appellant would submit that:

4.1. The entire case of the prosecution is without any basis. The prosecution has been unable to establish beyond all reasonable doubt that the accused is involved in the offences alleged.

4.2. The case of the prosecution is based on conjectures. There is nothing on record to establish as to how the Investigating Officer connected the accused to the crime. The accused has been arrested on the basis of the instructions issued by the Circle Police Inspector without any basis.

4.3. Even as per the post-mortem report and the evidence of the doctor, who has conducted the post-mortem, the body of the deceased was decomposed. Hence, he submits that the allegation that the deceased went missing from 03.02.2014

and the complaint had been filed on 05.02.2014 that at 1330 hrs the body has been found in a decomposed state, and animals having eaten the body would indicate that the death of the deceased had occurred much earlier and not on 03.02.2014 or 04.02.2014 as claimed by the prosecution.

4.4. That the alleged seizure of the gold Boramal chain of the deceased is made contrary to the mandate under Section 27 of the Indian Evidence Act. The seizure of this Boramal chain, based on which the accused has been convicted is also contrary to the principles of Indian Evidence Act.

4.5. The allegation is that the body of the deceased was lying for nearly two days without anybody knowing about it, which is not acceptable since the location where the body was lying is close to a temple as also close to a house of the farmer and very close to the National Highway, no body could have been lying there decomposed emanating foul smell for such a long period of time.

4.6. That allegedly a stone weighing 25-30 kilos has been dropped on the head of the deceased crushing her head, which could not have been done by the accused. There is no analysis made on the said stone to verify if the fingerprints of the accused were present on the said stone. The slight build of the accused would indicate that he could not have lifted the said stone and dropped it on the head of the deceased.

4.7. The investigation which has been carried out is lopsided inasmuch as the investigation is carried out only to fix the guilt on the accused and not to ascertain the truth of the matter.

4.8. The witnesses though have tried to support the case of the prosecution, PW1 – son of the deceased has stated that the gold Boramal chain recovered by the police is not that of his mother. When such an important piece of evidence is not attributed to the mother, the recovery of the same cannot link the accused to the same.

4.9. As regards the goats which have been seized, he submits that there is no way of identifying and ascertaining the identity of the said goats to be that belonging to the deceased and/or PW1, there being no identifying mark as such available on the goat except that the goats were black in colour.

4.10. Therefore, the prosecution has been unable to prove the guiit of the accused. The trial Court has erred in convicting the accused without properly appreciating the evidence on record, which has resulted in miscarriage of justice and as such, the order of conviction passed by the trial Court is required to be set aside.

4.11. He relied upon the following judgments in support of his contentions:

4.11.1. Criminal Appeal No.64-65/2022 in the case of ***Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh,*** decided on 13.10.2022 by the Hon'ble Supreme Court at Para No.45 "Principles of Law relating to appreciation of circumstantial evidence". The relevant paragraphs 52, 53, 54, 55, 56, 57, 58, 64, 65,

66, 70 and 86 are extracted below for easy reference:

45. In 'A Treatise on Judicial Evidence', Jeremy Bentham, an English Philosopher included a whole chapter upon what lies next when the direct evidence does not lead to any special inference. It is called Circumstantial Evidence. According to him, in every case, of circumstantial evidence, there are always at least two facts to be considered:

a) The Factum probandum, or say, the principal fact (the fact the existence of which is supposed or proposed to be proved; &

b) The Factum probans or the evidentiary fact (the fact from the existence of which that of the factum probandumis inferred).

52. Section 27 of the Evidence Act, 1872 reads thus:

"27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

53. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence along with his blood stained clothes then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as

he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.

54. The reason why we are not ready or rather reluctant to accept the evidence of discovery is that the investigating officer in his oral evidence has not said about the exact words uttered by the accused at the police station. The second reason to discard the evidence of discovery is that the investigating officer has failed to prove the contents of the discovery

panchnama. The third reason to discard the evidence is that even if the entire oral evidence of the investigating officer is accepted as it is, what is lacking is the authorship of concealment. The fourth reason to discard the evidence of the discovery is that although one of the panch witnesses PW2, Chhatarpal Raidas was examined by the prosecution in the course of the trial, yet has not said a word that he had also acted as a panch witness for the purpose of discovery of the weapon of offence and the blood stained clothes. The second panch witness namely Pratap though available was not examined by the prosecution for some reason. Therefore, we are now left with the evidence of the investigating officer so far as the discovery of the weapon of offence and the blood stained clothes as one of the incriminating pieces of circumstances is concerned. We are conscious of the position of law that even if the independent witnesses to the discovery panchnama are not examined or if no witness was present at the time of discovery or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the discovery evidence unreliable. In such circumstances, the Court has to consider the evidence of the investigating officer who deposed to the fact of discovery based on the statement elicited from the accused on its own worth.

55. Applying the aforesaid principle of law, we find the evidence of the investigating officer not only unreliable but we can go to the extent to saying that the same does not constitute legal evidence.

56. The requirement of law that needs to be fulfilled before accepting the evidence of discovery is that by proving the contents of the panchnama. The investigating officer in his

deposition is obliged in law to prove the contents of the panchnama and it is only if the investigating officer has successfully proved the contents of the discovery panchnama in accordance with law, then in that case the prosecution may be justified in relying upon such evidence and the trial court may also accept the evidence. In the present case, what we have noticed from the oral evidence of the investigating officer, PW7, Yogendra Singh is that he has not proved the contents of the discovery panchnama and all that he has deposed is that as the accused expressed his willingness to point out the weapon of offence the same was discovered under a panchnama. We have minutely gone through this part of the evidence of the investigating officer and are convinced that by no stretch of imagination it could be said that the investigating officer has proved the contents of the discovery panchnama (Exh.5). There is a reason why we are laying emphasis on proving the contents of the panchnama at the end of the investigating officer, more particularly when the independent panch witnesses though examined yet have not said a word about such discovery or turned hostile and have not supported the prosecution. In order to enable the Court to safely rely upon the evidence of the investigating officer, it is necessary that the exact words attributed to an accused, as statement made by him, be brought on record and, for this purpose the investigating officer is obliged to depose in his evidence the exact statement and not by merely saying that a discovery panchnama of weapon of offence was drawn as the accused was willing to take it out from a particular place.

57. Let us see what has been exactly stated in the discovery panchnama (Exh.5) drawn on 24.01.2010. We quote the relevant portion as under:

"Today on 24.1.2010, the arrested accused Ramanand alias Nandlal Bharti son of Late Shri Gobre, resident of Naamdar Purwa, Hamlet Amethi, original resident of village Basadhiya, Police Station Isanagar, District Lakhimpur Kheri has been taken out of the lockup, taken in confidence and then interrogated by me the Station House Officer Yogendra Singh before Hamrah S.S.I. Shri Uma Shankar Mishra, S.I. Shri Nand Kumar, Co. 374 Mo. Usman, Co. 598 Prabhu Dayal, Co. 993 Santosh Kumar Singh, Co. 394 Shrawan Kumar then he confessed the offence occurred in the incident and weepingly said in apologizing manner that, "I myself have committed this crime to get government grant for being a rich man and to marry Km. Manju D/o Kanhai, resident of Pakadiya, Police Station Tambaur, District Sitapur regarding whereof the detailed statement has been recorded by you. The baanka used in the incident and the pant shirt, on which blood spilled from the bodies of deceased persons got stained and which had been put off by me due to fear, have been kept hidden at a secret place by me which I can get recovered by going there." In expectation of recovery of murder weapon and bloodstained clothes, I the Station House Officer Yogendra Singh along with aforesaid Hamrahis departed carrying accused Ramanand alias Nandlal Bharti by official jeep UP70AG0326 alongwith driver Raj Kishor Dixit for the destination pointed out by the accused, vide Rapat No. 7 time 07.15…" [Emphasis supplied]

58. We shall now look into the oral evidence of the PW7, Investigating Officer wherein, in his examination in chief, he has deposed as under:

"In January 2010 I was posted as Station House Officer, Kotwali Dhaurahara. On 22.1.10, I myself had taken the investigation of aforesaid case. On that day I had copied

chik, rapat and recorded the statements of chik writer H. Constable Dhaniram Verma and complainant of the case. After recording the statement of complainant of the case Shambhu Raidas I inspected the occurrence spot on his pointing out and prepared the site plan which is present on record; on which Exhibit Ka6 has been marked. And I had also recorded the statement of hearsay witnesses Ahmad Hussain and Nizamuddin. On 23.1.10, I recorded the statements of witnesses Kshatrapal, Rustam Raidas. On 24.1.10, I arrested accused Ramanand and recorded his statement and when he expressed that he may get recovered the murder weapon used in the incident, I recovered the murder weapon baanka before the witnesses on his pointing out; which had been sealed stamped at the spot and its recovery memo had been prepared at the spot itself, which is present on record as Exhibit Ka5…." [Emphasis supplied]

64. The conditions necessary for the applicability of Section 27 of the Act are broadly as under:

(1) Discovery of fact in consequence of an information received from accused;

(2) Discovery of such fact to be deposed to;

(3) The accused must be in police custody when he gave information; and (4) So much of information as relates distinctly to the fact thereby discovered is admissible – Mohmed Inayatullah v. The State of Maharashtra: AIR (1976) SC 483 Two conditions for application – (1) information must be such as has caused discovery of the fact; and (2) information must relate distinctly to the fact discovered - Earabhadrappa v. State of Karnataka: AIR (1983) SC 446"

65. We may refer to and rely upon a Constitution Bench decision of this Court in the

case of State of Uttar Pradesh v. Deoman Upadhyaya reported in AIR (1960) SC 1125, wherein, Paragraph71 explains the position of law as regards the Section 27 of the Evidence Act:

"71. The law has thus made a classification of accused persons into two: (1) those who have the danger brought home to them by detention on a charge; and (2) those who are yet free. In the former category are also those persons who surrender to the custody by words or action. The protection given to these two classes is different. In the case of persons belonging to the first category the law has ruled that their statements are not admissible, and in the case of the second category, only that portion, of the statement is admissible as is guaranteed by the discovery of a relevant fact unknown before the statement to the investigating authority. That statement may even be confessional in nature, as when the person in custody says: "I pushed him down such and such mineshaft", and the body of the victim is found as a result, and it can be proved that his death was due to injuries received by a fall down the mineshaft." [Emphasis supplied]

66. The scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in Pulukuri Kottaya and Others v. Emperor, AIR 1947 PC 67, which have become locus classicus, in the following words:

"10. ….It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information

supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

70. Thus, in the absence of exact words, attributed to an accused person, as statement made by him being deposed by the investigating officer in his evidence, and also without proving the contents of the panchnama (Exh.5), the trial court as well as the High Court was not justified in placing reliance upon the circumstance of discovery of weapon.

86. The Courts below have relied upon the strong motive for the accused appellant to commit the crime as one of the incriminating circumstances. It is the case of the prosecution that the accused appellant desperately wanted to get married to Manju. Manju herself at the relevant point of time was a married lady. It appears from the evidence on record that the accused appellant had even got engaged with Manju during the subsistence of his marriage with the deceased Sangeeta. It also appears that the engagement ceremony was celebrated with pomp and show. However, before the accused appellant could get married to Manju, he got arrested in one offence under Section 307 of the IPC. According to the prosecution thereafter, although the accused appellant tried his best to get married to Manju, more particularly, after being released on bail yet as there was lot of opposition at the end of his

wife deceased Sangeeta, he was not able to marry her. In such circumstances, it is the case of the prosecution that the accused appellant decided to terminate his wife Sangeeta as well his four minor daughters on the fateful night of the incident.

4.11.2. 2004 KCCR(4) SN 380 (DB) in the case of ***Gopal Ram Gouda Vs. State of Karnataka.*** The relevant paragraphs 9 and 10 are extracted below for easy reference:

9. It is well established by now that all the circumstances should point towards the guilt of the accused and should be inconsistent with the innocence of the accused. Circumstantial evidence shall be the basis of conviction only if it is wholly inconsistent with the innocence and is consistent with the guilt of the accused. But the circumstances in this case do not point towards the guilt of the accused and it cannot be said that they are wholly inconsistent with the innocence of the accused. Thus even believing, the case of the prosecution as aforesaid in its entirety, still we find the evidence as against the present appellant is lacking in this case. The case of the prosecution is not free from doubt. It is well settled that if two views are possible, the one which is favourable to the accused is to be accepted. In view of the insufficient material against the appellant, he is entitled to get the benefit of doubt.

10. Added to this, as aforesaid, based on almost same set of material on record, thew very learned Sessions Judge acquitted accused No.2 in S.C.No.25/2000 by the Judgment dated 28.9.2000. On the very day ie, on 28.9.2000 the Sessions Case No.87/99 (out of which the present appeal arises) is disposed of by convicting the appellant, that too, on the same set of facts and material on record. It is unfortunate that the learned Sessions Judge

has not clubbed both the Sessions Case It is relevant to note that the State has not preferred any appeal against the Judgment and Order of acquittal in favour of accused No.2 in S.C.No.25/2000. The learned Sessions Judge ought to have given the same benefit as was given to accused No.2 in S.C.No.25/2000. The material on record against both the accused is one and the same inasmuch as the same witnesses are examined in both these matters. It is not in dispute that both the accused as well as the deceased were with the accused till 8 p.m. The very reasons assigned by the learned Sessions Judge for acquitting accused No.2 are also applicable to the case of accused No.1. Under such circumstances, we find ample force in the arguments of learned counsel for the appellant.

4.11.3. 2004 KCCR (4) 442 SC in the case of ***Anjlus Dungdung Vs. State of Jharkand.*** The relevant paragraph V is extracted below for easy reference:

V) Upon disclosure statement made by accused Rajesh Yadav @ Raju Gowala, the bloodstained balwa and tangi were recovered by the police.

So far as the first circumstance, i.e., the motive is concerned, the prosecution has examined Silas Kerketta (PW 1), Fransis Kerketta (PW 2), Albinus Kerketta (PW 3), Patrik Kerketta (PW 4), Bhimsent Kerketta (PW 5), Abhinash Topno (PW 7), Walter Kerketta (PW 11), Mariyanus Dungdung (PW

12), Vinsent Toppo (PW 18) and informant _ Kajmir Kerketta (PW 19) who have consistently stated in their statements that a land dispute was going on between the deceased - Benedik Dungdung and the

appellant & his brother Jowakim Dungdung. They further stated that a panchayati was also held in the village which was not attended by the appellant and his brother rather they had given out threats to kill the deceased. Neither any infirmity could be pointed out in the evidence nor we find any ground to disbelieve the same on this count. Thus, we hold that the prosecution has proved motive for commission of the offence.

Second circumstance has been proved by PW 1 and PW 7 in whose presence, investigating officer - Subodh Kumar Jaiswal (PW 20) recovered the letter from the house of the appellant. The statement of these witnesses is corroborated by the evidence of PWs 2,3,11, 12 and 19 who also stated that they had learnt that appellant had written a letter to accused Jowakim Dungdung informing him that the appellant had died. Though the appellant has denied his handwriting on the letter but the same tallied with his specimen writing taken in Court. Thus, the prosecution has proved that the appellant had written a letter to accused Jowakim Dungdung informing him that the appellant was dead.

Third circumstance is that four to five days before the date of the alleged occurrence the appellant had come to his village and seen in village Simdega by Vinsent Toppo (PW 18). The fact that the appellant came to the village of occurrence, four to five days before the date of occurrence from Punjab is proved by the railway ticket which was recovered from his pocket by the investigating officer PW 20 in presence of Govind Sao (PW 13) and Benjamin Kullu (PW 14), who have consistently supported the factum of recovery. As regards the fact that the appellant was seen in village Simdega four to five days before the date of the alleged occurrence by PW 18, the best evidence in this regard is that of PW 18 who has categorically stated in court that he had

seen the appellant in village Simdega four to five days prior to the date of the alleged occurrence and the same is consistent with his statement before the police. That apart, evidence of PW 18 is corroborated by PWs 1, 7 and 12 who stated that PW 18 disclosed before them that he had seen the appellant in village Simdega four to five days before the date of the alleged occurrence. Thus, the prosecution has successfully proved this circumstance as well.

Fourth circumstance is recovery of one torch cell as well as a knife from the pocket of the appellant after the alleged occurrence which has been proved by PWs 13 and 14 in whose presence, the said articles were recovered by the investigating officer _ PW 20. No infirmity could be pointed out in the evidence of these witnesses.

Last circumstance is recovery of bloodstained balwa and tangi upon the disclosure statement made by accused Rajesh Yadav @ Raju Gowala. In order to prove this circumstance, prosecution examined Radha Prasad Sao (PW 8) in whose presence the same are said to have been recovered, but this witness has categorically stated that nothing was recovered in his presence. He has further stated that seizure memo was prepared near his house which was signed by him and the same shows that it was not prepared at the alleged place of recovery. Thus, the solitary seizure witness has not supported the factum of recovery and in view of his statement, it is not possible to place reliance upon the evidence of the investigating officer - PW 20 who stated that he recovered balwa and tangi in the presence of PW 8 on disclosure statement made by accused Rajesh Yadav @ Raju Gowala.

Thus, from the aforesaid discussion, it would be clear that out of the five circumstances, the

prosecution has failed to prove the recovery of blood stained balwa and tangi upon the disclosure statement of accused Rajesh Yadav @ Raju Gowala by credible evidence. The circumstance that the appellant came to his village from Punjab four to five days before the date of the alleged occurrence and was seen by PW 18 in village Simdega cannot be said to be an unnatural conduct on the part of the appellant, as such the same cannot be taken as a circumstance against him. Recovery of one torch cell and knife from the pocket of appellant after the date of alleged occurrence cannot be used as a circumstance against him, especially when neither there is any case nor evidence that the knife recovered was stained with blood. The other circumstances which remain are motive and letter written by the appellant giving false information to his brother that he was dead. These two circumstances raise strong suspicion against the appellant, but it is well settled that suspicion howsoever strong it may be cannot take the place of proof. In any view of the matter, on the basis of these circumstances, it is not possible to draw an irresistible conclusion which is incompatible with innocence of the appellant so as to complete the chain. It is well settled that in a case of circumstantial evidence, the chain of circumstances must be complete and in case there is any missing link therein, the same cannot form the basis of conviction. For the foregoing reasons, we are of the opinion that prosecution has failed to prove its case beyond reasonable doubt against all the accused persons, much less the appellant.

We find cases of accused Rajesh Yadav @ Raju Gowala and Silbestor Dungdung stand on the same footing as that of the appellant, though their conviction was upheld by the High Court and no appeal has been preferred to this Court. It is well settled that in such circumstances, this Court, in the exercise of

powers under Article 136 of the Constitution, can set aside their conviction as well in spite of the fact that they did not prefer any appeal to this Court if, in its opinion, their case also stands on the same footing. Reference in this connection may be made to the decision of this Court in the case of Pawan Kumar Vs. State of Haryana, (2003) 11 SCC 241, in which case even though no appeal was preferred by one of the accused, but while hearing appeal of another accused, this Court having doubted veracity of the prosecution case in its entirety, interfered with the conviction of that accused also who did not prefer any appeal to this Court. Thus, we are of the view that accused Rajesh Yadav @ Raju Gowala and Silbestor Dungdung are also entitled to acquittal along with the appellant.

5. Per contra Sri. V. M. Banakar, learned Addl. SPP would submit that:

5.1. The trial Court has taken into consideration all the relevant aspects. Though PW1 has not identified the gold Boramal chain, PW7, who is the wife of PW1 and daughter-in-law of the deceased has identified the gold Boramal chain and as such, the recovery and identification of the gold Boramal chain would implicate the accused.

5.2. That there are several witnesses who have deposed as regards the accused being present more or less

in the same place where the body of the deceased was found, the accused having transported the goats in a mini bus from Hattaragi bus stand to Sankeshwar and in a tempo trax from Sankeshwar to Hukkeri. This evidence being on record, the independent witnesses having established the same, the trial Court rightly convicted the accused and as such, this Court ought not to intercede in the matter and/or set aside the order of conviction.

6. It is in the above background, that we are called upon to re-examine the evidence on record to ascertain if the order of conviction passed by the trial Court is proper and correct or if the same is required to be set aside.

7. The fact of the body found being that of the deceased has been adverted to by PW1 and PW7. Though there are questions which have been posed to dislodge the identity of the deceased, there is no particular elicitation of any answer so as to reach a conclusion that the body does not belong to the deceased. Hence, we are of the

considered opinion that the fact of the body being that of the deceased has been established by cogent evidence.

8. PW1 has deposed that, when he came back home on 03.02.2014, he was informed by PW7, his wife, that the deceased had gone out to graze the goats in the morning and had not come back. He further stated that PW7 had informed him of her having gone in search of the deceased, but was unable to find her.

9. It is in that background that PW1 at 6.00 pm again went in search of the deceased, but could not find her and thereafter, he along with PW8, PW9, CW10 and CW11, had gone in search of the deceased, but were not able to find her, even though they searched the usual places where she used to take the goats for grazing. He stated that he had gone at 10.00 am on 04.02.2014 to the Police Station to report the fact of his mother being missing. When the police asked him to search once again, he has not stated in his evidence as to what he did thereafter, but he has stated that at 10.00 pm in the night on 04.02.2014, he lodged a missing complaint at

Yamakanamaradi Police Station, which is marked as Ex.P1.

10. PW7, the wife of PW1 has stated that the deceased left the house at 10.00 am with six goats for grazing, when she did not return PW7 along with her husband went for search of deceased, however, did not find her. Thus, there is contradiction in terms in the evidence of PW1 and PW7, PW1 stating that his wife PW7 had told him that she had gone out to search the deceased at 5.00 pm and returned home at 6.00 pm., PW1 not stating anything about PW7 being involved in the search by him.

11. Thus, the occurrence of the events on 03.02.2014, which can be only attributed to PW1 and PW7 as also PW8, PW9, CW10 and CW11, has not been properly established.

12. PW8 and PW9 being the relatives of PW1 have only stated about they having joined PW1 and searching for the deceased. They have not stated the time nor they have stated as to where all they searched for the deceased.

13. Suffice it to say that the evidence of PW1, PW7, PW8, PW9 do not establish the events that occurred on 03.02.2014. CW10 and CW11 have not been examined. On the next day on 04.02.2014, PW1 is stated to have gone to the Police Station at 10.00 am. However, the police asked them to search for the deceased. That it is only in the night at 10.00 pm PW1 again went and lodged the complaint. There is no evidence led of any witness as regards what happened in the intervening night on 03.02.2014 and 04.02.2014 as also on 04.02.2014, as also lodging of the complaint.

14. There is no evidence on record as regards whether the search was carried out by PW1, PW7 or others and what was the result of the search, where the search was conducted etc.

15. On lodging of the complaint at 2200 hours on 04.02.2014, Crime No.46/2014 was registered for a woman missing, but the same was not forwarded to the Magistrate. Perusal of Ex.P1 indicates that there is correction of the date inasmuch as initially the date with

numeral 3 was entered which has been corrected to be numeral 4 and the date entered on the next page in a different hand writing than that of writing on the complaint, the date being entered as 04.02.2014.

16. Shockingly, the next complaint, which was lodged on 05.02.2014 at 1530 hours also bears Crime No.46/2014 which has been sent to the Principal District and Sessions Judge, Belagavi, on which basis S.C.No.115/2014 came to be registered. The endorsement made is of an offence under Section 302 of the IPC.

17. In the second complaint at Ex.P2, it is stated that, PW1 on 05.02.2014 continued to search, PW1, CW10 and others were along with them. Surprisingly, who are the others is not mentioned and CW10 has not been examined. PW1 has stated that he noticed dogs pulling something near the land of one Appanna Shivamurthy Shilli, where they found the dead body of their mother, which has been crushed by stone. He has stated that the body was identified on the basis of saree and blouse worn by her.

18. There is no evidence which has been led apart from that of PW1 as to how the body was found and who were with PW1 when the said body was found. PW1 has stated that someone has murdered his mother to take the gold zumukies and gold Boramal chain worn by his mother. He has identified the paragon slippers worn by his mother as M.O.1, gunny bag taken by his mother as M.O.2, bamboo stick belonging to his mother as M.O.3 and the big stone weighing 20 kgs situated near the body as M.O.4, the saree worn by his mother as M.O.5 and the blouse worn by his mother as M.O.6.

19. In his supplementary statement, he has informed the Investigating Officer that his mother was not wearing gold zumakies, but only wearing gold Boramal chain. It is on the basis of the said statement and the complaint that the spot mahazer was conducted.

20. PW10 being the witness to the spot mahazer, has supported the case of the prosecution. PW11 and PW12 being the witnesses to the cloth seizure, have also supported the case of the prosecution.

21. PW1 in his deposition has stated that, when he made enquiries at the bus stand, one groundnut (kadale) vendor had informed him that one person at 12.30 to 1.00 pm had taken six goats in a tempo and had gone by his motorcycle following the tempo. The date on which he was informed about the same has not been mentioned.

22. PW3 has stated that the accused had transported six goats from Hattargi bus stand to Sankeshwar bus stand in his passenger bus and the accused had followed the mini passenger bus of PW3 in his motorcycle. In his cross-examination, PW3 has stated that there were four passengers in the bus when the goats were transported in the luggage dicky of the mini passenger bus. He has denied that six goats could not be put in the luggage dicky. Though he admits that animals cannot be transported in a passenger vehicle, he has stated that he has transported the goats in the mini bus. He has further stated that one Umesh was the conductor in the mini bus at that time. It is rather shocking that none of the four passengers of the bus or the conductor have been contacted and their statements recorded let alone being

examined in the matter. The statement of PW3 is not supported by any other evidence and it is rather unacceptable that six fully grown goats could have been transported in a luggage dicky of a mini passenger bus. More so, when there are no photographs which have been produced of the mini passenger bus as also of the luggage dicky of the said bus. PW3 has not deposed as regards what is the amount he has charged from the accused and how much money was paid by him and how.

23. PW2 is said to be the driver of the tempo trax which plies between Kurani and Sankeshwar. He has stated that, at 4.00 pm the accused was near the vegetable market at Sankeshwar and had requested PW2 to transport six goats from there to Kurani. The goats being loaded in the tempo trax, the accused came on a motorcycle following the vehicle, but instead of going to Kurani, he unloaded the goats at Hukkeri itself, for which he paid Rs.300/-. He has stated that, second day after the goats were transported by tempo trax, he was called by the police to the Police Station where he identified the person who had

transported the goats in his tempo trax. He has also identified the goats present in the Police Station.

24. If the case of the prosecution is to be believed, then on 03.02.2014, PW3 has transported goats from Hukkeri to Sankeshwar in the afternoon and on the same day the said goats were transported from Sankeshwar to Hukkeri at 4.00 pm, and PW2 was called to the Police Station on the very next day i.e., on 05.02.2014. We are unable to believe that, when the body was traced at 1.30 pm on 05.02.2014 and the complaint for offence under Section 302 of the IPC was filed in the afternoon of 05.02.2014 at 15.30 hours, the police could have called PW2 to the Police Station at which time accused was present and goats were also present.

25. Apart there from, PW2 has stated that, in the tempo trax there were 4-5 passengers who traveled when the goats were being transported, the six goats also being loaded on to the tempo trax. The names of the said 4-5 passengers has not been given by PW3 nor their

statements recorded by the Investigating Officer let alone they being examined in the matter.

26. Lastly, PW2 claims that he was paid a sum of Rs.300/- by the accused for transport of the goats and at the end of the day after deducting his wages of Rs.110/- he has given Rs.225/- to the owner of the vehicle as daily collection on that day. This would imply that in all for that day the daily collection was Rs.335/- out of which Rs.300/- is alleged to have been given by the accused. PW3 is stated to have been operating the tempo trax as passenger carrying vehicle between Sankeshwar and Kurani. It is unimaginable that in the entire day PW2 has only earned Rs.35/- from other passengers, the earning of Rs.300/- being attributed to the accused.

27. PW6 has stated that he had met the accused in Hukkeri, who informed him that his mother was ill and wanted to sell gold ornaments and in that background he took accused to PW5 and requested them to buy the ornaments for which PW5 paid Rs.9300/-. He identifies M.O.7 to be the ornament sold by accused to PW5. In the

cross-examination he denied all the suggestions put across.

28. PW5 is the gold smith who has stated to have brought the gold Boramal chain. He has stated that M.O.7 does not wear an used appearance. He has stated that he has assessed the quality, purity as also the weight merely by looking at the said necklace to be that of 4.3 grams for which he has paid Rs.9,300/-. He has stated that two days after him buying the said necklace, the police came with the accused to his house and took him to the shop, where the accused has sold him the gold Boramal. From the records it is clear that the seizure of the gold Boramal chain happened on 07.02.2014. This, if the evidence of PW5 is to be believed. The sale of the Boramal happened on 05.02.2014. The evidence of PW5 does not inspire much confidence inasmuch as PW5 who is aged about 27 years claims to be working as a gold smith in his uncle's shop for last 4-5 years and claims to have assessed the purity of the gold in the Boramal chain and weight of gold without examining or measuring.

29. It is also pertinent to note here that the gold chain which is known as Boramal chain consists of gold beads which cover lac (a form of wax) and as such the beads are not entirely made of gold, but is lac covered by gold. Thus in our considered opinion no person could merely looking at the Boramal chain without examining the purity of the gold and further examining the thickness of the gold covering the lac, determine the weight of the said ornaments.

30. The above is also strengthened by the fact of the defence counsel who while cross-examining him has handed over his gold finger ring for assessment when PW5 informed that the purity is 22 carat, but he was unable to give the weight of the gold. If PW5 cannot give the weight of the gold of a finger ring, it could be unimaginable how he can give weight of the Boramal chain, which is even more difficult. Thus, the evidence of PW5 does not inspire any confidence.

31. PW5 has further stated that the police along with the accused had come to his house and from there they went

to the shop, none of the other witnesses have spoken of the Accused having at the time of sale of the Boramal Chain having gone to the house of PW5, how the Accused took the police to the house of PW5, is not forthcoming from the evidence.

32. PW4, who is said to be the person involved in purchasing and selling of sheep and lambs has stated that the accused had came to him and sold 6 goats for a sum of Rs.2,700/- per goat, for which PW4 has given him Rs.13,200/- and balance of Rs.3,000/- has to be given later. He has identified the goats. He has stated that the goats were sold to him at 4.00 pm on Monday and the police came to him on Wednesday night along with the accused and seized the goats and took them away.

33. A perusal of the calendar of the year 2014 indicates that Monday was 3rd February and the goats were sold to him on that day and the police came along with accused on Wednesday, which is 5th February, in the night and the seizure was made on 05.02.2014.

34. This evidence of PW4 is also unbelievable since the body itself was found at 1.30 pm on 05.02.2014, complaint was filed at 3.30 pm, the police having arrested the accused and taken the accused on Wednesday i.e., on 05.02.2014 would not at all arise. More so, when the accused was arrested only on 07.02.2014 as per the statement by PW22.

35. In the above circumstances, the date on which the deceased went missing, the date on which the body of the deceased was found, the date on which the goats were transported and sold, the date on which the goats were seized and recovered, the date on which the Boramal chain was sold, the date on which Boramal chain was recovered, are suspect and have not been established.

36. PW13, who is the doctor who has conducted the post-mortem has stated that the body was in the advanced stage of decomposition; the whole body was bloated up with foul smell, marbling of veins was seen on the chest, shoulders and roots of limbs; postmortem blisters

scattered randomly over the body; peeling of skin in patches seen all over the body; scalp hair could be easily removed. He has further stated that, skin and subcutaneous tissues were completely lost on the left side and upto half of cheek on right side, mandible was totally exposed intact with absence of dentition; the exposed soft tissue remains are darkened and partially liquefied. He has also deposed about animal bites, multiple fractures, presence of contusions in the neck etc. The post-mortem having been conducted on 05.02.2014, he has stated that time of death is 2 to 3 days prior to conducting of the post-mortem. He has stated that the approximate weight of M.O.4 stone is 25 kilos which had been dropped on the head of the deceased.

37. From the evidence given by PW13, it is clear that the body was in the advanced stage of decomposition. Though PW13 has state that the death has occurred 2 to 3 days prior to the post-mortem, the manner in which the injuries have been detailed and described by PW13 indicates that the death has occurred much prior and not within 2 to 3 days prior to the post-mortem being

conduced since the body is in advanced stage of decomposition. Insofar as the stone is concerned, PW13 has clearly deposed that the approximate weight of the stone is 25 kilos. It is rather difficult for any person to lift the stone of 25 kilos and drop it on the head of any person.

38. Be that as it may, the said stone has not been examined for the finger prints and/or for any other evidence to implicate the accused by the Investigating Officer and/or by Scientific Officers. The body being found in February, 2014, which is still in the winter month, PW13 having categorically stated that de-composition of the body in winter months being at lesser rate than the summer, the advanced stage of decomposition of the body as described by PW13 would indicate that the death has occurred prior to 2 to3 days, as deposed by PW13.

39. The gold Boramal chain which has been recovered when produced before PW1, PW1 in his examination-in-chief has stated that the said chain does not belong to his mother and has thereafter marked as M.O.7. Thus, it is

clear from the evidence of PW1 that the gold Boramal chain is not that of the deceased. PW5 has not deposed anything about the condition of the gold Boramal chain. PW7 has stated that the deceased was wearing the gold Boramal chain having 30 beads. Her marriage having taken place 15 years ago, the deceased was wearing gold Boramal chain even before the marriage, that is to say, the gold Boramal chain was worn by the deceased for at least 15 years prior to her death. PW7 in her cross-examination though stated that M.O.7 is the gold Boramal chain worn by the deceased. She has further gone on to say that M.O.7 is a new Boramal chain.

40. PW23 has stated that the deceased was wearing gold Boramal chain for 15-20 years. He denies that the gold Boramal chain was a new one.

41. From the evidence above, as regards the gold Boramal chain, it is clear that PW1 has categorically stated that it does not belong to the deceased. PW7 though has stated that it belongs to the deceased has stated that the same is a new one. Admittedly, the said gold Boramal chain

was worn by the deceased for at least 15-20 years. Thus, the identity of the gold Boramal chain itself as that belonging to the deceased is in doubt.

42. Insofar as the recovery of goats are concerned, PW20, who is stated to be the videographer, who has videographed the recovery, has stated that, when he visited PW4, he had shown them 10-12 sheep and the police seized all the 10-12 sheep. If the accused had stolen six goats and sold them, the question of 10-12 goats being seized as per the deposition of PW20 would not arise. This statement made by Pw20 has been accepted by the prosecution since PW20 has not been treated as hostile let alone been cross-examined. Thus, this evidence of PW20 does not inspire any confidence in the seizure of the goats as claimed to have been made by the Investigating Officer.

43. The trial Court records have been called for. The CD which has been produced and marked as Ex.P26 has been stapled to the file in a plastic cover and hence we are

unable to view the same. Separate directions in relation to the same are also being issued.

44. From the above it is clear that the recovery of gold Boramal chain and six goats is not categorically established to implicate the accused. Furthermore, PW23 has stated that the accused had first taken them to the person who bought goats and then to the goldsmith. However, PW20 has stated that first they went to the goldsmith and then to the person who has bought the goats.

45. As observed above, the accused was arrested by PW22 on the instructions given by the Circle Inspector of Police -- PW23. The arrest having been made on 07.12.2012, there is nothing on record to show as to how the Circle Police Inspector came to the conclusion that the accused is required to be arrested. There is no evidence on record as to on what basis the Investigating Officer approached PW2 and PW3 to ascertain how the goats have been transported. There is also nothing on record to indicate as

to how the Investigating Officer has approached PW5 and PW6 to ascertain the sale of gold Boramal chain.

46. Suffice it to say that the entire investigation is lacking in terms of details and the chain of investigation has not been clearly established so as to prove guilt of the accused beyond reasonable doubt.

47. **DIRECTIONS**

47.1. The Investigating Officer, any person handling the electronic evidence including that in the court are directed to comply with the directions issued by this Court in Criminal Appeal No.615/2013 dated 02.11.2018 (***Madhukara @ Madhu @ Mallesha Vs. The State of Karnataka)***, which are reproduced hereinbelow:

(1) All the concerned in each stage has to take proper precautions for search, seizure, packing, labeling, sending the digital evidence to expert, submitting to the Trial Court with proper custody.

(2) Investigating agency has to make efforts to disable security settings like PIN, Password, Pattern Lock, Finger Print etc., before seizure procedure so that it should not create further obstruction/hurdle at any stage for the purpose of perusal, analysis of electronic gadgets.

(3) The media containing the electronic record should be submitted by the investigating officer in a sealed and

secured manner to the Court. Before that, the investigating officer has to keep the copy of the said electronic evidence in their computers, so that even if the compact disc or any electronic gadget produced before the Court, if for any reason is destroyed or corrupted, the copy which was preserved by the police can be used as secondary evidence before the Trial Court.

(4) The media viz., CD/DVD/Pendrive/Hard Disk/Magnetic device etc., shall be preserved in anti-static envelope, away from humidity and heat in a proper manner even before the same is produced before the court and after production the court should also take care to keep them in proper manner till the said evidence is admitted by the Court during the course of the evidence.

(5) It has to be ensured that such media do not get damaged due to the packing, sustain scratches (if optical) in any way while handling the file.

(6) Concerned Government Authorities and the High Court have to take strict measures to provide Proper training to the investigating officers and also the concerned staff, Judicial officers and staff of the court with reference to packing and preserving the media for future use and retrieval of the contents of the said electronic media, as and when required, so that it would safely exist till the case is logically concluded.

(7) The copy of the electronic record shall be kept in the server or in the PC of the concerned police station or the PC provided to the concerned investigating officer and also the PC provided to the concerned Court for reference as back up. An endorsement should also be made in the order sheet in this regard or in the case diary, as the case may be.

(8) As soon as an electronic record is admitted in evidence, a copy of the relevant portion be stored in the concerned folder of the said case in a separate media and also stored in the PC in a separate drive so that a back up is preserved for future reference, even if for any reason hard disk/C.D. is destroyed or gets corrupted or rendered un-readable.

(9) The electronic media shall be kept in safe deposit with the Chief Ministerial Office of the Court with a

direction to preserve it in proper manner till the case is logically concluded.

(10) Experts at FSL also if possible have to retain a copy of mirror image, extracted data with evidentiary value with proper labeling, which may be used as a secondary evidence at any point of time.

47.2. In W.P.No.11759/2020 (Mr. Virendra Khanna Vs. State of Karnataka & Another)

17.8. In all the cases above, the seized equipment should be kept as far as possible in a dust- free environment and temperature controlled. 17.9. While conducting the search, the investigating officer to seize any electronic WP No.11759/2020 storage devices like CD, DVD, Blu-Ray, pen drive, external hard drive, USB thumb drives, solid-state drives etc., located on the premises, label and pack them separately in a faraday bag.

17.10. The computers, storage media, laptop, etc., to be kept away from magnets, radio transmitters, police radios etc., since they could have an adverse impact on the data in the said devices.

47.3. The concerned Principal District Judges of each court to provide necessary storage boxes or CDs, DVDs, pen drives etc., which are anti-static anti-magnetic.

47.4. Any court receiving any of the above electronic evidence to store the same in suitable container which is anti-static, anti-magnetic and suitable for

storage of electronic equipment without loss of data.

47.5. As and when required, the concerned Court would always call for the electronic evidence from the safe custody, as above.

47.6. The concerned Courts should also be provided with necessary equipment to play the electronic evidence in the form of CDs, DVDs, pen drives, SD card etc.

47.7. The Director General of the Police, Director, Public Prosecution, as also the Registrar (General), High Court of Karnataka to make arrangements for necessary training of their respective officers in respect of receiving, handling, storage and use of electronic evidence.

48. In the above circumstances, we are therefore of the considered opinion that the order of conviction and sentence passed by the trial Court is not supported by

the evidence on record and is therefore required to be set aside. As such, we pass the following order:

ORDER

i. Appeal is allowed. The order of conviction dated 01.06.2017 passed by the Principal Sessions Judge, Belagavi in Sessions Case No.115/2014 is set aside.

ii. Consequently, the order of sentence is also set aside.

iii. The accused being on bail in terms of the order dated 11.07.2017, bail bond stands discharged.

iv. Though the above appeal is disposed of, re-list this matter on 06.12.2022 for reporting compliance.

v. The Additional Registrar (General) of this Court is directed to forward a copy of the above order to the Director General of Police and the Director (Public Prosecution) and Registrar (General), for information and action.

Sd/-
JUDGE

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