

**Yogish Vs. The State Of Karnataka**

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**SooperKanoon Citation :** [sooperkanoon.com/1234310](http://sooperkanoon.com/1234310)

**Court :** Karnataka

**Decided On :** Nov-23-2022

**Judge :** K.Somashekar and Pradeep Singh Yerur

**Appeal No. :** CRL.A 1054/2017

**Appellant :** Yogish

**Respondent :** The State Of Karnataka

**Judgement :**

R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE23D DAY OF NOVEMBER, 2022 PRESENT THE HON'BLE Mr. JUSTICE K.SOMASHEKAR AND THE HON'BLE Mr. JUSTICE PRADEEP SINGH YERUR CRIMINAL APPEAL No.1054 OF 2017 BETWEEN: YOGISH S/O.KRISHNAPPA POOJARY AGED ABOUT33YEARS OCC; GROCERY SHOP RESIDING AT MATHRUSHRI BHANDASALE BETTU NO.52, HEROOR VILLAGE UDUPI TALUK - 576 101 ... APPELLANT (BY SRI N.R.KRISHNAPPA, ADVOCATE) AND: THE STATE OF KARNATAKA BY CIRCLE INSPECTOR OF POLICE BRAHMAPUTRA CIRCLE UDUPI DISTRICT - 576 231 REPRESENTED BY STATE PUBLIC PROSECUTOR HIGH COURT BUILDING BENGALURU - 560 001 . RESPONDENT (BY SRI VIJAYAKUMAR MAJAGE, ADDL. SPP) \*\*\* 2 THIS CRIMINAL APPEAL IS FILED UNDER SECTION3742) CRPC PRAYING TO SET ASIDE THE

JUDGMENT

AND

ORDER

OF CONVICTION AND SENTENCE DATED 24.05.2017 PASSED BY PRL. SESSIONS JUDGE, UDUPI DISTRICT, UDUPI IN SESSIONS CASE NO.23/2011 CONVICTING FOR THE OFFENCES PUNISHABLE UNDER SECTION 302 AND 397 IPC AND ACQUIT THE APPELLANT / ACCUSED OF THE CHARGES LEVELED AGAINST HIM AND ETC. THIS CRIMINAL APPEAL HAVING HEARD AND RESERVED FOR PRONOUNCEMENT OF

JUDGMENT

ON 26.07.2022 COMING ON FOR PRONOUNCEMENT OF

JUDGMENT

THIS DAY, PRADEEP SINGH YERUR. J., DELIVERED THE FOLLOWING:

## **JUDGMENT**

This Criminal Appeal is preferred by the appellant - accused challenging the judgment of conviction and order of sentence dated 24.05.2017 passed by the Principal Sessions Judge, Udupi District, Udupi in S.C. No.23/2011 convicting the appellant - accused for the offences punishable under Sections 302 and 397 of the Indian Penal Code, 1860 (for short IPC).

2. The appellant - accused has been convicted and sentenced to imprisonment for life for the offence punishable under Section 302 IPC and to pay fine of Rs.5,000/- and in default of payment of fine amount to undergo simple imprisonment for further period of six 3 months. The appellant - accused was sentenced to undergo imprisonment for a period of seven years for the offence punishable under Section 397 of IPC. The accused was also ordered to pay compensation of Rs.25,000/- to the LRs of deceased Sunanda Shetty. Both the sentences were ordered to run concurrently.

3. This appeal against the afore stated judgment of conviction is made by the appellant - accused with an endeavour to free himself of the charges laid against him by the prosecution and from the ordeal or the torture of imprisonment for life. It

is to be seen after re-examining and re-appreciating the material evidence placed on record as to whether the prosecution has made out valid grounds to uphold the judgment of conviction and order of sentence passed by the trial Court and whether the appellant - accused is able to succeed in coming out of the clammy grip of the sentence of imprisonment of life which would depend on the appreciation of the evidence and the material placed on record.

4. The appellant is accused of having done to death one Smt. Sunanda A. Shetty on 20.12.2010 at about 4 7.30PM at Herur Village, Udipi Taluk, who is none other than the mother-in-law of first informant. It is the case of prosecution that appellant - accused committed the death of Smt. Sunanda A. Shetty by holding her neck and pressing it tightly with his hands while she was washing the ground floor. It is further stated that the accused came to the house of deceased in his motorcycle bearing Registration No.KA-20 U-4468 and after having jumped the compound wall of the house of Smt.Sunanda A. Shetty committed robbery by taking away the golden ornaments weighting 102.300 grms namely, black beads (Karimani Chain), four bangles, one pair of ear studs, ear chain and Lakshmi pendent valued at Rs.1,80,000/- from the person of Smt. Sunanda A. Shetty. Hence, appellant - accused committed offence punishable under Section 302, 392/395 r/w Sec. 397 of IPC.

5. The first information report was laid by Sri Jnana Vasantha Shetty to Bramhavar Police Station. Based on the first information the SHO of Bramhavara Police Station registered a case in Cr. No.344/2010 for the offences 5 punishable under Sections 302, 392/395 r/w Sec. 397 of IPC and submitted FIR to Addl. Civil Judge and JMFC, Udupi. On filing of the FIR law was set into motion and investigation was conducted by the Investigating Officer visiting the spot, where he conducted the inquest and spot panchanama in the presence of panch witness by recording the statement of witnesses. Thereafter, the Investigating Officer arrested the accused, recovered incriminating material at his instance and after receiving all the relevant documents filed charge sheet against the accused for the afore stated offences.

6. Pursuant to filing of the charge sheet cognizance for the aforesaid offences was taken by the learned Addl. Civil Judge and JMFC, Udupi in CC No.811/2011 acting under Section 190(1)(a) of Cr.P.C. Later, a case came to be committed to the Court of Sessions under Section 209 of Cr.P.C. as the offences alleged were exclusively triable by the Sessions Court. After the committal of case accused appeared before the Court of Sessions through his counsel and was enlarged on bail. In compliance of Section 6 207 of Cr.P.C. accused was supplied with the copy of charge sheet.

7. In order to establish the case and prove the guilt of the accused prosecution examined in all 25 witnesses as PW1 to PW25 and got marked in all 50 documents at Ex.P1 to P50 and so also, MOs1 to 19. The defence got examined DW1 to 4 and got marked Ex.D1 and D2. Thereafter, the statement of the accused was recorded under Section 313 of Cr.P.C. by explaining the incriminating material available and placed by the prosecution. Accused denied all the questions explained to him and claimed to be tried. Hence, he was put to trial.

8. PW.1 who is none other than first informant namely, Jnana Vasantha Shetty in his evidence has deposed that he is a resident of Heroor Village and Proprietor of Jnana Communications. Deceased Smt.Sunanda A.Shetty is none other than his mother-in-law, who was residing within a distance of 100 feet from his house. PW.1 was residing in his house along with his wife and children. Deceased Sunanda A.Shetty was 7 residing alone in her house pursuant to the death of her husband, who died prior to 6 to 7 months. It is the case of prosecution that Smt.Sunanda A.Shetty was fond of growing plants and she had grown plants and trees around her house. The house of accused was situated behind the house of PW.1 at a distance of 1 furlong. The front portion of the house of deceased Smt.Sunanda A.Shetty could not be seen. PW.1 states that on 20.12.2010, his wife and himself had dinner and slept. On the next day i.e. 21.12.2010 at about 5.00 a.m. he received a calling bell at his door where one newspaper boy by name Ravindra told PW.1 and his wife that his mother in law Smt.Sunanda A.Shetty was lying in front of her house in the open yard and the lights and TV in the house were on, based on his statement, PW.1 and his wife rushed to the house of Smt.Sunanda A.Shetty, where he saw his mother in law lying on the ground and

her body was turtled and her tongue had protruded and they noticed bleeding near the ear. The golden bangles and karimani chain and ear-studs of the deceased were missing. PW.1 and his wife therefore suspected that somebody must have committed murder 8 and robbed her golden ornaments. At about 7.30 a.m., the Police came to the spot and PW.1 gave the first information as per Ex.P1. Later, the Police conducted inquest panchanama and took photographs. Later on, PW1 identified the golden ornaments of Smt.Sunanda A.Shetty as per M.Os.2 to 7 on the same being seized.

9. PW.2-Smt.Arundathi Shetty is the daughter of deceased Smt.Sunanda A.Shetty and wife of PW.1, who on examination adduced evidence and reiterated the evidence narrated by her husband PW.1.

10. PW.3-Ravindra is none other than the newspaper and milk vendor, who first saw the dead body of deceased Smt.Sunanda A.Shetty in between the time at 4.45 a.m. and 5.00 a.m. on 21.12.2010. According to this witness, on 21.12.2010 at about 4.45 a.m. when he went to the house of deceased Smt.Sunanda A.Shetty to supply newspaper and milk, at that time, the electric lights in the house were burning and the TV was playing and the body of Smt.Sunanda A.Shetty was fallen on the ground in verandah where her face and body was facing towards the 9 ground. Despite PW3 calling out deceased Smt.Sunanda A.Shetty as Amma, Amma, there was no response. Hence, immediately he rushed to the house of PWs.1 and 2 and after informing them of the incident, all three came together to the house of deceased Sunanda A.Shetty and were shocked on seeing the body of the deceased facing ground. At that time, PW.2 observed that the gold ornaments worn by the deceased Sunanda A.Shetty were missing.

11. PW.4-Panduranga is the owner of the house opposite to the house of the deceased. He has deposed that during 2010 in the month of December at 5.00 a.m. he heard sound of crying in the house of the deceased Sunanda A.Shetty. When he went to the house of deceased, he saw her dead body lying in the verandah of the house and her body was facing towards the ground.

12. PW.5-Arvinda K., daughter of deceased Sunanda A.Shetty deposed in the similar fashion as that of PW.2 corroborating her statement. 10

13. PW.6-A.Mohan, the then RTO furnishes the particulars of vehicle of accused bearing registration No.KA20U-4468. PW.7-Venkataraman Bhat, the Branch Manager of Brahmavara Agricultural Cooperative Society, Uppinakote Branch has adduced evidence to the fact that PW.8 Smt.Shakunthala came to his Branch in order to secure gold loan. He has further deposed that PW.8 pledged one gold chain weighing 18.300 gms. and obtained gold loan of Rs.24,000/- under jewel loan No.1358 in his branch. He has further deposed that on 03.01.2011, PWs.8 and 10 came with the Police and repaid the entire loan amount of Rs.24,000/- with interest.

14. PW.8-Smt.Shakunthala, who was working at Disha Beauty Parlour at Brahmavar along with PW10 - Smt.Geetha deposed in her evidence that both of them were working in Disha Beauty Parlour in Brahmavar. On 28.12.2010, PW.10-Geetha asked for some help for which she told that she is having a gold chain which she wanted to pledge and thereby secured the loan by pledging the gold and gave the said money to her. She has further 11 deposed that on questioning PW10 as to whom gold chain belonged to, she answered that it belonged to her brother Yogeesh, who is none other than the accused herein. It was further deposed that Yogeesh, the accused required the money to get released her gold pledged by accused, which was given by her to him. Therefore, in order to help PW10-Geetha, PW.8 pledged the said gold chain with Brahmavar Agricultural Cooperative Society, Uppinakote Branch and took loan of Rs.24,000/- and handed over the amount of PW10-Geetha. PW8 has further deposed that on seeing the newspaper of 30.12.2010, she came to know of the murder and robbery of gold ornaments and that the name of Yogeesh appeared in the newspaper as accused and that the news of one gold chain having been pledged, hence, PW.8 enquired with PW.10 and suspected that the chain which was given to her by Yogeesh might be the very same gold chain. Therefore, both PWs.8 and 10 became nervous and on 03.01.2011 went to Brahmavar Police Station and informed the Police about the pledging of gold chain, which was given by accused to PW10. Based on the statement of PWs8 and 10, the Police took both of 12 them to the Bank where the gold chain was pledged and after identification of the said gold chain, Police have seized the said gold chain under panchanama.

15. PW9-Diwakar Subbanna Shetty, is none other than the brother of deceased Sunanda A.Shetty, who deposed in a similar fashion to that of PWs 2 & 5, daughters of deceased Sunanda A.Shetty.

16. PW10-Geetha is none other than the distant relative and friend of the accused, in her evidence she has stated regarding friendship with the accused from one year, ie., since 2010. She has further deposed that accused was having some financial problem and hence he had requested to part with some money for which she has stated that she does not have money to help him. It is further stated that the accused requested her to handover the gold chain which was given to her by the accused and that he would return the gold chain very shortly, but he never handedover the gold chain and kept on postponing. It is further deposed by PW10 that after 25.12.2010 accused told her that he is having golden chain belonging 13 to his brother and asked her to pledge the same and get loan, so that he can get released her gold chain from that money. It is further deposed that she confided that she does not have any account and the accused told her to request any of her friend who is having bank account for the said purpose. It is based on this that PW10 requested PW8 to pledge the gold chain given by the accused and to secure loan. Therefore, PW8 pledged the gold chain with the Brahmavar Agricultural Co-operative Society, Uppinakote Branch and secured loan of Rs.24,000/-, which amount was handed over to PW10. PW10 retained the said amount with her, since the accused did not contact her for two days. On 30.12.2010, PW10 noticed in the news paper that the accused committed murder and robbed the gold ornaments. PW10 was shocked and was surprised that the gold chain given by accused might be one of the gold ornaments robbed by the accused. On 03.01.2010 PW8 and 10 went to the Police Station and informed about all the events which was in their knowledge to the Police. Thereafter, Police took PW8 and 10 to the aforesaid Bank and gave Rs.24,000/- and got 14 released the gold chain, which came to be seized by the Police under panchanama.

17. PW11 - Sunil Sooda and PW12 - Santhosh Jathanha are panch witnesses to seizure mahazar at Ex.P16 and 17 prepared on 29.12.2010 at the seizure of gold ornaments from the Jack fruit tree situated in front of the house of the accused and seizure of motor bike.

18. PW13 - Prashanth, who is friend of accused deposed before the Court about the earlier transaction with the accused and the liability of accused who was in need of money.

19. PW14 - Sudhesh Shetty worked in Crime detective team under Dy.SP, Udupi, who found the suspected accused on 29.12.2010 at 5.30 a.m.

20. PW15-Harish is the Junior Engineer from PWD, Udupi, who prepared the sketch of scene of occurrence as per Ex.P34.

21. PW16-Sudhakar.K, the Head Constable carried the material objects to RFSL, Mangalore. 15

22. PW17-K.Ganesh, the Head Constable carried the FIR to the Court on 21.12.2010.

23. PW18-K.Hosakerappa, the Sub-Inspector of Police registered the case in Cr. No.344/2010.

24. PW19-Dr.Geetalakshmi.P., is the Scientific Officer of RFSL, Mangalore, who conducted the chemical examination on the MOs and issued report.

25. PW20-Dr.Vinod C. Nayak, from the Department of Forensic Medicine KMC Manipal conducted the PM on the dead body of deceased Sunanda A.Shetty.

26. PW21-Dayankar Prasad, Head Constable carried four seized articles to RFSL, Mangalore.

27. PW22-Jaikishan, Architect, who was working near the Office of PW1 saw the dead body of deceased Sunanda A.Shetty along with PW1. He is also panch witness to the inquest mahazar.

28. PW23-Diwakar,Asst. Engineer, MESCOM deposed about the supply of electricity on 20.12.2010 and on 21.12.2010. 16

29. PW24-Rajashekar Rao, Panchayat Development Officer supplied details and particulars of the house of the deceased Sunanda A.Shetty.

30. PW25-G.Krishnamurthy, Dy.SP and Investigating Officer filed the charge sheet against the accused.

31. On behalf of the defence accused got examined one Ramachandra, Prakash, Usha A.Vaidya and Shivananda as DWs1 to 4.

32. DW1-Ramachandra deposed with regard to the call details. However, this witness turned hostile and nothing else has been elicited from him even though he has been cross examined by the Counsel for accused.

33. DW2-Prakash, Police constable has deposed about the investigation of crime with the help of dog.

34. DW3-Usha A.Vaidya, Sub-Divisional Engineer, BSNL deposed about the call details of the landline bearing No.2561965 for the period from 20.12.2010 to 22.12.2010. 17

35. DW4-Shivananada, Police Constable produced the call details to the Court pertaining to mobile phone number 9535241300 from 20.12.2010 to 04.01.2011.

36. It is the case of prosecution that the case is based on circumstantial evidence and that all the incriminating circumstances were found to be incompatible with the innocence of accused. Based on the oral evidence of PWs.1, 2, 3, 7, 8 and 10 to 13 and the exhibits produced at Ex.P1 to P50 along with MO1 to 19, and the chain of events conclusively relate to the accused having committed the murder of deceased Sunanda A.Shetty for gain of robbery of gold chain. It is also the case of the prosecution that as per Section 27 of the Evidence Act, the information given by the accused in custody consequences of which the fact discovered being admissible in evidence and in accordance with the statement made by the PWs8, 10 to 12 and 25, it is proved beyond reasonable doubt that the golden chain recovered from the house (in front of house i.e. jack fruit tree) belonged to the deceased and the entire process of recovery was video graphed. In order 18 to create doubt and suspicion and divert the investigation accused through M.O.1-cap which belongs to him usually owned by Muslim Community men in order to misguide the investigation.

37. Wherein it is the case of prosecution that when a case is based on circumstantial evidence, it the mandate of law and criminal jurisprudence that circumstances if taken cumulatively should form a chain of events so complete that there is no escape from the conclusion, which in all human probability would pin point the commission of offence/crime by the accused none else.

38. On the contrary, it is the case of defense, the case made out by prosecution is inconclusive, inconsistency and that the material confession and recovery made at the instance of accused under Section 27 of the Evidence Act cannot be taken as evidence as the same admittedly was during the custody of accused.

39. It is the further case of defence that there are no eye-witnesses even according to the prosecution and 19 there is no incriminating circumstances and clinching material evidence to prove the chain of events to prove the guilt of accused beyond reasonable doubt. However, having considered all these material evidence, oral, documentary and the material objects, the trial Court convicted the accused for the offence punishable under Section 302 of IPC and sentenced to undergo imprisonment for life and also for the offence punishable under Section 397 of IPC wherein he is sentenced to undergo imprisonment for 7 years. Both the sentences are order to run concurrently. It is this order of conviction and sentence which is put in challenge by the accused.

40. It is the vehement contention of learned counsel for appellant-Sri.N.R.Krishnappa that order of conviction and sentence of punishment are contrary to law material evidence on record and the probabilities of the case. He vehemently contends that the learned Sessions Judge committed a serious error in convicting the appellant-accused on the basis of evidence of prosecution which is contradictory, unreliable, artificial and the 20 witnesses being interested parties. Therefore, the conviction is liable to be set aside, solely on this ground.

41. It is further contended by the learned Counsel that the prosecution is guilty of suppression of material evidence and has not placed the true version of incident. He further contends that the trial Court has committed a serious error in holding that the prosecution has proved the guilt of the accused beyond reasonable doubt.

42. Learned Counsel further contended that the learned Sessions Judge ought to have acquitted the accused solely on the ground of lack of evidence and also on the fact that the complainant has stated that initially a missing complaint was filed by the son-in-law of deceased Sunanda A. Shetty which was totally ignored and by taking advantage of the alleged incident with connivance of the interested persons, which is politically motivated a false case was foisted and the accused is convicted thereby causing miscarriage of justice. 21

43. It is further contended that the accused is to be acquitted solely on the ground that there is no motive on the part of the accused to commit murder of deceased Sunanda A. Shetty. He further contends that there is absolutely no preparation or commission of the offence as alleged by the prosecution and the same is also not proved beyond all reasonable doubt, pin pointing the act to be committed by the accused and none-else.

44. Learned Sessions Judge has also committed an error in relying on the interested testimony of the Investigating Officer, whose evidence does not link the accused for committal of the offence. The learned Sessions Judge has also ignored the material omissions, contradictions which suffer from legal infirmities.

45. Learned Counsel further contends that admittedly there being no eye witness and that no body has seen the accused with the deceased soon before the incident under the 'last seen theory'. 22

46. Learned Counsel further contends that the accused ought to have been acquitted on the basis of the evidence adduced by defence at DW1 to 4, which casts serious doubt about the truth of the prosecution case.

47. Further contended Learned Sessions Judge has committed an error in drawing adverse inference against the accused casting the burden of proof on the accused by invoking the provisions of Section 106 of the Evidence Act, whereas in criminal cases it is the duty cast upon the prosecution to prove the guilt of the accused beyond all reasonable doubt and the accused has the right of remaining silent without even adducing evidence on his behalf.

48. Learned Sessions Judge ought to have discarded the recovery of articles seized by the Investigating Officer at the instance of accused. Further, the prosecution witnesses namely, PW8 and 10 are interested witnesses who are close friends of complainant PW1. The reliance of their evidence cannot be acceptable 23 as they are interested parties and the benefit of doubt ought to have been extended to the accused for acquittal.

49. Learned Counsel further contends that there are no overt acts against the accused and the case being designed in the form of circumstantial evidence and the chain of events not being related and the dots of chain of events not connected to the circumstances, the prosecution has miserably failed to prove the guilt of accused. He further contends that the prosecution has relied on extra judicial confession of the accused which are not conclusive in nature, lacking the necessary ingredients to convict the accused. On the basis of lack of evidentiary material both oral and documentary and the chain of events not connecting to the incident, the accused is liable to be acquitted. Hence, on these grounds he seeks to allow the appeal and set aside the judgment of conviction and order of sentence passed by the learned Sessions Judge. 24

50. The learned Counsel appearing for the appellant - accused relied on the following judgment in support of his case:

1. Madhu vs. State of Kerala reported in 2012 (5) KCCR3624(SC)

2) R Rajesha vs. State of Karnataka by Tiptur Town Police Station, Tiptur reported in 2018 (2) KCCR17843) Palani P. Aramugam vs. State of Karnataka reported in 2017(5) KCCR9684) State of Goa vs. Sanjay Thakran and Another reported in (2007) 3 SCC755

5) Ashish Jain vs. Makrand Singh and Ors reported in AIR 2019 SC54651. Having heard the learned Counsel for the appellant - accused and the learned Addl. State Public Prosecutor on behalf of respondent - State, the points that would arise for consideration before this Court are:

"(1) Whether there is homicidal death of the deceased Sunanda A.Shetty?. 25 (2) Whether the accused is involved in the commission of offence under Section 302 of IPC?. (3) Whether the accused is involved in the commission of offence under Section 397 of IPC?. (4) Whether the prosecution has proved the guilt of the accused beyond reasonable doubt?.

52. Admittedly, in the case on hand deceased Sunanda A.Shetty, aged 60 years, was staying alone in her house at the time of commission of incident. She was suffering from heart problem and was taking treatment. It is also borne by records that house of accused is situated at a distance of 100 ft. from the house of the deceased Sunanda A.Shetty.

53. The evidence of PW1 and 2 that on 21.12.2010 at about 5.00am a newspaper supplying boy namely, PW3, came to their house and informed them about that incident of deceased Sunanda A.Shetty is lying in the varanda open yard of her house and her body facing the ground, based on which PW1 registered a complaint at Ex.P1.

54. On the basis of medical evidence of PW20-Dr. Vinoda C. Nayak, who conducted the PM examination on 26 the dead body of the deceased it is apparently evident from the autopsy report at Ex.P39 that there are seven external injuries, 9 internal injuries, which are as follows:

"(1) Contusion, reddish blue in colour, measuring 3.5 X12 cm was present over the front of the forehead, 2 cm above the root of the nose; (2) Abraded contusion, reddish-blue in colour, measuring 3X0.5 cm was present over the front of the nose and its left ala; (3) Superficial laceration measuring 0.4X0.1 cm was present over the back of the left lobule of the ear, with surrounding contusions, reddish blue in colour around the artificially created defect for the ear stud; (4) Contusion, reddish blue in colour, measuring 1X0.5 cm was present over the angle of the mouth on the right side; (5) Abrasion, reddish in colour, measuring 1X0.8 cm was present over the front of the chin, 1.5 cm above its lower end; (6) Vertically placed linear abrasion, reddish in colour, measuring 1X0.1 cm was present over the front of the neck on the right side, 5 27 cm above and 2.8 cm away from the supra sternal notch; (7) Contusion, reddish blue in colour, measuring 2X0.5 cm was present

over the front of the chest on the left side, 4 cm below and 10 cm away from the midline."

As per the evidence of PW20 deceased died due to Sequelae of constriction of the neck structure (throttling) and time since the death will be 8 to 16 hours prior to conduct of PM examination. It is evident that there is a mark on the neck of the deceased which is anti-mortal. Hence, it is safely concluded that the death of deceased is homicidal.

55. PW1 is the son-in-law of the deceased, PW2 & 5 are daughters and PW9 is the brother of the deceased. These witnesses have clearly identified the deceased and as per the Inquest Mahazar the position of dead body and visible injuries are clearly described.

56. The prosecution will have to adduce cogent and believable evidence to prove the guilt of accused and involvement of accused in the death of deceased Sunanda 28 A.Shetty. PW25 Investigating Officer in his evidence has deposed that on 25.12.2010 at 6.15am, when PW14- Sudhir Shetty and PC Krishna Prasad produced the accused, who admitted his guilt and gave a voluntary statement at Ex.P47. As per Ex.P47 accused has disclosed that he has robbed gold ornaments from the deceased and committed the murder. At the instance of accused the gold ornaments are recovered from the Jack fruit tree in front of the house of the accused.

57. To substantiate further the evidence of PW10 would be necessary and worthy of consideration, who has deposed to the fact that she had friendship with the accused since 2010 and that accused had revealed to her that he had financial difficulty and constraint, wherein he asked her to part with some money and she expressed her inability. Accused asked her to deliver her gold chain, which she did and the accused failed to return it.

58. As accused was not able to return the gold chain, on 25.12.2010 it is stated that the accused informed PW10 that he was in possession of gold chain which can be 29 pledged by securing loan and the same could be given to the Bank for release of gold chain belonging to PW10. Accordingly, on 28.12.2010 the accused

handed over the gold chain to PW10 and based on which PW8 was requested by PW10 to pledge the gold chain with the Brahmavar Agricultural Service Co-Operative Society, Uppinkote Branch, and secured the loan of Rs.24,000/-, PW8 handed over it to PW10. But, the accused did not collect the amount.

59. On 30.12.2010, after reading the newspaper, PW10 realised that accused must have committed the murder and robbed the gold ornaments. Hence, PW8 and 10 went to the Bramhavar Police Station on 03.01.2011 and informed about the gold ornaments. Based on the statement of PW8 and 10 the Police recovered the gold ornaments from PW7, which is identified by PW8 and 10 as per MO8. PW7 - Branch Manager and PW8 have clearly stated about the factual aspect and identification of gold chain. 30

60. It is the contention of the defence counsel that the accused is a resident of Herur Village and a religious person involved in religious organization and up coming political leader in a party. In order to take political rivalry against him he has been deliberately framed in this case with the collusion and involvement of the Police and interested witnesses PW8 and PW10 and the Branch Manager of the Bank - PW7. So also, it is his case that the accused and the complainant were not in cordial terms and that the complainant and his family members were not in cordial terms with deceased Sunanda A.Shetty.

61. The evidence of PW1 reveals that he is a political leader, however, in the cross examination the defense counsel has not made any elicitation or suggestion that the accused was an upcoming leader in a political party and that there being any rivalry between Bunts and Billavas, which is taken as a defence by the accused. Though it is also the case of accused that PW8 and 10 are unknown to him, nothing prevented the accused to cross examine and elicit information to that effect of they being 31 strangers to accused, whereas on the contrary, PW10 has deposed to the fact that she is distant relative of the accused and also became friend since 2010. These aspects could have been denied, much less, there is not even a suggestion made to the effect that they are strangers and hired witnesses by PW1. Though the accused has taken the defence that even PW7 - Branch Manager of the Bank has colluded with PW1, being the member of the bank, to fix

the accused in this case, the same is not established or cogent evidence is not placed to prove the same, whereas the prosecution has produced Ex.P10 - PL Loan Ledger Extract issued by the Bank, wherein at page No.125, name of PW8 - Shakuntala is forthcoming, who pledge the chain and received a sum of Rs.24,000/- on 28.12.2010. These documents are entries in the account books regularly kept during the course of business which are admissible under Section 34 of the Evidence Act. Hence the same is relevant for consideration and there is no error committed by the learned Sessions Judge in taking the same into consideration. 32

62. It is the defence taken by counsel for appellant/accused that PW1, 2, 5, 8 and 10 are all interested witnesses and the evidence given by them cannot be taken into consideration to convict the accused, as they are interested parties. However, on perusal of the evidence of these witnesses nothing is forthcoming in the cross examination with regard to there being enmity against the accused. Hence, evidence of these witnesses cannot be disbelieved merely for the reason that they are related to deceased Sunanda A.Shetty, unless their testimony is tested on credence, credibility and trustworthiness, which is not forthcoming in the cross examination.

63. It is further case of the learned Counsel for appellant - accused that there are lot of discrepancies in the witness of the prosecution and there are contradictions, inconsistencies and lacunas in the case of the prosecution. Further, it is contended that none of the chain of circumstances relate to the accused having committed the crime of murder of deceased Sunanda 33 A.Shetty. It is also contended by the learned Counsel that mere recovery of material objects at the instance of the accused while in custody, cannot be the ground to convict the accused, so also, mere recovery of the gold chain, which was pledged to the Bank by PW.8 and the material objects from the Jack fruit tree, does not pin-point to the crime having been committed by the accused. It is also contended that admittedly there was no case of "last seen theory" of prosecution that accused was seen with the deceased Sunanda A.Shetty by any one. There is also no motive or preparation of commission of offence, the prosecution has failed to prove the involvement of accused for the offence of murder under Section 302 of IPC. No cogent material

evidence is placed by the prosecution either through the witnesses, exhibits or material objects, with regard to commission of murder of deceased Sunanda A.Shetty.

64. Learned Counsel further contends that there is delay in filing the FIR and there is no explanation with regard to delay by the prosecution. He also contends that 34 the prosecution has not adduced sufficient, cogent material evidence and there is lot of material contradictions and lapses on the part of the prosecution to prove the guilt of the accused.

65. It is the case of prosecution that the present case is based on the circumstantial evidence and based on the material evidence which is cogent and positive with credible sequence of events and factual truth linking the accused with the commission of offence by means of forcible throttling the neck of deceased Sunanda A Shetty, which is also corroborated by the witnesses and the seizure of ornament at Ex.P16 and MOs. 2 to 7 clearly establishes the involvement of accused in commission of ghastly murder and robbery of the gold ornaments. Hence the chain of events required to establish and prove the guilt of accused is very well founded including the voluntary statement of accused is unimpeachable and the same is proved beyond reasonable doubt. Therefore, the judgment of conviction and the sentence of punishment awarded by the tribunal trial Court cannot be found fault 35 and no illegality or perversity is committed and the same is very well reasoned. The learned SPP further contends that under Section 27 of Evidence Act, the accused has given voluntary statement and information in custody in consequence of which the fact is discovered is very much applicable and admissible in evidence. Therefore, on these grounds he contends that the appeal preferred by the accused is devoid of merits and the same deserves to be dismissed affirming the judgment of conviction and sentence of punishment passed by the trial Court.

66. Admittedly, in the present case there is no eye witness and even according to the prosecution the present case is based upon circumstantial evidence and recovery of articles and the instance of accused while in the custody. In the case of circumstantial evidence the entire onus lies upon the prosecution to prove the

complete chain of events linked to each other which shall undoubtedly point towards the guilt of accused to such an extent that there can be nobody else other than the accused herein, who has committed the murder and robbery of gold ornaments. 36 Further, while the prosecution relies on the case on the basis of circumstantial evidence coupled with extra judicial confessions and recording of voluntary statements the Court will have to examine the same with a microscopic view and greater degree of care and caution.

67. In criminal jurisprudence when the prosecution relies upon extra judicial confession and recovery of articles at the instance of accused in custody, it is settled principle that extra judicial confession is a weak piece of evidence. The onus is enormously high on the prosecution as the basis of such reliance by the prosecution should inspire absolute confidence which will have to be corroborated by cogent evidence of other prosecution witnesses. If the extra judicial confessions suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the version put-forth by prosecution, it would become difficult for the Court to base the judgment of conviction on such confessions. In fact on the contrary, it would enure to the benefit of accused and the Court would be justified in ruling such evidence out of 37 consideration. It is also relevant to note that the Court will have to satisfy itself on; (i) voluntariness of the confession (ii) truthfulness of the confession and (iii) corroboration of such confession through other cogent material evidence.

68. In order to prove the guilt of the accused based on the circumstantial evidence, the following necessary ingredients and chain of events will have to be established and proved by the prosecution: (a) That the accused committed the murder of deceased Sunanda A.Shetty in the varanda of her house; (b) That the accused throttled the neck of deceased Sunanda A.Shetty due to which she died homicidal death; (c) That the accused was in financial crises, while committing robbery of gold chain caused the death of deceased Sunanda A.Shetty; (d) That the accused handed over the gold chain to PW10, in order to be pledged to the Bank to secure money; 38 (e) That the accused hid the remaining gold articles in a Jack fruit tree in front of his house; (f) That the gold ornaments MO1 to 8 were recovered from the accused.

69. In the present case on hand, there is admittedly no eyewitness as stated earlier, at the cost of repetition the case is based on circumstantial evidence and recovery of articles and extra judicial confession. It is also not the case of prosecution that the accused was last seen with the deceased. There are several catena of judgment which has taken a consistent view that even in the case of circumstantial evidence based on last seen theory it would raise suspicion and it is not independently sufficient to lead to a finding of guilt of accused.

70. The next point for convicting the accused in the present case is on the ground of recovery of articles upon the voluntary statement made by accused under Section 27 of the Evidence Act. Admittedly, these statements are recorded by the investigating agency while 39 in the police custody. No doubt, based on the statements made by the accused, the gold ornaments are recovered as per MOs.2 to 7 and the gold chain has got released by the investigating agency, but by this itself prosecution cannot be said to have established proof beyond reasonable doubt pin-pointing the commission of murder of deceased by the accused and so also robbery.

71. The other ground of the trial Court in convicting the accused is that the accused has not placed cogent and relevant material that he was not involved in the murder of deceased and that no suggestions have been put forth to the witnesses PW.8 and 10 that they are having ill-will against accused and that the witnesses PWs.1, 2, 5, 8 and 10 are interested witnesses. The trial Court has also relied on the evidence of Geeta who is none other than the distant relative of accused and held that same to be credible and trustworthy. The learned trial judge has also relied upon the Section 106 of Evidence Act to convict the accused, on the finding that "when any fact is specially within the knowledge of any person the burden of proving the said fact is upon him". The trial Court has assumed and presumed that it is for the accused to divulge the information of fact of the occurrence of death to the prosecution reliable upon the Section 106 of Evidence Act. On these grounds of assumption, the trial Court has held that the prosecution has proved that the accused has committed murder and thereafter robbed the belongings of deceased and kept the gold ornaments in a jack fruit tree. The trial Court has also further held that it is for the accused to show as to in what manner

the deceased died and the person who robbed her belongings.

72. The trial Court has also based its reasoning for convicting the accused for the offence of murder under section 302 and for robbery under section 397 on the following grounds; (a) Admittedly the deceased was alone staying in her house and she died in homicidal death. (b) The accused was in financial crisis thus he came to the house of deceased committed murder by throttling her neck and robbed her golden ornaments. 41 (c) The accused handed over gold chain to PW.10 in order to pledge/got money and hid the remaining gold articles on the jack fruit tree. The remaining gold articles were recovered at the instance of accused. (d) It is also established that accused had failed to contact PW.10 for two days after handing over gold chain. (e) Nothing is placed on record that PWs.8 and 10 had rivalry with accused so as to disbelieve their testimony.

73. It is based on these above reasoning that the trial Court has come to the conclusion that the circumstantial evidence is proved beyond reasonable doubt and the accused has throttled the neck of deceased and robbed the gold ornaments on her body and hence the chain of circumstances is complete thereby leading to the conclusion that it is the accused alone and nobody else has committed the murder of deceased Sunanda A.Shetty.

74. In a case of circumstantial evidence the prosecution must satisfy the high order of test of proof in criminal prosecution. The prosecution must establish a 42 complete unbroken chain of events leading to the determination that the inference being drawn from the evidence is the only inescapable conclusion with corroborating unimpeachable evidence pin-pointing to the crime having been committed by the accused alone and none-else. In the absence of convincing circumstantial evidence the accused would be entitled to the benefit of doubt.

75. It is the case of prosecution that deceased was done to death by the accused by throttling her neck, but there is admittedly no eyewitness against the accused, there is also no case of last seen theory by the prosecution. Therefore, admittedly there is no clinching evidence to establish the guilt of accused for having committed the murder of deceased. One set of witness produced by the prosecution speak about recovery of the missing gold ornaments at the instance of

accused while in police custody and the same is recovered and exhibited as MOs.2 to 7. The statement recorded by the investigating agency of the accused are inadmissible in spite of mandate 43 contained in Section 27 of the Evidence Act for the simple reason that they cannot be stated to have resulted in the discovery of some new fact. This analysis is fortified by the Judgment of the Apex Court in the case of MADHU VS. STATE OF KERALA reported in 2012(5) KCCR 3624 SC). In the factual background of the present case the gold ornaments which eventually to be recovered by the police allegedly at the instance of accused may at the most amount to theft of the ornaments or receiving of stolen ornaments by the accused.

76. The prosecution has not established any motive behind the commission of murder. The reasoning of the trial Court that accused was in financial crisis and hence he came to the house of deceased committed the murder by throttling her and robbed the golden ornaments cannot be believed as there is no clinching, cogent evidence and none has seen the accused with the deceased either committing the murder or robbing the gold ornaments. Therefore, the theory of prosecution that the accused has committed the murder has no basis as it is 44 not substantiated by any piece of evidence either oral, documentary or any other corroborative piece of evidence.

77. The main ground of prosecution to bring home the guilt of accused is the recovery of gold ornaments belonging to deceased and the same corroborated by the evidence of PWs.8 and 10. This could at the most infer that the gold chain was handed over to PW.10. At no stretch of imagination it can pin-point to the accused having committed murder and robbery or otherwise robbery with murder falling under Section 302 and 397 of IPC. When this being the case there is no vital link in the chain of events established by the prosecution against the accused for having committed the offence of robbery with murder or murder. The prosecution has failed to establish the unbroken chain of events leading to the determination that the inference being drawn from the evidence is only inescapable conclusion pinpointing to the accused and none-else. In fact, in our opinion, the prosecution has not been able to connect the accused with the alleged crime of robbery and murder in any manner whatsoever. 45

78. One other reason for convicting the accused by the trial Court is that the accused has not contacted PW.10 for two days after handing over the gold chain. It would be disastrously preposterous to hold the accused guilty of robbery and murder of deceased, merely because after handing over the chain to PW.10, accused has not contacted her for return of the same or to collect the money.

79. The trial Court has also based its reasoning for convicting the accused on the ground that he has not offered any explanation while recording his statement under Section 313 of Cr.P.C. It is again preposterous to hold the silence of accused against him, in the present case for not giving explanation while recording his statement under Section 313 of Cr.P.C. as it is the fundamental principle and rule of criminal jurisprudence that the accused can remain silent and not offer any explanation. Therefore, in the circumstances, the accused not giving any explanation in his examination under Section 313 of Cr.P.C. cannot be taken at any stretch of 46 imagination to be a circumstance pointing towards the irresistible conclusion that he is the only one involved in the commission of crime.

80. In view of the entirety of discussion made by us above, in the facts and circumstances of the case the nature of evidence placed by the prosecution coupled with the manner of its consideration leaves us satisfied without any iota of doubt that the links in the chain of circumstantial evidence cannot be said to have been established leading to the inescapable conclusion that the accused committed robbery and murder of deceased. Mere suspicion however grave cannot replace the weight attached to evidence, in fact the prosecution will have to establish the guilt of accused and prove beyond reasonable doubt that it is the accused and he alone has committed the crime of robbery and murder. When the prosecution is relying on the circumstantial evidence it must necessarily satisfy the following tests:

47. (i) The circumstance from which an inference of guilt is sought to be drawn must be cogently and firmly established. (ii) Those circumstances should be of definite tendency unerringly pointing towards the guilt of accused. (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was

committed by the accused and none-else; and (iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of accused and such evidence should not only be consistent with guilt of accused but should be inconsistent with his innocence.

81. Considering the facts and circumstances of the case on hand and having given our considered opinion, in view of the recovery of gold articles at MOs.2 to 7 and the evidence of PWs.8 and 10 the offence on hand at the most will be theft of gold ornaments in a dwelling house, where the punishment for such offence is imprisonment for a 48 term which may extend to 7 years and also be liable to fine under Section 380 of IPC.

82. In view of our above discussion, the prosecution has miserably failed to make out a case for the offence punishable under Section 302, 397 of IPC and in view of there being no chain of circumstances linking the accused for the commission of crime for the above said offences. Consequently, the judgment of conviction and order of sentence passed for the aforesaid offences deserves to be set aside. However, we are of the opinion that the accused would at the most fall within the category of having committed the crime for the offence punishable under Section 380 of IPC. Hence, we pass the following;

#### ORDER

(a) The criminal appeal is partly allowed; (b) The impugned judgment of conviction and order of sentence dated 24.05.2017 passed by the Principal Sessions Judge, Udupi District, Udupi in Sessions Case No.23/2011 is set aside for the offences punishable under Sections 302 and 397 of IPC; 49 (c) The appellant-accused is acquitted for the offences charged against him under Sections 302 and 397 of IPC; (d) Appellant-accused is convicted for the offence punishable under Section 380 of IPC and sentenced to undergo imprisonment for a period of 06 years 1 month 12 days, which would suffice and meet the ends of justice; (e) In view of accused having already undergone imprisonment for a period of 06 years 1 month 12 days, he shall be set at liberty forthwith by the concerned Jail authority, if he is not required in any other case. Sd/- JUDGE Sd/- JUDGE VK LB/MSR

