R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 8TH DAY OF JUNE, 2022

PRESENT

THE HON'BLE MR. JUSTICE K. SOMASHEKAR

AND

THE HON'BLE MR. JUSTICE SHIVASHANKAR AMARANNAVAR

CRIMINAL APPEAL No.1372 OF 2017

BETWEEN:

SMT. KAVITHA

... APPELLANT

(BY SRI. R.P. CHANDRASHEKAR, ADVOCATE FOR
SRI. C.H. HANUMANTHARAYA, ADVOCATE)

AND:

STATE OF KARNATAKA
BY KORATAGERE P.S.,
TUMKUR DIST
BY S.P.P. HIGH COURT BUILDING
BANGALORE – 560 001.

...RESPONDENT

(BY SRI. VIJAYKUMAR MAJAGE, ADDITIONAL SPP)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF CR.P.C., PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION AND ORDER OF SENTENCE DATED:22.07.2017 PASSED BY THE IV-ADDITIONAL DISTRICT AND SESSIONS JUDGE, MADHUGIRI IN S.C.NO.5051/2016 – CONVICTING THE APPELLANT / ACCUSED FOR THE OFFENCE PUNISHABLE UNDER SECTION 302 OF IPC AND ACQUIT THE APPELLANT OF THE ALLEGED CONVICTION FOR OFFENCE P/U/S. 302 OF IPC.

THIS CRIMINAL APPEAL COMING ON FOR HEARING THIS DAY, ***K. SOMASHEKAR .J*** DELIVERED THE FOLLOWING:

JUDGMENT

This is one of the classic appeals whereby the appellant / accused is challenging the impugned judgment of conviction and order of sentence dated 22.07.2017 rendered by the IV-Additional District and Sessions Judge, Madhugiri (hereinafter for brevity referred to as the 'trial Court') in S.C.No.5051/2016, convicting the appellant / accused for the offence punishable under section 302 of Indian Penal Code, 1860 and sentencing her to undergo life imprisonment and pay fine of Rs.10,000/-, in default, to undergo simple imprisonment for one year. Whereas in this appeal, the appellant / accused is seeking intervention in the aforesaid judgment of conviction and order of sentence by considering the grounds urged in the

appeal and consequently, seeking for setting aside the judgment of conviction and order of sentence rendered in the aforesaid case against her and acquit her of the offence punishable under section 302 of Indian Penal Code, 1860 (hereinafter for brevity referred to as the 'IPC').

2. Heard learned counsel Sri.R.P.Chandrashekar appearing for the appellant / accused and Sri.Vijaykumar Majage, learned Additional State Public Prosecutor appearing for the respondent - State and perused the impugned judgment of conviction and order of sentence rendered by the trial Court in S.C.No.5051/2016.

3. The factual matrix of the appeal are as under:

It is transpired in the case of the prosecution that, on 24.08.2016 at around 2.00 p.m., the accused had come with her husband CW.1, who is examined as PW.1 – Manjunatha, to the Renuka Hospital situated at Koratagere along with their two months' old girl baby for treatment, as the child was suffering from some respiratory problem and also epilepsy. Later, on the same day, at around 4.00 p.m., as the child had respiratory

problem and epilepsy, the accused, who is none other than the mother of the deceased girl baby, was not getting the enough milk to feed the baby, threw her baby into Suvarnamukhi river by the side of Koratagere town. This is the narration in the complaint made by PW.1 – Manjunatha and based upon his complaint, criminal law was set into motion by recording FIR as per Ex.P15 for the offence punishable under section 302 of IPC. Subsequent to registration of the crime and so also criminal law was set into motion, PW.15 – S.Muniraju being an Investigating Officer, took up the case for investigation and during investigation, he conducted spot panchanama at Ex.P2 in the presence of PW.7 and PW.12 and took photographs at Ex.P3 and Ex.P4 and also conducted inquest over the dead body of two months' old baby in the presence of the panch witnesses as per Ex.P8 in the presence of PW.5 – Babu, PW.6 – Abhilash and PW.7 – Adinarayana. The dead body of the two months' old baby had been sent to the mortuary and whereby PW.14 – Dr.Rudramurthy who conducted autopsy over the dead body and issued postmortem report

as per Ex.P14 and whereby he opined that the cause of death was due to asphyxia as a result of drowning.

4. Subsequent to completion of the investigation done by PW.15 by following the requisite provisions of section 173(2) of Code of Criminal Procedure, whereby laid the charge sheet against the accused before the committal court and the committal court had passed an order under section 209 of Code of Criminal Procedure, by following the requisite provisions and the case has been committed to the Sessions Court for trial. Subsequently, the accused has been secured to face the trial, whereby the trial Court has framed charges against the accused for the offence punishable under section 302 of IPC and by hearing on charge by the learned Public Prosecutor so also defence counsel, read over and explained the charges to the accused in the language known to her. However, the accused pleaded not guilty and claimed to be tried and accordingly, plea of the accused has been recorded separately.

5. In order to prove the case of the prosecution, the prosecution examined, in all, 15 witnesses as PW.1 to PW.15 and got marked 16 material documents as Ex.P1 to Ex.P16. The trial Court has called upon the accused to enter on her defence evidence as contemplated under section 233 of Cr.P.C., but the accused did not come forward to adduce any defence evidence. After completion of evidence of the prosecution witnesses, the statement of the accused, as contemplated under the provision of section 313 of Cr.P.C., was recorded. The accused denied the incriminating evidence adduced by the prosecution witnesses against her, but not led any defence evidence on her behalf.

6. Subsequently, the trial Court heard the arguments advanced by the learned Public Prosecutor and so also the defence counsel and after appreciating the evidence of PW.3 – Dr.Mallikarjunaiah who treated the child aged of two months and the evidence of PW.14 – Dr.Rudramurthy who conducted autopsy over the dead body of the child aged two months and issued postmortem

report – Ex.P14 and so also the evidence of PW.15 – S.Muniraju, Investigating Officer who conducted spot mahazar at Ex.P2 and inquest over the dead body of two months' old baby at Ex.P8 and received the postmortem report at Ex.P14, the trial Court came to the conclusion that the prosecution has proved the case against the accused for the offence punishable under section 302 of IPC, but strangely even after having noticed that CW.1, CW.3, CW.4, CW.8 and CW.9 have turned hostile and CW.1, 8 and 9 are her close relative, the trial Court has completely given a goby to the versions of their statements, but has given more credentiality to the evidence of PW.3 – Dr.Mallikarjunaiah, PW.13 – Nataraju, who drew the map of scene of crime at Ex.P13, PW.14 – Dr.Rudramurthy who conducted autopsy over the dead body and issued postmortem report at Ex.P14 and PW.15 – S.Muniraju, Investigating Officer, while rendering the conviction judgment which is reflected in the operative portion of the order. The trial Court has held that the circumstances and the evidence of the Doctor proves the case of the prosecution and has observed that the only inference that

can be drawn from the completed chain of events is that the accused threw the child into the river and killed it. These are the observations that were made by the trial Court while rendering conviction to the accused for the offence under section 302 of IPC. The trial court relied on the judgments reported in following cases;

i) *2007 Crl.L.J. 2282 - YOGESH NARASIN SAXENA vs. STATE OF UTTARANCHAL;*

ii) *2015(4) KCCR – SN 413(SC) - STATE OF PUNJAB vs. BITTU & Another,* and;

iii) *(2017)2 SCC (Crimes) 262 - KISHORE BHADKE vs. STATE OF MAHARASHTRA*, while rendering a conviction judgment against the accused for the offence punishable under section 302 of IPC. It is this impugned judgment which has been challenged in this appeal, urging the various grounds.

7. Heard learned counsel Sri.R.P.Chandrashekar appearing for the appellant / accused, who has taken us through the evidence of PW.1- Manjunatha, who is the father of the deceased two months' old baby and the

author of the complaint at Ex.P1 whereby the circumstances were narrated in the FIR at Ex.P15, has turned hostile to the case of the prosecution, but the trial Court had given conviction without appreciation of the evidence on the part of the prosecution. Therefore, it requires intervention in this appeal, if not intervened, certainly gravamen of accusations would be the sufferer and also substantial miscarriage of justice would arise. It is further contended that the evidence of PW.3 – Dr.Mallikarjunaiah who treated the child at Renuka Hospital, Koratagere and advised PW.1 – Manjunatha and accused, who are the parents of the child, to get blood test done of that baby, does not support the case of the prosecution to prove that the accused has caused death of the deceased two months' old baby.

8. PW.2 and PW.4 are the witnesses on the part of the prosecution to prove the last scene theory. But this theory requires to be established by the prosecution by facilitating worthwhile evidence, but in the case on hand, both PW.2 and PW.4 have turned hostile to the case of the

prosecution theory. They are the most material witnesses in respect of the offences leveled against the accused, but PW.2 and PW.4 did not support the case of the prosecution to any extent, but this grave discrepancy has not been taken into consideration and also not properly appreciated by the trial Court and conviction has been rendered by the trial Court, therefore, on this count alone, it requires to be intervened in this appeal, by considering the grounds as urged therein by referring to the evidence of PW.2 and PW.4 inclusive of the evidence of PW.5, PW.6 and PW.7. PW.5 to PW.7 are the panch witnesses in respect of inquest (Ex.P8) done over the dead body of girl baby aged about two months, but nothing incriminating against this accused is forthcoming on the part of the prosecution by facilitating worthwhile evidence. Even PW.8, PW.9, PW.10 and PW.11 have been subjected to examination on the part of the prosecution who were present during the inquest done over the dead body of girl baby aged about two months, but these witnesses have also turned around the fulcrum of the facts of the inquest proceedings at Ex.P8. Even though they are the material witnesses on the part of

the prosecution, they did not withstood examination done on the part of the prosecution to prove the guilt against the accused. PW.12, who is one of the witnesses, has been subjected to examination in respect of spot mahazar at Ex.P2. Even this witness has also not withstood relating to the incriminating facts as narrated or stated in the spot mahazar said to have been conducted by PW.15 being an Investigating Officer. PW.13 being the Engineer who drew the map of scene of crime as per Ex.P13, nothing incriminating has been elicited by the prosecution to prove the guilt against the accused. PW.14 being the Doctor who conducted autopsy over the dead body and issued postmortem report as per Ex.P14, nothing worthwhile has been elicited by the prosecution. But the trial Court has given more credentiality to the evidence of PW.14 – Dr.Rudramurthy who is the Doctor who conducted postmortem, PW.15 – S.Muniraju who is the Investigating Officer and PW.3 – Dr.Mallikarjunaiah, being the Doctor who provided treatment to that baby aged of two months, but the gravamen of the accusations is the sufferer, who is in judicial custody for almost six years since from the date

of arrest. Even though there is no worthwhile evidence which has been facilitated by the prosecution, despite of which conviction has been held by the trial Court. Therefore, in this appeal, it requires to be intervened by considering the grounds as urged therein, if not, the accused would be the sufferer and there shall be substantial miscarriage of justice. On all these premises, learned counsel for the appellant / accused emphatically submitted for consideration of the grounds as urged in this appeal and sought for intervention and consequently setting aside the judgment of conviction and order of sentence rendered by the trial Court in S.C.No.5051/2016 and to acquit the accused of the offence punishable under section 302 of IPC.

9. On the other hand, Sri.Vijaykumar Majage, learned Addl. SPP appearing for State, has taken us through the evidence of PW.3 – Dr.Mallikarjunaiah being the Doctor who provided the treatment to the girl baby aged two months who was suffering from some sort of respiratory problem and also epilepsy, for that reason the

parents namely PW.1 – Manjunatha and accused Kavitha, who is none other than the genital mother of that baby, have taken the baby to the Renuka Hospital at Koratagere, where the Doctor - PW.3 had given treatment and gave advice to the parents that the child requires to be subjected to blood test, but the accused Kavitha who is mother of the deceased baby aged of two months, threw that baby into the Suvarnamukhi river which is situated by the side of Koratagere town on 24.08.2016 at around 4.00 p.m. The allegation is the child had respiratory problem and also epilepsy and accused was not getting proper milk to feed that child and this was the intention kept in her mind which made her to throw the child into Suvarnamukhi river and cause her death. This is the theory put forth by the prosecution and same has been established by the prosecution by facilitating the evidence through PW.3 – Dr.Mallikarjunaiah who gave treatment to the baby and PW.14 – Dr.Rudramurthy who conducted autopsy over the dead body at Ex.P14 and PW.15 – S.Muniraju, Investigating Officer, who laid charge-sheet against the accused, drew the spot mahazar at Ex.P2 and

conducted the inquest mahazar at Ex.P8, these are the evidence appreciated by the trial Court and the entire evidence available on record has led conjunctively to the only inference that can be drawn is the guilt of the accused. Therefore the very accused Kavitha threw the child into the Suvarnamukhi river with an intention to killing the child knowing fully that the child of two months of age would drown in the river and die, as the accused thought that the child was suffering with breathing problem and epilepsy and she had no enough milk to feed that child. Therefore, the prosecution has facilitated the evidence and has successfully proved its allegation made against the accused. The same has been appreciated by the trial Court while rendering a conviction for the offence punishable under section 302 of IPC and several citations were also stated in the impugned judgment at para Nos.44, 45, 46, 47 and 48. Therefore, in this appeal, it does not call for any interference and no warranting circumstances would arise for intervention, re-appreciation of the evidence and also re-visiting the impugned judgment of conviction rendered by the trial Court and more over,

the child of two months' age was thrown into the river merely because the child was suffering with respiratory problem and also epilepsy, these are all the evidence which have been forthcoming on part of the prosecution. The accused is none other than the mother of the deceased child aged of two months. Therefore, in this appeal, it does not call for any interference and there is no perversity and illegality noticed in the impugned judgment of conviction and consequently, the appeal deserves to be rejected being devoid of merits. On these premises, learned Addl. SPP appearing for State is seeking for dismissal of this appeal.

10. We have gone through the entire evidence of the prosecution i.e., PW.1 to PW.15 and so also material documents, but strangely, the trial Court has given more credentiality to the evidence of PW.14 – Dr.Rudramurthy who conducted autopsy over the dead body and issued postmortem report at Ex.P14 and opined that the death was due to asphyxia as a result of drowning and more credentiality is given to the evidence of PW.15 – S.Muniraju being an IO, who conducted investigation,

recorded the voluntary statement of the accused at Ex.P16 and based upon her voluntary statement, conducted spot panchanama at Ex.P2, inquest mahazar at Ex.P8 and also recorded statement of witnesses.

11. PW.1 – Manjunatha is the author of the complaint at Ex.P1 and he did not withstood the averments made in the complaint and even PW.5, PW.6 and PW.7 who are the panch witnesses have been secured and in their presence, panchanama has been drawn by PW.15 at Ex.P8. But they did not support the case of prosecution to any extent and the same has been seen in their evidence itself. Ex.P2 – spot panchanama has been drawn by PW.15 being an IO in the presence of PW.7 – Adinarayana and PW.12 – Hanumantharayappa. However, the entire case has been revolving around the evidence of PW.3 – Dr.Mallikarjunaiah who provided treatment to the deceased child, which was brought by PW.1 and also his wife Kavitha, who is arraigned as an accused, as the child was suffering with respiratory problem and also epilepsy and more so, Kavitha being the mother of the child was not

getting adequate milk to feed her child. These are the things as according to the theory of the prosecution that the accused Kavitha was having an intention to throw that baby into the Suvarnamukhi river by the side of Koratagere town on 24.08.2016. Even prior to the child aged of two months, the aforesaid Kavitha, being arraigned as an accused, had given birth to a child who is aged of six years, at the time the criminal law was set into motion by receipt of a complaint at Ex.P1 by PW.1 – Manjunatha. PW.9, who is also subjected to examination on the part of the prosecution, being secured as a witness and in whose presence, inquest proceedings were held over the dead body of child aged of two months at Ex.P8 and whose statement was recorded as per Ex.P10 at the time of inquest held over the dead body whereby PW.1 – Manjunatha who was secured by the Investigating Agency by telephonical information to him on 24.08.2016 at around 9.00 p.m. that he has told that he and accused had taken the child to Renuka Hospital at Koratagere as there was some respiratory problem to the child and the Doctor who had examined the child, told the parents of the

child to get the blood test of the child done and after giving the blood for blood test as per the advice made by Doctor – PW.3 – Dr.Mallikarjunaiah, they had returned to the hospital and at around 3.00 p.m., the accused Kavitha gone out along with the child aged two months and when she did not return, PW.1 – Manjunatha searched for them everywhere. At about 6.30 p.m., when Manjunatha went to Koratagere bus stand area, he noticed his wife Kavitha sitting there and when he questioned her about the child, she told him that somebody closed her mouth and took away the child and the jewelry. Later he along with his wife, went to the police station and informed the police, then the PSI asked her to show the place where the alleged incident took place and the PSI along with his staff were taken to the spot, again when the accused Kavitha was questioned to tell the truth, the accused told that she does not get enough milk to feed the baby aged of two months and that baby was suffering with respiratory problem and also epilepsy. Therefore, at about 4.00 p.m., she took the child aged of two months to the river side near a house situated in Koratagere and threw the child into the river

and by saying so, she took the complainant and the police to the aforesaid spot and there they found the baby floating in the river and had died. Though this theory has been put on the part of the prosecution, but PW.1 – Manjunatha, who is the author of the complaint – Ex.P1, by securing certain information about the child of two months from his wife - accused Kavitha and thereafter initiated criminal prosecution against the accused by filing complaint at Ex.P1, but PW.1 has turned around and he is treated as hostile to the case of the prosecution as he has stated in his evidence that he does not know how the child had died and he has not given any statement to the police regarding the death of the child, but he has specifically admitted in his evidence that he is the husband of the accused and hence it is clear that he wants to hide the truth. Thus if other evidence proves the prosecution case, the hostilities of these witnesses were also appreciated by the trial court, but not proved fatal to the case of the prosecution. This was also an observation made by the trial Court while assessing the evidence of PW.1, PW.14 and PW.15, but the entire case is rested on circumstantial

evidence and that each circumstance should be established by the prosecution without giving any room to doubt.

12. Therefore, it is deemed appropriate to refer to the judgment of the Hon'ble Supreme Court in the case of ***LALIT KUMAR & Others vs. SUPERINTENDENT & REMEMBRANCER*** reported in ***AIR 1989 SC 2134***, wherein it is held that the power of an Appellate Court to review evidence in appeals against acquittal is as extensive as its power in appeals against convictions, but Appellate Court should always be re-appreciating the evidence and revisiting the entire evidence as well as marking of the documents on their part to prove the guilt against the accused beyond all reasonable doubt. But, in the instant case, the Trial Court has given more credentiality to the evidence of PW.3, PW.14 and PW.15. Therefore, it is deemed appropriate to refer to section 3 of the Indian Evidence Act, 1872.

13. Even last seen theory requires corroboration. Accused persons cannot be convicted solely on the basis of

the evidence of last seen together with the deceased and it was extensively addressed by the Hon'ble Supreme Court of India in a judgment of ***AIR 2013 SC 2027*** in the case of ***NAVANEETHAKRISHNAN vs. STATE, By Inspector of Police.***

14. In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards guilt of the accused. It was also extensively addressed by the judgment rendered by the Hon'ble Supreme Court of India reported in ***AIR 2012 SC 2435*** in the case of ***SAHADEVAN vs. STATE OF TAMIL NADU***.

15. It is relevant to refer to one more judgment in the case of ***WAKKAR vs. STATE OF UTTAR PRADESH*** reported in ***2011 Crl.L.J. 1639***, the principle for basing a conviction on the basis of the circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt

of the accused can be safely drawn and no other hypothesis against the guilt is possible.

16. Insofar as the circumstantial evidence on the part of the prosecution, it is the duty of the Court to scrutinize the evidence carefully and to see that acceptable evidence is accepted and the same is extensively addressed by the Hon'ble Supreme Court of India in a judgment in the case of ***STATE OF GUJARAT v. GANDABHAI GOVINDBHAI*** reported in of ***2000 Crl.L.J 92 (Gujarat).***

17. Where there are material contradictions creating some reasonable doubt in a reasonable mind, such eyewitnesses cannot be relied upon to base their evidence in the conviction of accused and this view is expressed by the Hon'ble Supreme Court in the case of ***NATHIA vs. STATE OF RAJASTAN*** reported in ***1999 Crl.L.J. 1371 (Rajastan)***.

18. These are all the reliances which are required in the instant appeal, preferred by the appellant / accused being gravamen of the accusation, while re-appreciating

the evidence on record and so also revisiting the impugned judgment of conviction and order of sentence. In the instant case, though the prosecution has examined PW.1 to PW.15 and got marked Ex.P1 to Ex.P16, but the trial Court has given more credentiality to the evidence of PW.3 – Dr.Mallikarjunaiah, who had provided treatment to the child aged of two months and evidence of PW.14 – Dr.Rudramurthy who conducted autopsy over the dead body of the child aged of two months and PW.15 – S.Muniraju, being an Investigating Officer who conducted entire investigation and laid charge-sheet against the accused and on basis of the evidence of those witnesses, the trial Court has arrived at the conclusion that the prosecution has proved the guilt against the accused beyond all reasonable doubt, which view, in the instant appeal, requires to be re-appreciated and the impugned judgment of conviction and order of sentence requires to be revisited. If re-appreciation as well as revisiting the impugned judgment is not done by this Court, certainly there shall be some substantial miscarriage of justice against the accused being a gravamen of accusations.

Therefore, it is deemed to be appropriate to state that merit of the statement is important. It is well known principle of law that reliance can be based on the solitary statement of a witness if the court comes to the conclusion that the said statement is the true and also correct version of the case of the prosecution. It was also extensively addressed by the Hon'ble Supreme Court of India in the case of ***RAJA vs. STATE*** reported in ***(1997) 2 Crimes 175.***

19. Similarly the Court is always expected of quality of evidence and not the quantity of evidence and this aspect also has been addressed by the Hon'ble Supreme Court of India extensively in a judgment in the case of ***STATE OF UTTAR PRADESH vs. KISHANPAL*** reported in ***2008 (8) JT 650.*** Even section 134 of the Indian Evidence Act, 1872 it is envisaged that it is the quality and not the quantity which determines the adequacy of evidence. It was also extensively addressed by the Hon'ble Supreme Court of India in the judgment in the case of ***LAXMIBAI (Dead) Through LRs. V.***

BHAGWANTBURA (Dead) Through LRs. reported in AIR ***2013 SC 1204***.

20. In the instant case, the importance of corroboration of the evidence which was facilitated by the prosecution, it must be positive, cogent, consistent and probabalized that the accused had committed the murder of the deceased. But in the instant case, Kavitha who is none other than the mother of the deceased baby aged two months, though the prosecution in their case put on trial of this accused, subjected examination of PW.1 to PW.15, but no worthwhile evidence has been facilitated by the prosecution for securing the conviction of the accused for the offence under section 302 of Indian Penal Code, 1860. Therefore, in this appeal it requires intervention. If not intervened by re-appreciation of evidence and also revisiting judgment of conviction and order of sentence, certainly there shall be some substantial miscarriage of justice to the accused, who is gravamen of the accusations.

21. In the light of the aforesaid reasons and findings, we are of the opinion that the appeal deserves consideration keeping in view the grounds urged and also referring the evidence which is contended by the learned counsel for the appellant and more so there are substances in the contentions made by the learned counsel for the appellant seeking setting aside of the judgment of conviction and order of sentence rendered by the trial Court. Accordingly, the appeal deserves to be allowed.

22. In view of the aforesaid reasons, we proceed to pass the following:-

ORDER

i) The appeal preferred by the appellant / accused under Section 374(2) of Cr.P.C. is hereby **allowed**.

ii) Consequently, the impugned judgment of conviction and order of sentence rendered by the learned IV Addl. District and Sessions Judge, Madhugiri, in S.C.No.5051/2016 dated 22.07.2017 is hereby set-aside.

iii) Consequent upon setting aside the impugned judgment of conviction and order of sentence, the appellant / accused is acquitted of the offence punishable under Section 302 of IPC which was charged against her.

iv) The fine amount, if any, deposited by the appellant / accused shall be returned to her, on due identification. Accordingly, it is ordered.

v) Registry of this Court is directed to forward copy of the operative portion of the judgment to the concerned Jail authority with a direction to release the appellant/accused forthwith, if she is not required in any other case. Accordingly, it is directed.

Sd/-
JUDGE

Sd/-
JUDGE

Bss