Madhu @ Madhuranatha & Anr vs State Of Karnataka on 28 November, 2013

Equivalent citations: AIR 2014 SUPREME COURT 394, 2014 (12) SCC 419, 2013 AIR SCW 6766, AIR 2014 SC (CRIMINAL) 313, 2014 (3) AJR 489, 2014 (1) AIR KANT HCR 305, (2014) 3 ALLCRILR 397, (2014) 2 KCCR 985, (2014) 133 ALLINDCAS 87 (SC), 2013 (14) SCALE 502, 2014 (133) ALLINDCAS 87, (2013) 14 SCALE 502, (2013) 4 CRIMES 571, (2014) 2 KANT LJ 158, (2014) 1 RECCRIR 203, (2013) 4 CURCRIR 530, (2014) 1 DLT(CRL) 475, (2014) 84 ALLCRIC 329, (2014) 1 ALD(CRL) 699

Author: B.S. Chauhan

Bench: B.S. Chauhan, S.A. Bobde

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOs.1357-1358 of 2011

Madhu @ Madhuranatha & Anr. …Appellants

Versus

State of Karnataka …Respondent

With

Criminal Appeal No.109 of 2013

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. These criminal appeals have been preferred against the impugned judgment and order dated 8.9.2010, passed by the High Court of Karnataka at Bangalore in Criminal Appeal Nos.833, 855 and 864 of 2008 by which the High Court has affirmed the death sentence and confirmed the judgment and orders of the learned District & Sessions Judge dated 11/17.7.2008, passed in Sessions Case No.152 of 2005 with certain observation about the charging Sections of the Indian Penal Code 1860 (hereinafter referred to as 'IPC') by which and whereunder the appellants have been convicted under Sections 364/302/201 r/w Section 34 IPC and for the offences punishable under Section 364 r/w Section 34 IPC, sentenced to undergo RI for 7 years and a fine of Rs.25,000/- each and in default of payment of fine to undergo a further imprisonment for a period of 18 months. They have been further convicted under Section 201 r/w Section 34 IPC and sentenced to undergo RI for 5 years and a fine of Rs.10,000/- each and in default to undergo further RI for a period of 12 months. All the three appellants have been further convicted under Section 302 r/w Section 34 IPC and awarded death penalty.

2. Facts and circumstances giving rise to these appeals are that:

A. Madhusudhan, deceased had gone from Anandpura to Sagar on being asked by his uncle Prahlad (PW.1) to collect the outstanding dues in respect of sale and purchase of ginger from K.B. Sreenath (PW.2) and K.S. Kiran (PW.12). As Madhusudhan did not turn up, Prahlad (PW.1) got worried and contacted K.B. Sreenath (PW.2) and K.S. Kiran (PW.12) to find out the whereabouts of Madhusudhan. Both K.B. Sreenath (PW.2) and K.S. Kiran (PW.12) informed Prahlad (PW.1) that Madhusudhan had collected Rs.2,50,000/- and Rs.1,50,000/- respectively from them at about 12.30 P.M. and left for Anandpura. Prahlad (PW.1) contacted all his relatives and friends to find out the whereabouts of Madhusudhan but all in vain.

B. K.B. Sreenath (PW.2) and K.S. Kiran (PW.12) filed a complaint FIR No. 148/2005 (Ex.P-84) in the Police Station, Sagar against unnamed persons suspecting that Madhusudhan had been kidnapped. In the meanwhile there were rumors in Anandpura that the appellants had looted the money and killed Madhusudhan as some persons i.e. Nagesh (PW.4); Sirajuddin (PW.5); Nagendra (PW.3); and Chandrashekar (PW.6) had come forward and informed that they had seen Madhusudhan, deceased in the company of appellants on 8.8.2005 at 12.45 P.M. C. In view of this, an FIR was lodged on 11.8.2005 against the appellants and one Lakshmeesha under Section 365 r/w Section 34 IPC at Police Station Anandpura.

The Police tried to trace Madhusudhan as well as the appellants. It came to the knowledge of the investigating agency that the deceased was seen in the company of the appellants in a Maruti van bearing Registration No.KA-15-3112 on which "Kadala Muttu" had been written on the back side. Thus, the Investigating Officer tried to search for the said vehicle and came to know that it belonged to Jayanna @ P. Aya (A.3).

D. The location of mobile phone of Jayanna @ P. Aya (A.3) was put on surveillance/watch and thereby he was arrested on 12.8.2005 at Anandpura and on the same day Rafiq @ Munna (A.2) was arrested by a separate team of police at Bangalore from the house of Felix D'Costa (PW.10). Madhuranatha (A.1) surrendered before the police on the same day. They made certain voluntary statements, on the basis whereof, recoveries were made. Jayanna @ P. Aya (A.3) took the police and others persons (recovery witnesses) to the forest area and pointed out to a place wherefrom the dead body was exhumated. Only the trunk of the body was found as the head had been chopped off and thrown in the nearby Nandi river. Prahlad (PW.1), Srinivasa (PW.15), Shivananda (PW.16), Devaraja (PW.17) and K. Keshavamurthy (PW.22) witnessed the said recovery and identified the corpse. However, in spite of the efforts made by the police, the head could not be recovered. Immediately thereafter recovery of most of the looted amount had been made from the appellants. A mobile phone belonging to Jayanna @ P. Aya (A.3) purchased from the loot amount was also recovered. A gold ring belonging to the deceased was given to the Investigating Officer by Felix D'Costa (PW.10) from whose house Rafiq (A.2) had been arrested in Bangalore.

E. After completing the investigation, chargesheet was filed against the appellants and trial commenced.

F. In the court Nagesh (PW.4) and Chandrashekar (PW.6) corroborated the prosecution case to the extent that they had seen the deceased in the company of all the three appellants on 8.8.2005 at about 12.45 P.M. Pranesh (PW.11) and Sadananda (PW.13) supported the case of extra-judicial confession as made by Madhuranatha (A.1) before (PW.11). A.1 had also approached PW.13 for help to contact the police and disclosed that he had committed the murder of Madhusudhan alongwith Rafiq (A.2) and Jayanna @ P. Aya (A.3).

G. Recovery of the dead body was supported by Shivananda (PW.16) and Devaraja (PW.17). K.B. Sreenath (PW.2) and K.S. Kiran (PW.12) had supported the prosecution case deposing about payment of money to Madhusudhan on 8.8.2005 at about 12.45 P.M. to the tune of Rs.4,00,000/-. The issue of motive was proved by Prahlad (PW.1), K.B. Sreenath (PW.2), Felix D'Costa (PW.10), Pranesh (PW.11), K.S. Kiran (PW.12) and Sadananda (PW.13). The dead body was identified and the evidence in respect of recovery of the dead body was given by PWs.1 and 22. The same stood affirmed by the report of the DNA test. The Investigating Officer Bhaskar

Rai (PW.47) proved all the recoveries and furnished the details as to how the investigation was carried out and how the arrest of the appellants was made.

H. On the basis of the above, the Trial Court convicted and sentenced the appellants under Sections 364, 302, 201 read with Section 34 IPC. No conviction was made under Sections 120A or B IPC.

I. Aggrieved, the appellants preferred appeals before the High Court which have been dismissed by the impugned judgment and order with respect to death sentences while maintaining the other sentences as well. However, the court made a passing observation that the charge should have been framed under Section 364A IPC instead of Section 302 IPC.

Hence, these appeal.

3. Mr. N.D.B. Raju and Mr. Amit Kumar, learned counsel appearing for the appellants have agitated all the issues which had been raised on behalf of the appellants before the Trial Court as well as before the High Court and have taken us through the evidence recorded before the Trial Court. According to them there is nothing on record to show that the death of the deceased was homicidal or he was even abducted by the appellants, what to talk of causing death of deceased Madhusudhan. In the absence of any material on record to prove that his head was chopped off by any of the appellants, their conviction is bad, particularly in view of the fact that there is no evidence to show that the appellants had buried the lower portion of the corpse in the forest and threw the head in the flowing river. More so, the High Court had taken a view that the conviction under particular provisions of IPC by the Trial Court was not justified, meaning thereby that the Trial Court did not frame the charges properly. Even the money shown to have been recovered from the appellants had been planted and not actually recovered. Most of the witnesses examined by the prosecution are relatives of the deceased. There are material contradictions in the deposition of the witnesses and a large number of witnesses to some of the recoveries have been withheld. Only the police personnel have been made the recovery witnesses though large number of persons had gathered and were available for being made the recovery witnesses. The video prepared at the time of exhumation of the dead body was not presented in the Trial Court and that Jayanna (A.3) on whose behest it is alleged that the dead body was recovered is not shown in the photographs taken at the time of exhumation. One of the alleged witnesses of recovery i.e. Pranesh (PW.11) had been dis-believed by the Trial Court and another witness i.e. Sadananda (PW.13) has been dis-believed by the High Court. They are the witnesses of extra- judicial confession as well. In such a fact-situation, none of the said witnesses are trustworthy. Under no circumstance the appellants could have been awarded the death sentence. Thus, the appeals deserve to be allowed.

4. On the contrary, learned counsel appearing for the State had opposed the appeals contending that the Investigating Officer was not asked in cross-examination any of the question raised before this Court for the first time, either in respect of the videography prepared at the time of exhumation or about the absence of Jayanna (A.3) in the photographs taken at that time. Law does not prohibit making the police personnel as recovery witnesses and most of the discrepancies raised by the

appellants are of trivial nature which do not materially affect the merit of the case. Thus, in view of the above, the appeals are liable to be dismissed.

5. We are of the considered opinion that both the courts below have taken into consideration the evidence and appreciated the same meticulously. The prosecution has relied on the following circumstances to prove its case:

> I. The motive of the offence was robbery and in pursuance to which the accused persons murdered the deceased, robbed him, chopped off the head and buried the trunk of the body. The head and the weapon of offence were thrown in Nandi River.
>
> II. PW-11 deposed about the motive and produced cash amounting to Rs. 39000/- and a mobile phone along with its SIM purchased from the total cash of Rs. 50000/- deposited by A- 1 with him.

III. A-1 made an extra-judicial confession before PW-13, requesting PW-13 to save him and on his advice, surrendered before the police.

IV. Voluntary disclosure by A-3 about the location of the dead body and wherefrom, the dead body was exhumed.

V. PW-1 identified the trunk of the dead body from the tattoo. The D.N.A. report confirmed the body to be that of the deceased/son of PW-22.

VI. The Post Mortem Report and the manner in which the body was found irrefutably point to a homicidal death.

VII. A-2 was arrested from the house of PW-10 who had produced two worthless articles and a gold chain-MO5 before the police left by A-2. PW-1 had identified the said gold chain to be that of the deceased.

VIII. Recovery of Rs. 1,01,000/- from the house of A-1 and Rs.

2,02,700/- from the house of A-2 concealed in the cattle shed which is un-explained and un-accounted.

IX. Recovery of a mobile set MO14 from A-3 identified by PW-1 as that of the deceased.

X. Last seen circumstance of the deceased being in the company of the accused persons on 8.8.2005 around 12:30 PM as deposed by PW-4 who is acquainted with the deceased as well as the accused persons.

6. This Court has dealt with the case of circumstantial evidence time and again. It has consistently been held that a conviction can be based solely on circumstantial evidence. The prosecution's case

must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are complete in themselves. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable or point to any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. The evidence produced by the prosecution should be of such a nature that it makes the conviction of the accused sustainable. (Vide: Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622; State of Uttar Pradesh v. Satish, AIR 2005 SC 1000; and Paramjeet Singh @ Pamma v. State of Uttarakhand, AIR 2011 SC 200).

7. Both the courts below have dismissed the aforesaid circumstances in light of the aforesaid legal propositions and reached to a conclusion that the appellants had committed the crime. We do not see any reason to interfere with such concurrent finding of fact.

8. It has been canvassed on behalf of the appellants that there are discrepancies and contradictions in the depositions of witnesses like the timings when deceased was seen last with the appellants and the distances of places etc. do not tally. Thus, their evidence cannot be relied upon.

9. In Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181, this Court considered the issue of discrepancies in the depositions. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution must not prompt the court to reject the evidence in its entirety. Therefore, irrelevant details which do not in any way corrode the credibility of a witness should be ignored. The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, so as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness.

A similar view has been re-iterated in State of U.P. v. M.K. Anthony, AIR 1985 SC 48; State rep. by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; and Vijay @ Chinee v. State of M.P., (2010) 8 SCC 191.

10. Learned counsel for the appellants has vehemently argued that in some of the recoveries, though a large number of people were available, but only police personnel were made recovery witnesses. Thus, the whole prosecution case becomes doubtful.

The term ‘witness’ means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or

otherwise.

In Pradeep Narayan Madgaonkar & Ors. v. State of Maharashtra, AIR 1995 SC 1930, this Court dealt with the issue of the requirement of the examination of an independent witness, and whether the evidence of a police witness requires corroboration. The Court held that though the same must be subject to strict scrutiny, however, the evidence of police officials cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigation or in the prosecution. However, as far as possible the corroboration of their evidence on material particulars should be sought.

(See also: Paras Ram v. State of Haryana, AIR 1993 SC 1212; Balbir Singh v. State, (1996) 11 SCC 139; Kalpnath Rai v. State (Through CBI), AIR 1998 SC 201; M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, AIR 2003 SC 4311; and Ravinderan v. Superintendent of Customs, AIR 2007 SC 2040).

11. Thus, a witness is normally considered to be independent unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause to bear such enmity against the accused so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence.

12. This Court in Laxmibai (dead) Thr. L.Rs. & Anr. v. Bhagwantbuva (dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204 examined a similar issue and held:

> "Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: Khem Chand v. State of Himachal Pradesh, AIR 1994 SC 226; State of U.P. v. Nahar Singh (dead) & Ors., AIR 1998 SC 1328; Rajinder Pershad

(Dead) by L.Rs. v. Darshana Devi (Smt.), AIR 2001 SC 3207; and Sunil Kumar & Anr. v. State of Rajasthan, AIR 2005 SC 1096)".

13. It has been canvassed on behalf of the appellants that the provisions of Sections 174 and 176(3) Cr.P.C. had not been complied with and the body had been exhumed by the IO without the permission of the Executive Magistrate and therefore, the investigation had not been conducted in accordance with law. Sub-section (1) of Section 174 Cr.P.C. only puts an obligation on the part of the IO to intimate the Executive Magistrate empowered to hold inquest but there is nothing in law which provides that investigation cannot be carried out without his permission in writing or in his absence. Even otherwise, the provision stands qualified "unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate." The object of the inquest proceeding is merely to ascertain whether a person has died under unnatural circumstances or an unnatural death and if so, what is the cause of death. More so, the inquest report is not a piece of substantive evidence and can be utilised only for contradicting the witnesses to the inquest examined during the trial. Neither the inquest report nor the post-mortem report can be termed as basic or substantive evidence and thus, any discrepancy occurring therein cannot be termed as fatal or suspicious circumstance which would warrant benefit of doubt to the accused.

(Vide: Pooda Narayan & Ors. v. State of A.P., AIR 1975 SC 1252; Rameshwar Dayal & Ors. v. State of U.P., AIR 1978 SC 1558; Kuldeep Singh v. State of Punjab, AIR 1992 SC 1944; George & Ors. v. State of Kerala & Anr., AIR 1998 SC 1376; Suresh Rai & Ors. v. State of Bihar, AIR 2000 SC 2207; and Munshi Prasad & Ors. v. State of Bihar, AIR 2001 SC 3031).

14. So far as the provisions of Section 176 Cr.P.C. are concerned, the said provisions are attracted when a person dies in police custody and there is suspicion that death had been caused by the police itself. In other eventualities also, as provided in Section 176 Cr.P.C., the Magistrate may hold the enquiry. Even if the submission of the appellants is considered to have some substance it will not tilt the balance in their favour. It is a settled legal proposition that evidence collected even by improper or illegal means is admissible if it is relevant and its genuineness stands proved. However, the court may be cautious while scrutinizing such evidence. In such a fact-situation, it may be considered a case of procedural lapse on the part of the Investigating Officer and it should not be discarded unless the appellant satisfies the court that any prejudice has been caused to him.

(Vide: Umesh Kumar v. State of Andhra Pradesh, JT 2013 (12) SC 213; and Pooran Mal v. Director of Inspection, Income-Tax, New Delhi & Ors., AIR 1974 SC 348).

15. A number of witnesses have deposed of seeing the deceased in the company of the appellants before the incident. In cases where the accused was last seen with the deceased victim (last seen-together theory) just before the incident, it becomes the duty of the accused to explain the circumstances under which the death of the victim occurred. (Vide: Nika Ram v. State of Himachal Pradesh, AIR 1972 SC 2077; and Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106).

16. It is obligatory on the part of the accused while being examined under Section 313 Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the court must take note of such explanation even in a case of circumstantial evidence, to decide whether or not the chain of circumstances is complete. [Vide: Musheer Khan @ Badshah Khan & Anr. v. State of Madhya Pradesh, AIR 2010 SC 762; and Dr. Sunil Clifford Daniel (supra)].

17. The High Court regarding Sadananda (PW.13) has observed as under:

> "It may be that PW11 may appear as accomplice but nonetheless the evidence of PW13 clinchingly establish the extra- judicial confession of A1. The analysis of the above evidence would clinchingly establish the guilt of A1 to A3. Therefore, the order of conviction is sound and proper." Similarly, the Trial Court in respect of PW.11 observed as under:
>
> "Even if the extra-judicial confession said to have been made by the first accused before PW.13 is eschewed, the statement made before PW.11 shows that immediately after the incident the first accused Madhuranatha who had earlier sought the assistance of PW.11 for the same crime has met him in his house during night and handed over Rs.50,000/- for safe custody and also requested him not to disclose it to any one." If the aforesaid findings of the courts below are read together, none of them has disbelieved either of the witnesses. Therefore, we do not find any force in the submissions advanced by learned counsel for the appellants that one of the said witnesses had been disbelieved by the Trial Court and another by the High Court and thus, none of them could be relied upon. The courts below opined that even if evidence of one of them is eschewed, deposition of another is enough to lend support to the prosecution case.

18. However, the facts of the case did not warrant death penalty.

The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender are also required to be taken into consideration along with the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty. (Vide: Bachan Singh v. State of Punjab, AIR 1980 SC 898; Machhi Singh v. State of Punjab, AIR 1983 SC 957; Devender Pal Singh v. State of NCT of Delhi, AIR 2002 SC 1661; State of

Maharashtra v. Goraksha Ambaji Adsul, AIR 2011 SC 2689; and Neel Kumar v. State of Haryana, (2012) 5 SCC 766).

19. In Haresh Mohandas Rajput v. State of Maharashtra, (2011) 12 SCC 56, this court held as under:

> "20. 'The rarest of the rare case' comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of 'the rarest of the rare case'. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded."

20. The facts and circumstances involved in the instant case do not meet the requirement of rarest of rare cases as explained hereinabove and we are of the considered view that it is not a fit case where the death sentence awarded to the appellants should be affirmed. Considering the current trend in view of the judgment of this Court in Swamy Shraddanand (2) @ Murali Manohar Mishra v. State of Karnataka, (2008) 13 SCC 767 which has subsequently been followed by this Court as is evident from the judgments in State of Uttar Pradesh v. Sanjay Kumar, (2012) 8 SCC 537; and Gurvail Singh @ Gala v. State of Punjab, (2013) 2 SCC 713, we are of the considered opinion that ends of justice would meet if they are awarded the sentence of 30 years without remission.

21. With the aforesaid modification, the appeals stand disposed of.

.....J.
(DR. B.S. CHAUHAN)

.....J.
(S.A. BOBDE)

New Delhi,

November 28, 2013