

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.06.2016

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
and
THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.259 of 2014

Kotti @ Kottiswaran

... Appellant

-Vs-

State Rep. by
The Inspector of Police
Thiruvottiyur Police Station
Chennai.

... Respondent

This Criminal Appeal has been preferred to set aside the conviction and sentence imposed by judgment dated 26.06.2012 made in S.C.No.62 of 2011 on the file of the IV Additional District and Sessions Court, Ponneri.

For Appellant : Mr.T.Muruganantham

For Respondent : Mr.M.Maharaja
Additional Public Prosecutor

J U D G M E N T

(Judgment of the Court was delivered by S.NAGAMUTHU, J.)

The appellant is the sole accused in S.C.No.62 of 2011 on the file of the IV Additional District and Sessions Judge, Ponneri. He stood charged for offences under Sections 302 and 380 IPC. The Trial Court, by judgment dated 26.06.2012 convicted him under both the charges and sentenced him to undergo imprisonment for life (no fine is imposed) for offence under Section 302 IPC and to undergo rigorous imprisonment for two years for offence under Section 380 IPC (no fine is imposed). Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

2. The case of the prosecution in brief is as follows:-

The deceased in this case was one Mrs.Baby Ammal @ Subramaniya Baby Ammal, aged about 70 years. She was residing at No.43/11, Gandhi Nagar Main Road, Thiruvottiyur, Chennai. P.W.1 is the son of the deceased. On 02.08.2010, P.W.1., had

gone out in connection with some work leaving his mother alone in the house. It is alleged that around 3.00 p.m., on the same day, the accused, who was the former driver under P.W.1., came to the house of the deceased and demanded money. Since the deceased refused, the accused stabbed her with knife and had stolen away a gold chain from her neck; a gold ring, two pairs of ear stud, a pair of stud and drops and two gold balls from the house of the deceased and fled away from the scene of occurrence. When P.W.1 returned home on the same day, (time not stated by the witness), he found the house left open. He entered into the house and found the deceased in a pool of blood. He heard a murmuring sound from the deceased, indicating that she was still alive. Immediately, he took the deceased to Apollo Hospital and admitted her.

3. P.W.7 - Dr.Senthurapandian, examined her at 5.35 p.m at Apollo Hospital, Tondiarpet, Chennai. He found the following injuries:-

- "1.Lacerations over left side of forehead ; eyebrow; behind ear; neck; lower abdomen; hand
- 2.Bite marks on left hand
- 3.Laceration on Right thumb"

He entered the same under Ex.P4. At that time, the deceased was conscious. She told that she was assaulted by Kottiswaran, i.e, the accused with knife. He admitted her as in patient. Despite treatment given in the hospital, she died on 12.08.2010 at 9.51 a.m.

4. When the deceased was undergoing treatment in the hospital, P.W.1. went to Tiruvottiyur Police Station on 02.08.2010 at 7.00 p.m and made a complaint under Ex.P1. P.W.11 - Mr.Balaji, the then Inspector of Police, Tiruvottiyur Police Station, on receipt of the said complaint registered a case in Crime No.532 of 2010 under Section 397 IPC. He forwarded both the documents viz., Complaint [Ex.P1] and First Information Report [Ex.P8] to court, which were received by the learned Magistrate at 10.30 p.m. on the same day.

5. Taking up the case for investigation, P.W.11. proceeded to the place of occurrence and prepared an Observation Mahazar and a rough sketch. Then he arrested the accused on 03.08.2010 in the presence of witnesses. On such arrest, the accused gave voluntary confession, in which, he had disclosed the place where he had hidden the jewels, knives, pant and banian. In pursuance of the same, he took the police and the witnesses to his house and produced as many as nine properties. The accused also produced M.Os.14 to 17. On returning to the Police Station, P.W.11 forwarded the accused to the Court and also forwarded the

Material Objects to the Court. On completing the investigation, he laid charge sheet against the accused.

6. P.W.10 - Dr.B.Santhakumar, conducted autopsy on the body of the deceased at 4.15 p.m. on 12.08.2010. He found the following injuries:

- "1) Vertically oblique sutured stab wound 1.3x0.2x2.2 cm on the outer aspect of the lower part of left knee.
- 2) Horizontally oblique sutured stab wound 2x0.3x4.2 cm on the upper third of back of left thigh, direction of the wound was forwards, horizontal and inwards.
- 3) Horizontally oblique sutured stab wound 2x0.3x5.2 cm on the upper part of back of left thigh, direction of the wound was forwards, horizontal and outwards.
- 4) Irregular healed abrasion 1x0.3 cm with firmly adherent black dry scab on the lower part of left lateral aspect of the abdomen.
- 5) Horizontal sutured stab wound 4x0.5 cm x cavity deep on the lower part of left side of the abdomen; the outer end was acute and the inner end was blunt.
- 6) Healed irregular abrasion 2 x0.5 cm with firmly adherent black dry scab on the middle part of later aspect of the abdomen.
- 7) Healed irregular abrasion 1.7 x0.3 cm with firmly adherent black dry scab on the middle part of left side of the abdomen.
- 8) Horizontal irregular sutured stab wound 5.5x1-0.2 cm x cavity deep, on the upper part of left side of the abdomen.
- 9) Oblique roughly circular sutured wound 5x3 cm x cavity deep, on the middle part of right side of the abdomen - colostomy wound (surgical wound).
- 10) Vertical sutured incised wound 27 cm on the midline of the abdomen, on removal of the sutures wound margins were regular and gaping.

- 11) Horizontally oblique sutured stab wound 1x0.3x3 cm on the front of upper third of right arm.
- 12) Dark red diffuse bruising of the upper and lower eyelids.
- 13) Vertical cut wound 2.5x0.3-0.1x0.3 cm on the upper part of centre of the forehead.
- 14) Oblique cut wound 1x0.2x0.3 cm on the upper part of left side of the forehead.
- 15) Oblique sutured cut wound 2.7x0.3x0.5 cm on the upper part of left frontal region of the scalp.
- 16) Curved cut wound 2.2 x0.3x0.5 cm on the upper part of left side of the forehead.
- 17) Sutured laceration 1x0.3x0.5 cm on the lower part of right side of the forehead; the lower end of the laceration was abutting the middle third of right eyebrow.
- 18) Oblique lacerated wound 3 x0.3x0.5 cm on the outer half of left eyebrow.
- 19) Sutured laceration of 1 x0.3x1.5 cm on the middle part of left side of the chin.
- 20) Sutured laceration 1 x0.3x0.8 cm on the lower aspect of the left side of the chin.
- 21) Lacerated wound 6 x0.3x4.5-1 cm on the upper part of left cheek; on dissection; irregular complete fracture of the underlying left zygoma and left side of the body of the mandible bones.
- 22) Oblique lacerated wound 2.5 x0.3x2.8-0.5 cm on the left cheek, 1.5 cm in front of the lower end of left ear.
- 23) Sutured laceration 2 x0.2x0.5 cm on the anteromedial part of right parietal region of the scalp; on dissection : 1x0.2-0.1x0.1 cm cut fracture on the underlying right parietal bone.

24) Curved sutured cut wound 15x1x1-0.5 cm on the lower part of left side of the occipital region, left mastoid region and upper part of left side of the neck.

25) On reflection of the scalp: dark red scalp deep diffuse bruising on the frontal, left temporal and left parietal region of the scalp; 1.2x0.1x0.1 cm cut fracture on the left side of the frontal region of the calvarium.

26) Sutured stab wound 1.3x0.3x1.8 cm on the back of the left elbow."

Ex.P.7 is the Post Mortem Certificate. According to him, the deceased would have died due to the effects of multiple injuries.

7. Based on the above materials, the Trial Court framed the charges under Sections 302 and 380 IPC. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 11 witnesses were examined and 9 documents were exhibited, besides 17 Material Objects.

8. Out of the said witnesses, P.W.1 - the son of the deceased has stated that on 02.08.2010, the deceased alone was at her house and when he returned in the evening, he found the deceased inside the house in a pool of blood with injuries on her body. She was still conscious. When he enquired her, the deceased told him that the accused Kottiswaran demanded cash and jewels and since she refused to give, he stabbed her. Then he has further stated that he took her to Apollo hospital and admitted her. He has also stated that he went to the Police Station and made the complaint under Ex.P1. P.W.2 is the wife of P.W.1. She has stated that on 02.08.2010, on hearing about the information, when she went to the hospital, she found the deceased conscious. The deceased told her that the accused Kottiswaran stabbed her and snatched away the gold chain owned by her. She further stated that from the house, a gold ring, three pairs of ear stud, two items in Thali, 1 chain, 1 Silver tumbler, Silver Kamatchiamman Vilakku, 3 watches and one cell phone, besides a sum of Rs.2000/- were found missing. P.W.3 is the neighbour of the deceased. On hearing the distress call raised by P.W.1 on 02.08.2010, at 5.00 p.m., he ran into the house of the deceased. He found the deceased with injuries and she was lying in a pool of blood. She was conscious. He was told by P.W.1 that the accused stabbed his mother with knife. P.W.6 - the then Sub-Inspector of Police has stated that he took the dead body to Stanley Hospital and handed over the same to the Doctor for post-mortem. P.W.7 - Dr.Senthura Pandian, at Apollo Hospital, Tondiarpet has stated that on 02.08.2010 at 5.35 p.m., the deceased was brought by P.W.1 for treatment. He

found number of injuries on her body. She was conscious. He admitted her as inpatient. He has further stated that under Ex.P4 - Accident Register, he has made entries of all the injuries. P.W.8 - yet another Doctor in the same hospital has stated that the deceased was undergoing treatment from 02.08.2010 and died on 12.08.2010. He has further stated that due to injuries, there was infection. P.W.9, who is the Scientific Expert has stated that she examined the material objects and sent the same for chemical examination. She found blood stains on all the material objects including the bill-hook. P.W.10 has spoken about the Postmortem conducted and his final opinion regarding the cause of death. According to him, the death of the deceased was due to the effect of multiple injuries. P.W.11 - the Inspector of Police has stated that on 02.08.2010, based on the complaint of P.W.1, he registered a case in Crime No.532 of 2010 under Section 397 IPC. He has further stated that he immediately went to the place of occurrence and prepared Observation Mahazar and Rough sketch. He further stated that he arrested the accused and on his confession Mos 14 to 16 were recovered .

M.O.14 - Knife with wooden handle

M.O.15 - Knife with Plastic handle

M.O.16 - Blood stained pant

M.O.17 - Blood stained banian

He has generally stated that he recovered the properties connected to the case under the Mahazar. He has further stated that he examined P.Ws.1 to 15 and recorded their statements. He has also stated in the Chief examination that he obtained opinion from the learned Public Prosecutor and laid charge sheet against the accused under Sections 302 and 380 IPC.

9. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. However, he did not choose to examine any witness on his side. His defence was a total denial.

10. Having considered all the above materials, the trial Court convicted the appellant as stated in the first paragraph of this judgment. Challenging the same, the appellant is before this Court with this Criminal Appeal.

11. We have heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

12. Mr.T.Muruganantham, learned counsel for the appellant would submit that absolutely, there is no evidence about the missing of any valuable properties including the jewels from the house of the deceased. He would further submit that absolutely there is no evidence that M.Os.1 to 13 were recovered from the possession of the accused. He would further submit that neither the witness, who has been examined to speak about the recovery of these properties nor P.W.11, the Inspector of Police has spoken about the same at all. He would further submit that M.Os.1 to 13 have not been proved as the properties recovered from the accused by any evidence. He would further submit that though the deceased was in the hospital for about 11 days, no effort was taken by the Inspector of Police to record Dying Declaration by a competent learned Magistrate. The learned counsel would further submit that absolutely there is no evidence against the accused in this case and therefore, the appellant is entitled to acquittal.

13. The learned Additional Public Prosecutor would contend that de hors the lapses on the part of the Investigating Officer and the shortcomings in the evidences let in, the conviction of the accused need to be sustained, as there are other evidences, which would cogently and convincingly prove that it was this accused who committed murder of the deceased and robbed her.

14. We have considered the above submissions.

15. Before proceeding to discuss with the evidence let in by the prosecution, let us, at the outset, say a few words about the charges framed by the Trial Court. It is the positive case of the prosecution that the accused caused extensive cut injuries on the deceased and in the course of the same transaction, he had stolen away the valuable properties viz., M.Os.1 to 13. The case was initially registered under Section 397 IPC . However, according to P.W.11, the Inspector of police had laid final report only for the offences under Sections 302 and 380 IPC.

16. It is not explained to the Court as to why final report was not filed for robbery, though FIR was registered for robbery and that it was the positive case of the prosecution itself that the stolen properties were robbed from the deceased as well as from her house in the course of the same transaction in which she was killed.

17. The Inspector of Police P.W.11 has been summoned by this Court to be present. When we enquired him, he told this Court that he laid charge sheet under Section 302 and 380 IPC against the accused and such legal opinion was given by the learned Public Prosecutor, who was incharge of the case before the Trial Court.

18. Time and again, this court has been reminding the Trial Court as well other stakeholders that before a Court of Session, the Trial shall be commenced by opening of case for the prosecution by the Public Prosecutor as provided under Section 226 of the Code of Criminal Procedure. During such hearing, the Public Prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. Seldom this mandatory provision is followed by the Trial Court, though the Honble Supreme Court as well as this Court has been repeatedly impressing upon trial Court that the hearing as required under Section 226 should be scrupulously followed .

19. In this case, had such hearing been held by the Trial Court; had the learned Public Prosecutor in charge of the case submitted the evidence which he proposed to let in to prove the charges; had the learned Judge who framed the charges had been attentive and diligent, we are sure that there would have been charge under Section 397 IPC, besides charge under Section 302 IPC. This shows that judicial attention was not bestowed both by the prosecution as well as by the Trial court. We express our unhappiness over this.

20. During trial, the case was not properly conducted by the prosecution. (we regret to say). We have also noticed that the witnesses have not been called upon to depose about many relevant facts as well as the facts known to them by the Prosecutor.

21. P.Ws.1 and 3 in their evidences have stated that when they entered in the house, they found the deceased lying with injuries in a pool of blood and that she was still conscious. She told them that it was this accused, who stabbed her and had snatched away Thali chain and took away other valuable properties from the house. P.W.2 - the daughter-in-law of the deceased has also stated that when she went to the hospital, the deceased was still conscious and she reiterated the same. These three statements would squarely fall within the ambit of Section 32 of the Evidence Act as Dying Declarations. There is no inconsistency between these three statements. We are of the considered view that these three dying declarations made at the earliest point of time, which are free from any tutoring, are sufficient to hold the accused guilty of the charges framed against him.

22. According to the case of the prosecution, the accused was arrested on 03.08.2010 at 1.30 p.m at Tiruvottiyur Railway Station in the presence of one Paulraj (P.W.5) and one Srinivasan. However, Srinivasan was not examined as a witness before the Trial Court. Further, according to case of the

prosecution, as many as 9 properties were recovered under Ex.P3 Mahazar. They are as follows:-

1. Ring depicting Venkatachalapalathy weighing 6.00 gms
2. A pair of Red and white stone ear stud weighing 7.880 mg
3. A pair of White colour stud weighing 7.600 mg
4. Chain weighing 24.00 gms
5. A pair of white and red stone Kammal with Jimmiki weighing 6.640 milligram
6. 2 balls weighing 1.00 gm
7. Cell Phone Model SGH - E250
8. Cash of Rs.1300/-
9. 1 Gunny bag

23. As we have already stated, P.W.5 has deposed that the accused was arrested on 03.08.2010. However, he was not called upon to say as to where he was arrested; in whose presence he was arrested; by whom he was arrested and at what time he was arrested. He has further stated in his evidence that the Police recovered jewels from the accused. He was not called upon to speak as to what are the jewels so recovered from the accused; whether they were recovered from the immediate possession of the accused or they were recovered from elsewhere on the disclosure statement made by the accused; at what time they have recovered and at which place they recovered. He has only stated in very general terms that silver articles, a knife and cloth were recovered. What are the silver articles, which is the knife and what are the clothes, which were recovered from the accused have not been spoken by this witness. It is not as though this witness was unable to speak about these vital facts.

24. It is very obvious that the learned Public Prosecutor did not call upon him to speak about these facts which are very relevant for the case. It is unfortunate that the Trial Judge was also a mute spectator without eliciting these relevant facts by exercising his power under Section 165 of the Evidence Act. This witness was not even called upon to identify the properties, which were recovered allegedly from the accused and the properties were not even shown to him in court. Thus the evidence of this witness, as rightly argued by the learned counsel for the appellant would not be useful for the prosecution in any manner.

25. The next witness, who has spoken about the recovery of material objects from the accused on his arrest is P.W.11, the Investigating Officer himself. He has stated in chief examination that on 02.08.2010, P.W.1 appeared before him and made a complaint, upon which he registered the case in Crime No.532 of 2010 under Section 397 IPC. He has not stated at what time P.W.1 came to make the complaint and what is the complaint, whether it was Ex.P1 or some other complaint. Neither the Public Prosecutor was vigilant to elicit these facts nor the Inspector was vigilant to speak about these facts on his own. The learned Judge also failed to elicit these facts by exercising his power under Section 165 of the Evidence Act. He would proceed to say that he prepared Observation Mahazar and rough sketch. Here again, he has not stated about the time, at which, it was prepared and in whose presence it was prepared. P.Ws.1 and 3 have stated that the deceased was lying in a pool of blood. P.W.11 has not stated that he recovered blood stained earth and sample earth for the purpose of proving the place of occurrence and also to compare the same with any property, which may be recovered from the accused. Though in the Observation Mahazar, it is stated that blood stains were found at the place of occurrence, there is no evidence that the same was recovered.

26. P.W.11 has further stated that the accused was arrested by him in the presence of witnesses. He has not stated where the accused was arrested ; in whose presence he was arrested; on what date he was arrested and at what time he was arrested. In a very vague manner, P.W.11 has deposed that he arrested the accused in the presence of witnesses. Thus he has not stated that M.Os.1 to 13 were recovered from the accused either from his immediate possession or from out of any disclosure statement made by him. He has stated that M.Os.14 to 17 i.e, the Knife with wooden handle; knife with plastic handle; a pant and a banian alone were recovered. Though it is the positive case of the prosecution that M.Os.1 to 13 were also recovered from the possession of the accused as stolen properties, P.W.11 has not at all deposed that he recovered those material objects from the possession of the accused. It is seen from his evidence that these material objects were not even shown to this witness so as to call him to identify the same. Thus, as rightly contended by the learned counsel for the appellant, absolutely, there is no evidence, as of now, that M.Os.1 to 13 were recovered from the accused.

27. The learned Public Prosecutor would point out that recovery of M.Os. 1 to 13 have been mentioned in Ex.P3 mahazar. Ex.P3 Mahazar cannot be treated as a substantive evidence and the substantive evidence shall be that of the person who recovered these Material Objects from the possession of the accused and the person who witnessed the same. It is not explained as to why these facts were not elicited from P.W.5 and

P.W.11. Therefore, we find no reason to reject the argument of the learned counsel for the appellant that there is no proof that M.Os.1 to 13 were recovered from the possession of the accused.

28. The learned counsel would next point out that even P.Ws.1 and 2 have not stated that M.Os.1 to 13 were stolen away from the house. In the Chief examination, P.W.1 was not even called upon to say as to what are all the jewels which were stolen away from his house or from the deceased. He was called upon only to say in very general terms that M.Os.1 to 13 are the properties which were found missing from the house. P.W.1 was examined in chief on 18.01.2012 and on the same day he was cross examined. On that day, nothing was elicited from him about the robbery committed at the house and the missing of valuable articles. He was recalled by the prosecution on 23.04.2012, on that date M.Os.1 to 13 were marked and P.W.1 had stated about the jewels which were stolen away from his house. Assuming that this much of evidence available from P.W.1 is sufficient to hold that M.Os.1 to 13 are the stolen properties, as we have already concluded, there is no evidence that these properties were recovered from the accused.

29. Now, on the score that the prosecution has failed to prove that M.Os.1 to 13 have been recovered from the accused, whether the accused is entitled to acquittal is the next question. Our answer is an emphatic "NO". As we have already concluded, from out of the three dying declarations made by the deceased, the prosecution has clearly established that it was this accused, who caused injuries, which resulted in her death and it was this accused who had stolen away valuable properties from the house of the deceased. Thus, we hold that the prosecution has proved the offence committed by the accused under Section 302 as well as 397 IPC. But we are unable to convict the accused under Section 397 IPC for want of a charge. The Trial Court has convicted him only under Section 380 IPC. Therefore, we are not in a position to alter the same.

30. Before parting with this case, we would like to express our displeasure and anxiety that the prosecution in this case has not been conducted properly and the witnesses had not been properly led by the Prosecutor. The case was not conducted with attention and care. The prosecution has lost a very valuable piece of evidence and presumption to be raised under Section 114 of the Evidence Act. We are only hopeful that in the days to come, these kinds of laches shall be avoided both by the Prosecutors, who conduct trials, the Investigating officers and the Trial Court.

31. In the result, the appeal fails and the same is accordingly dismissed. The conviction and sentence imposed by the trial court on the appellant are hereby confirmed. It is reported that the appellant is in jail. The appellant is directed to undergo the remaining period of sentence as imposed by the Trial Court.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate No.I, Tiruvottiyur.
 2. The Chief Judicial Magistrate, Thiruvallur.
 - 3.The IV Additional District and Sessions Judge,
Ponneri.
 - 4.The Inspector of Police
Thiruvottiyur Police Station, Chennai.
 - 5.The Public Prosecutor, High Court, Chennai.
 6. The Superintendent, Central Prison, Puzhal, Chennai.
- + 1 cc to Mr. T. Muruganathan, Advocate Sr.32146

Crl.A.No.259 of 2014

NM(CO)
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