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SHANTHAMALLESHAPPA

v.

STATE OF KARNATAKA

(Criminal Appeal Nos. 1583-1584 of 2018)

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DECEMBER 10, 2018

[UDAY UMESH LALIT AND R. SUBHASH REDDY, JJ.]

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Penal Code, 1860 – s.436 r/w. s.34 – Prosecution case was that accused no. 1 along with accused no.2 to 4 threw kerosene oil on the thatched shed situated in front of the house of PW-1(sister-in-law of accused no.1) and after setting it on fire, all accused fled away from the scene on motor cycles – Trial Court convicted all the four accused u/s. 436 r/w. s.34 of IPC and imposed fine of Rs.10,000/- on accused no.1 and imposed a fine of Rs.5000/- on accused nos.2 to 4 – High Court enhanced the sentence on accused no.1 to simple imprisonment for a period of six months and a fine of Rs.50,000/- and set aside the conviction of accused nos.2 to 4 – On appeal, held: There were civil disputes pending between accused no.1 and husband of PW-1, and earlier also they had filed complaints against each other – In view of such disputes and complaints against each other, there was a possibility of implicating accused by making false complaint – There were material contradictions in the oral evidence adduced on behalf of the prosecution and further, except the interested testimony of PWs-1 to 3, no other independent person was examined as a direct witness to the incident – PW-1 and 2 had not stated anything about the presence of PW-3 and whereas, PW-3 stated that she had also come out on hearing cries of PW-1 and 2 – Further, PWs-1 and 2 had stated that books and clothes were burnt, contrary to the statement recorded in the mahazar in which only partial burning of pedestal fan and the roof was stated – PW-7 admitted that nobody was residing in the shed which ran contrary to evidence of PWs-2 and 3 wherein they stated that PW-1, her husband and children were staying in the shed – Material contradictions were not noticed by the trial Court as well as the High Court which resulted in perverse findings against the accused – Thus, impugned judgments set aside.

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Allowing the appeals, the Court

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HELD : 1.1 Admittedly, the incident occurred at about 09:30 p.m. on the fateful day. Unless sufficient light was there it was not possible to identify the accused. It was not the case of the prosecution that the witness had seen the accused persons in the light emanated from the fire. There are material contradictions in the evidence of PW-1 and PW-2 and the contents of the mahazar. In the deposition, PWs-1 and 2 have stated that books and cloths were burnt, contrary to the statement recorded in the mahazar in which only partial burning of the pedestal fan and the roof is stated. In the mahazar drafted, there is not a whisper about burning of books and clothes, and the burning of fan is conspicuously absent in the evidence of witnesses. It is the case of the prosecution that accused after setting on fire the thatched shed, fled away on the motor cycles but there was no identity of any of the motor cycles by registration number etc. PW-2 is also silent regarding the presence of PW-3 at the time of incident. [Para 11][1158-A-D]

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1.2 Even according to the case of the prosecution there were civil disputes pending between the brothers in respect of family properties and also it is evident from the evidence on record that 2-3 days prior to the date of incident both the brothers have lodged complaints against each other. In view of such disputes and complaints registered against each other, there is a possibility of implicating accused by making a false complaint. It is also to be noticed that PW-1, in her deposition, has not stated at all that P.W.-3 has come out of the house at the time of occurrence of the incident. Contrary to the evidence of PWs-1 and 2 who have not spoken about the presence of PW-3, PW-3 in the oral evidence has stated that she has also come out on hearing cries of PWs-1 and 2 on the date of incident and witnessed the incident. [Para 11][1158-C-E; 1158-H; 1159-A]

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2. In the cross-examination, PW-7-Assistant Sub-Inspector categorically admitted that nobody was residing in the shed and the residential house is separate but the children were using the shed for studies. Said evidence of PW-7 runs contrary to the

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A evidence of PWs-2 and 3 wherein they have stated that PW-1, her husband and children were staying in the shed. To prove that, PWs-1 to 3 were residing in the village and whereas the shed in question is situated in the farmhouse of PW-1's husband, in the appeal before the High Court documentary evidence was filed and said documents were marked as Ex.D1 to D4. Though
 B the said documents were received and referred to but such documentary evidence is not considered at all by the High Court. [Para 11][1159-C-E]

3. There are material contradictions in the oral evidence adduced on behalf of the prosecution and further, except the
 C interested testimony of PWs-1 to 3, no other independent person is examined as a direct witness to the incident. In view of the material contradictions in the evidence of PWs-1 to 7 and the documentary evidence, filed before the appellate court, which is not considered at all, the trial court as well as the appellate court
 D has committed serious error in arriving at the conclusion that accused no.1 has committed the offence punishable under Section 436 IPC. The material contradictions as referred to above were not noticed by the trial court as well as the High Court which resulted in perverse findings against the accused for recording a conviction against him and to impose the sentence. Considering
 E the entire evidence on record, and having regard to peculiar facts of the case, if the impugned judgments are allowed to stand it will lead to a miscarriage of justice, as such, impugned judgments are liable to be set aside. [Para 12][1159-E-H; 1160-A]

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1583-1584 of 2018.

From the Judgment and Order dated 28.06.2017 of the High Court of Karnataka at Bengaluru in Criminal Appeal No. 531 of 2011 C/w Criminal Appeal No. 248 of 2011.

G Anand Sanjay M. Nuli, Dharm Singh, Suraj Kaushik, Nand Kumar K.B., Prawal Mishra, M/s. Nuli & Nuli, Advs. for the Appellant.

V. N. Raghupathy, Parikshit P. Angadi, Lagnesh Mishra, Advs. for the Respondent.

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The Judgment of the Court was delivered by

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R. SUBHASH REDDY, J.

1. Leave granted.

2. These criminal appeals have been preferred by accused no.1, in the crime registered on the file of the Chamarajanagar Rural Police Station, in the State of Karnataka aggrieved by the conviction recorded and sentence imposed in the judgment dated 17th January 2011 passed in Sessions Case No.59 of 2009 by the learned District & Sessions Judge, Chamarajanagar and the judgment of the High Court in Criminal Appeal No.531 of 2011 c/w Criminal Appeal No.248 of 2011 passed on 28.06.2017 by the High Court of Karnataka at Bangalore.

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3. Accused nos.1 to 4 in the aforesaid crime were charged for offence under Section 436 read with Section 34 of Indian Penal Code (IPC). The learned District & Sessions Judge, Chamarajanagar has convicted all the four accused for the offence under Section 436 read with Section 34 IPC and imposed the fine of Rs.10,000/-, in default, to undergo simple imprisonment for two months on accused no.1 and imposed a fine of Rs.5,000/- on accused nos.2 to 4, in default, to undergo simple imprisonment for a period of one month.

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4. Aggrieved by the conviction recorded and fine imposed, accused have filed Criminal Appeal No.531 of 2011 and the State of Karnataka has preferred Criminal Appeal No.248 of 2011 seeking enhancement of punishment, before the High Court. The High Court, by judgment dated 28th June 2017, allowed the appeal, filed by the accused, in part by setting aside the conviction recorded and fine imposed on accused nos.2 to 4 and allowed the appeal of the State by imposing the sentence on accused no.1 to undergo simple imprisonment for a period of six months and to pay a fine of Rs.50,000/-, and in default of payment of fine, accused no.1 has been ordered to undergo simple imprisonment for a further period of 1½ months.

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5. The case of the prosecution was that accused no.1 is the elder brother of husband of PW-1 Smt. Manjula Devi. It is alleged that there were civil disputes among the brothers with regard to the family property. On the day of *Shivratri* festival on 23.02.2009 at about 08:30 p.m., when the husband of PW-1 had gone to temple, when PW-1 along with her mother and children were in house, at about 09:30 p.m., accused no.1 along with accused nos.2 to 4 threw kerosene oil on the thatched

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A shed situated in front of the house of PW-1 and set it on fire. It was alleged in the complaint lodged before the police under Ex.P1 that all the accused have committed the offence, as such, all were charged for offence punishable under Section 436 read with Section 34 IPC. It was alleged that after setting the thatched shed on fire, all the accused fled away from the scene of occurrence on motor cycles.

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6. It is the case of the prosecution that on receiving the information, PW-7 the ASI, Chamarajanagar Rural Police Station, rushed to the spot and received the written complaint from PW-1 and on its basis registered the case against accused nos.1 to 4. On completion of investigation, chargesheet was filed against accused nos.1 to 4 for the offence punishable under Section 436 IPC read with Section 34 IPC. The accused denied the charges and claimed trial.

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7. To prove the charges framed against the accused, the prosecution examined seven witnesses and marked Ex.P1 to P3. Upon hearing learned Public Prosecutor and counsel for the accused, learned Sessions Judge found all the accused guilty of the alleged crime and recorded conviction and imposed sentence of fine.

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8. Pleading that the fine imposed on the accused is not in conformity with Section 436 of IPC, for the enhancement of punishment, State filed appeal and questioning the conviction recorded and fine imposed, accused nos.1 to 4 have also preferred appeal. Before the appellate court, additional documents were filed along with application under Section 391, Cr.P.C. The said application was allowed and documents were marked as Ex.D1 to D4. The High Court, by referring to the oral and documentary evidence on record, has partly allowed the appeal of the accused and set aside the conviction recorded against accused nos.2 to 4 and also allowed the appeal of State and enhanced the sentence imposed on accused no.1 to simple imprisonment for six months and a fine of Rs.50,000/-, in default to undergo simple imprisonment for a further period of 1½ months.

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9. In these appeals, we have heard Mr. Anand Sanjay M. Nuli, learned counsel appearing for the appellant-accused and Mr. V.N. Raghupathy, learned counsel appearing for respondent-State. It is contended by learned counsel for the appellant that though there is no acceptable evidence on record, the trial court and the appellate court have erroneously recorded conviction and imposed the sentence. It is submitted that except the interested testimony of PWs-1 to 3 no other independent eye witnesses have been examined to prove the charge. It

is further submitted that though there were material contradictions in the oral evidence of PWs-1 to 5 said evidence was not properly considered by the trial court as well as the High Court. It is submitted that even before the appellate court though additional evidence is filed along with application under Section 391 of the Cr.P.C., such documentary evidence is not considered by the High Court. It is contended that though the State has failed to prove the guilt of the accused beyond reasonable doubt, the conviction is recorded and sentence is imposed on the appellant-accused no.1. On the other hand, it is the case of the State that the oral evidence of PWs-1 to 5 is consistent and same is sufficient to record the conviction against the appellant. It is submitted that in view of the property disputes among the brothers, accused no.1 along with accused nos.2 to 4 have intentionally set fire to the dwelling house, as such, the trial court as well as the High Court rightly recorded the conviction and imposed the sentence. It is submitted that the Sessions Judge, even after recording conviction of the accused under Section 436 read with Section 34 IPC, has simply imposed only fine on the accused and the same is contrary to Section 436 IPC. As such, State has preferred the appeal which is rightly allowed by the High Court by imposing the sentence of six months and fine of Rs.50,000/-. It is submitted that there are no grounds to interfere with the said conviction recorded and sentence imposed.

10. Having heard learned counsel on both sides, we have perused the material on record and also oral evidence which is placed on record in the paper book.

11. PW-1 Smt. Manjula Devi, who was the complainant is the sister-in-law of accused no.1. It was her case that on 23.02.2009 on *Shivratri* festival day when her husband has gone to temple, she was in the house along with her mother and children. The son of PW-1 Abhijith was examined as PW-2 and mother of the accused was examined as PW-3. PW-1, in her evidence, has stated that on the date of incident, on hearing the sound of dog barking, when she went out along with her son, PW-2, they saw accused no.1 holding kerosene can and remaining accused were with him and the accused no.1 threw kerosene oil on the thatched shed and set it on fire. PW-1, in her deposition, has not said about the presence of PW-3 at all. In the complaint filed before the police it is alleged that five persons including the accused have committed the offence but coming to the chargesheet only accused nos.1 to 4 were chargesheeted. PW-1 stated in her complaint under Ex.P1 that she

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- A became alert on hearing the sound of motor cycles but coming to her deposition she has stated that on hearing the dog barking she has come out of the house and witnessed the incident. Admittedly, the incident occurred at about 09:30 p.m. on the fateful day. Unless sufficient light was there it was not possible to identify the accused. It was not the case of the prosecution that witness had seen the accused persons in the light emanated from fire. There are material contradictions in the evidence of PW-1 and PW-2 and the contents of the mahazar. In the deposition, PWs-1 and 2 have stated that books and cloths were burnt, contrary to the statement recorded in the mahazar in which only partial burning of the pedestal fan and the roof is stated. In the mahazar drafted, there is not a whisper about burning of books and cloths, and the burning of fan is conspicuously absent in the evidence of witnesses. It is the case of the prosecution that accused after setting on fire the thatched shed, fled away on the motor cycles but there was no identity of any of the motor cycles by registration number etc. PW-2 is also silent regarding the presence of PW-3 at the time of incident. Even according to the case of the prosecution there were civil disputes pending between the brothers in respect of family properties and also it is evident from the evidence on record that 2-3 days prior to the date of incident both the brothers have lodged complaints against each other, basing on which crimes were registered being Crime Nos.36 of 2009 and 37 of 2009 on 20.02.2009 for the offences punishable under Sections 323, 324, 341, 504, 506 read with 34 IPC. In view of such disputes and complaints registered against each other, there is a possibility of implicating accused by making a false complaint. It is also to be noticed that PW-1, in her deposition, has not stated at all that P.W.-3 has come out of the house at the time of occurrence of the incident. In the cross-examination, she has also admitted that accused no.1 is working in Sericulture department and residing in the places where he was posted. A suggestion was also put to her stating that accused no.1 is a Joint Director of Sericulture working and residing at Mysore and he is not residing in the village of Badanaguppe. PWs-2 and 3 in their depositions have stated that they were staying in the outhouse. It is the case of the accused that the said outhouse is situated in the farm house and the distance between the farm house and Badanaguppe village is about 1 Kilometer. PW-2, in the cross-examination, has categorically admitted that the Kuteera was put up in the farmhouse and the distance between the farmhouse and Badanaguppe village is about 1 Kilometer. Contrary to the evidence of
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PWs-1 and 2 who have not spoken about the presence of PW-3, PW-3 in the oral evidence has stated that she has also come out on hearing cries of PWs-1 and 2 on the date of incident and witnessed the incident. PW-4, who claims to be resident of the village, was also examined on behalf of the prosecution. In his evidence, he has stated that PW-1 and her husband were residing in the farm house since last 3-4 years but at the same time in the cross-examination he has stated that he is a good friend of husband of PW-1 and both are Bhartiya Janata Party workers. PW-5 is the panch witness to the mahazar. In the cross-examination he has clearly admitted that even by the time he went to the scene of occurrence police were preparing mahazar. A suggestion was put to PW-5 that himself and husband of PW-1 are in cordial terms. PW-7, the Assistant Sub-Inspector in his deposition has categorically stated that on receiving the call from the Badanaguppe village that shed situated in the garden of Manjunatha, husband of PW-1 has caught fire, he went to the spot and by that time shed was burnt. In the cross-examination, PW-7 categorically admitted that nobody was residing in the shed and the residential house is separate but the children were using the shed for studies. Said evidence of PW-7 runs contrary to the evidence of PWs-2 and 3 wherein they have stated that PW-1, her husband and children were staying in the shed. To prove that, PWs-1 to 3 were residing in the village and whereas the shed in question is situated in the farm house of PW-1's husband, in the appeal before the High Court documentary evidence was filed and said documents were marked as Ex.D1 to D4. Though the said documents were received and referred to but such documentary evidence is not considered at all by the High Court.

12. There are material contradictions in the oral evidence adduced on behalf of the prosecution and further, except the interested testimony of PWs-1 to 3, no other independent person is examined as a direct witness to the incident. In view of the material contradictions in the evidence of PWs-1 to 7 and the documentary evidence, filed before the appellate court, which is not considered at all, we are of the view that the trial court as well as the appellate court has committed serious error in arriving at the conclusion that accused no.1 has committed the offence punishable under Section 436 IPC. The material contradictions as referred to above were not noticed by the trial court as well as the High Court which resulted in perverse findings against the accused for recording conviction against him and to impose the sentence. Considering the entire evidence on record, and having regard to peculiar facts of the

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A case, we are of the view that if the impugned judgments are allowed to stand it will lead to miscarriage of justice, as such, impugned judgments are liable to be set aside.

13. For the aforesaid reasons, we find merit in these appeals. Accordingly, these criminal appeals are allowed by setting aside the conviction recorded and sentence imposed in the judgment dated 17.01.2011 in Sessions Case No.59 of 2009 on the file of District & Sessions Judge, Chamarajanagar and the judgment of the High Court dated 28.06.2017 in Criminal Appeal Nos.531 of 2011 and 248 of 2011. Resultantly, the appellant-accused is acquitted of the charge and the bail bonds, if any, furnished by the appellant-accused stand discharged. The appellant-accused is entitled for refund of the fine amount deposited by him.

Ankit Gyan

Appeals allowed.