

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 03.03.2016

CORAM

THE HONOURABLE MR. JUSTICE M.JAICHANDREN

AND

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

CRL.A.No.120/2011

1. Gangadaran
2. Vinoth @ Vinothkumar ... Appellants/A1 and A2

Vs

State by
The Inspector of Police,
Attur Police Station,
Attur, Salem District. ... Respondent/ Complainant
(Crime No.281/2008)

Appeal filed u/s.374 (2) of Cr.P.C., against the Judgment of conviction and sentence made in S.C.No.220 of 2005 dated 12.10.2010 by the learned Additional Sessions Judge, Fast Track Court No.II, Salem.

For 1st Appellant : M/s.Philip Ravindran Jesudoss
For 2nd Appellant : Mr.V.Gopinath,
Senior Counsel

For Respondent : Mr.M.Maharaja,
Addl. Public Prosecutor

JUDGMENT

[Judgment of the court was delivered by S.NAGAMUTHU, J.]

The appellants are the accused 1 and 2 in S.C.No.220 of 2005 on the file of the learned Additional Sessions Judge, Fast Track Court No.II, Salem. There was yet another accused, namely, Mubarak Ali, who was arrayed as the third accused. The appellants/accused 1 and 2 stood charged for an offence under Section 302 of IPC whereas the 3rd accused stood charged for an offence under Section 302 read with 34 of IPC. Further, the first accused stood charged for an offence under Section 380 of IPC whereas the accused 2 and 3 stood charged for an offence under

Section 380 read with 34 of IPC. By judgment dated 12.10.2010, the trial court convicted the accused 1 and 2 for the offence under Section 302 of IPC and sentenced the accused 1 and 2/appellants 1 and 2 to undergo imprisonment for life and to pay a fine of Rs.100/-, in default, to undergo rigorous imprisonment for 3 months. The trial court convicted the 3rd accused under Section 302 read with 34 of IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.100/-, in default, to undergo rigorous imprisonment for 3 months. For the offence under Section 380 of IPC, the trial court sentenced the 1st appellant/1st accused to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.100/- in default, to undergo rigorous imprisonment for 3 months. The trial court convicted the accused 2 and 3 under Section 380 read with 34 of IPC and sentenced them to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.100/-, in default, to undergo rigorous imprisonment for 3 months. Challenging the said conviction and sentence, the appellants 1 and 2/Accused 1 and 2 are before this Court with this appeal.

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

(a) The deceased in this case was one Kaladevi. P.W.1 is her husband and P.W.6 is her child. P.Ws.3 and 4 are the parents of P.W.1. All of them were living in their house at Narasinghapuram Therku Kadu Village. The accused 1 and 3 were earlier doing some business in which they sustained huge loss. Thus, the accused 1 and 3 were in need of money. Therefore, it is alleged that the accused 1 and 3 along with the 2nd accused had decided to commit theft at the house of the deceased.

(b) On 26.08.2003 at about 6.00 p.m., all the three accused came in a Motor Cycle to the house of the deceased. The family of the deceased was already very closely known to the 1st accused. At that time, P.W.1 had gone out and he was not available in his house. P.W.3 and P.W.4 had gone to the house of their neighbour, namely, P.W.2, to watch television there. Thus, at about 06.00 p.m., on the day of occurrence, in the house, the deceased was alone with her child P.W.6, who was hardly aged 7 years at that time. On reaching the house of the deceased, the 1st accused wanted the 3rd accused to take the child in his motorcycle and make a jolly round so as to keep the child away from the house. Accordingly, the 3rd accused took P.W.6 in the Motor Cycle and went away. After making a round, when he returned, the 1st accused again wanted him to make another round. Thus, the 3rd accused took the child again out. Thus, they made it a point that the deceased alone was there in the house and there was nobody else.

(c) Thus, the accused 1 and 2 entered into the house of the deceased. They strangled the deceased by using a cotton rope. They also attacked the deceased on her head and face with wooden logs. The deceased died on the spot. After killing her, they took away the Thali Chain from the neck of the deceased.

After finishing the task, the accused 1 and 2 were waiting outside the house. The 3rd accused returned with P.W.6. The 1st accused told P.W.6 not to disturb his mother and further told him that the deceased was sleeping. After leaving the child P.W.6, at the house of the deceased, all the three accused fled away from the scene of occurrence.

(d) P.W.6, entered into the house and to his shock, he found his mother lying inside the house in a pool of blood with injuries over her body. He raised alarm, cried for help and rushed to the house of P.W.2 where P.Ws.3 and 4 were watching television. He told about the occurrence to P.W.2 to P.W.4. P.Ws.2 to 4 rushed to the house of the deceased and found that the deceased was lying in a pool of blood and there was no life in the body. Then, P.W.1 went to Attur Police Station and made a complaint at 10.30 p.m. on 26.08.2003.

(e) P.W.26 the then Sub-Inspector of Police, Attur Police Station received the said complaint under Ex.P.1 and registered a case in Crime No.1022 of 2003 for an offence under Section 302 of IPC against the 1st accused and two unnamed persons. P.W.26, then forwarded the complaint and First Information Report (Ex.P.25) to the court through a police constable which were received by the learned Judicial Magistrate at 11.55 a.m. on 27.08.2003.

(f) P.W.29 took up the case for investigation. He proceeded to the place of occurrence and at 12.15 a.m., on 27.08.2003, he prepared an Observation Mahazar and a Rough Sketch in the presence of P.W.16 and another witness. He recovered blood stained earth and sample earth from the place of occurrence under a Mahazar. Then, he conducted inquest on the dead body of the deceased between 01.15 a.m. and 4.15 a.m. and forwarded the body for postmortem.

(g) P.W.23 conducted autopsy on the dead body of the deceased on 27.08.2003 at 2.50 p.m. He found the following injuries on the body of the deceased:

- 1) The frontal region seen depressed. A lacerated injury, present on the left side of forehead measuring 6 x 3x bone deep;
- 2) A lacerated injury on right side of forehead 5cm x 15cm x bone deep;
- 3) A lacerated injury below right eye 0.5x 0.5x 0.5 c.m.;
- 4) A lacerated injury on left cheek 3cm x 1cm x bone deep;
- 5) A lacerated injury on left side of lower jaw 2.5 cm x 0.5 cm x bone deep;
- 6) A lacerated injury on left side of the mouth, on left angle 1 x 0.5x 0.5 cm;
- 7) A lacerated injury on its middle part of upper

lip 0.1 x 0.5 x 0.5 cm.;

8) A lacerated injury on it middle part of lower lip 2 x 1 x 0.5 cm.;

9) Abrasion on i) Nose 2x0.5cm., ii) Below right eye 1 x 0.5 cm iii) one right side of lower jaw 1 x 0.5 cm. Red in colour;

10) A traverse ligature mark on entire neck, in its middle 34 cm x 1 ½ c.m (imprint abrasion of nylon rope, o/d internal neck structures are without, including the hyoid bone.

Internal:

11) Comminuted fracture of left frontal bone present at a tissue fracture extending to middle cranial fossa and to the right side of occipital bone;

12) Fracture of maxillary bones on left side and right side;

13) Fracture of mandible present in its left side;

14) Subdural and sub-arachnoid hemorrhages present in both cranial hemispheres (ante mortem) ;

Other things: Finger nails bluish, peripheral cavities

Peritoneal cavity empty, Heart: fluid blood present, Myocardium :Normal,

Coronaries present: Lungs: Congested and edematous, Liver spleen, Kidney; Congested, Stomach: 50 gram of partly digested grayish, yellow chyme present, No smell, mucosa congested. Large intestine - soft feral matters present - Uterus : empty, normal. Ovaries:normal. Hymen-absent, No fresh injuries present. (Swab and smear from vagina taken) Larynx, trachea, hyoid bone - intact. Bladder: 10cc of urine present. Pelvis, spinal column and cord:intact"

He gave opinion that the death was due to the head injuries. He further opined that the injuries would have been caused by a blunt object. Ex.P.24 is the Postmortem Certificate. Then, P.W.29, forwarded the recovered blood stained earth and sample earth including the wooden logs found at the place of occurrence to the court. He recovered the jewels as well as the clothes found on the body after postmortem was over.

(h) The investigation was then taken over by P.W.30, the Successor of P.W.29. On 30.08.2003 at 04.00 a.m., he arrested the 3rd accused in the presence of P.W.15 and another witness near Velmurugan Theatre at Udayarpalayam. On such arrest, he gave a voluntary confession in which he disclosed the place where he had hidden the cotton rope. In pursuance of the said disclosure statement, he took P.W.30 and the witnesses to the said place and produced the cotton rope (M.O.7). P.W.30 recovered the same under a Mahazar.

(i) On the same day at 01.00 p.m. at Amman Nagar Bus Stop at Attur Thalaivasal Road, in the presence of the same witnesses, he arrested the 2nd accused. On such arrest, he gave a voluntary confession in which he disclosed the place where he had hidden the TVS Champ Motor Cycle bearing Registration No.T.N.27Z 9741. In pursuance of the said disclosure statement, he took P.W.30 and the witnesses, to the place of hide out and produced the same. P.W.30 recovered the same under a Mahazar. Then, in the same disclosure statement, he disclosed the place where he had hidden a pant and a shirt. In pursuance of the same, he took P.W.30 and the witnesses to Chekku Vettiyar Thottam and produced M.O.14 shirt and M.O.15 Pant from the place of hide out. P.W.30 recovered the same. Then, he forwarded both the accused to judicial remand.

(j) On 03.09.2007, the 1st accused had surrendered before the learned Judicial Magistrate No.IV, Salem. P.W.30 took the custody of the 1st accused on the orders of the learned Judicial Magistrate on 13.09.2003. While in custody, in the presence of P.W.16, he gave a voluntary confession in which he disclosed the place where he had hidden the Registration Certificate and the Insurance Certificate for the TVS Champ Motor Cycle. In pursuance of the same, he further disclosed that he had pledged the Thali Chain with one Shanmugam. In pursuance of the same, he took P.W.30 and the witnesses to the house bearing Door No.16-C, Rajaji Colony and produced the Registration Certificate (Ex.P.12) and Insurance Policy (Ex.P.13). P.W.30 recovered the same under a Mahazar. Then, the 1st accused took P.W.30 and P.W.16 to a shop known as 'Srinivasa Finance' at Erode on the Mettur Road and identified the said shop as the place where he had pledged the gold Thali Chain.

(k) P.W.17 Shanmugam was then available in the shop. He admitted that the 1st accused had pledged the gold chain for a sum of Rs.2,000/-. There were initials in the said chain as 'V and RM'. P.W.17 returned the same to P.W.30. He recovered the same under a Mahazar. On returning to the police station, he forwarded the accused to court and handed over the jewel also to the court.

(l) In the meanwhile, at the request of the Investigating Officer, P.W.22, the learned Judicial Magistrate, conducted Test Identification Parade on 11.09.2003 for all the three accused. P.Ws.6 to 8 were allowed to participate in the same. P.Ws.6 and 7 identified all the three accused, on all the three occasions whereas P.W.8 identified only the accused 1 and 3 and not the 2nd accused.

(m) On completing the investigation, P.W.30, the Investigating Officer, laid charge sheet against all the three accused.

3. Based on the above materials, the Trial Court framed charges as detailed in the first paragraph of the Judgment. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 30 witnesses were examined and 32 documents and 15 material objects were also marked.

4. Out of the said witnesses, P.W.1, the husband of the deceased has stated that on the day of occurrence, he was not at the house and later, when he came to the house, he heard about the occurrence and then, he made a complaint. He further stated that P.W.6 told about the participation of all the three accused. P.W.2 is a neighbour of the deceased. P.Ws.3 and 4 are the father-in-law and mother-in-law respectively of the deceased. They have stated that they were, at the crucial point of time, watching television in P.W.2's house. They have further stated that P.W.6, the child came and informed them that the deceased was lying in a pool of blood. Therefore, they went to the house of the deceased and found the body of the deceased. P.W.5, who is the father of the deceased, has stated that on getting information about the death of the deceased, he came to the place of occurrence. He has not stated anything incriminating against the accused. P.W.6, the child has stated about the presence and participation of all the 3 accused. So far as P.W.5 is concerned, there was no Test Identification Parade conducted. So far as P.W.6 is concerned, he identified all the three accused in the Test Identification Parade. P.W.7 has stated that at 5.00 p.m., he found all the three accused going in a Motorcycle. P.W.8 has also stated that at 05.00 p.m., he found all the three accused going in a Motorcycle. P.W.9 has stated that he saw the accused returning from the house of the deceased in the same motorcycle. P.W.6 to 9 have stated about the movement of all the three accused, at or about the place or somewhere near the place of occurrence, in a motorcycle, at the time of occurrence. P.W.10 and P.W.11 have not stated anything incriminating against the accused. P.W.12 and 13 turned hostile and they have not supported the case of the prosecution in any manner.

5. P.W.14 was running a Barber Shop. According to him, on the day of occurrence, all the three accused came in a Motorcycle and the 1st accused asked him to shave his face and remove his mustache and he has done the same. P.W.15 has spoken about the Observation Mahazar. P.W.16 has stated about the Disclosure Statement made by the 1st accused and the consequential recovery of the Thali Chain. P.W.17, the Pawn Broker has stated that the 1st accused came along with his wife, pledged the Thali Chain (M.O.1) on the day of occurrence on 27.08.2003 for a sum of Rs.2,000/-. At the time of pledging, he told him that the Thali Chain belonged to his wife. He returned the same, when the police came along with him. P.W.18 Photographer has spoken about the photographs taken at the place of occurrence, at the request of the Investigating Officer. P.W.19 is the previous owner of the

Motorcycle. He has stated that the motor cycle was sold to the 1st accused by him. P.W.20 is the broker, who facilitated the 1st accused to purchase the motorcycle from P.W.19. He has vividly spoken about the same. P.W.20 is the Head Clerk attached to the Judicial Magistrate Court who has forwarded all the material objects for chemical examination. The report revealed that there were blood stains in the properties recovered from the place of occurrence.

6. P.W.22, the learned Judicial Magistrate has stated that on 11.09.2009, he conducted Test Identification Parade in which P.Ws.6 and 7 identified all the 3 accused on all the three occasions whereas P.W.8 identified only accused 1 and 3 and not the 2nd accused. P.W.23 has spoken about the postmortem conducted and his final opinion regarding the cause of death. P.W.24 has stated that 10 years before the date of occurrence, the father of the deceased purchased M.O.1 Thali Chain from his shop. He has identified the same. P.W.25 is the Constable who forwarded the F.I.R. to the court. P.W.26 has spoken about the registration of the case. P.W.27 is the Head Constable through whom the dead body of the deceased was sent for postmortem. P.W.28 is the Tahsildar before whom all the three accused have made their confession statements. The confession statement of the 1st accused has been marked as Ex.P.28. The confession statement of the 2nd accused has been marked as Ex.P.26 and the confession statement of the 3rd accused has been marked as Ex.P.27. P.Ws.29 and 30 have spoken about the investigation done by them and the laying of the charge sheet.

7. When the above incriminating materials were put to the accused u/s.313 Cr.P.C., they denied the same as false. Their defence was a total denial. However, they did not choose to examine any witness nor mark any document on their side.

8. Having considered all the above, the Trial Court convicted all the accused as detailed in the first paragraph of the judgment. Challenging the said conviction and sentence, the appellants 1 and 2/accused 1 and 2 are before this Court with this appeal.

9. We have heard the learned Counsel appearing for the 1st appellant/1st accused, the learned Senior Counsel appearing for the 2nd appellant/2nd accused and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

10. For the sake of convenience, let us now take up the appeal case relating to the 2nd accused. As we have narrated the facts and culled out the evidence, there are only two circumstantial evidences against the 2nd accused. The first and foremost circumstantial evidence is that P.W.6 had seen the 2nd

accused in the company of the accused 1 and 3 on the day of occurrence, when they had come to his house in the Motorcycle. Admittedly, the 2nd accused was not previously known to P.W.6. That is the reason why, the Test Identification Parade was conducted for him. According to the case of the prosecution, he was arrested on 30.08.2003. But P.Ws.1, 4, 5, 6 and 7 during cross-examination have stated that he was in the police custody on 26.08.2003 itself and it has also been stated by these witnesses that the 2nd accused was identified by P.W.6 and other witnesses in the police station itself even before he was sent for remand. In view of the said tacit admission made, in our considered opinion, the evidence of P.W.6, identifying the 2nd accused, both in the Test Identification Parade as well as before the court, cannot carry any weightage. Therefore, we find it difficult to accept the evidence of P.W.6, so far as it relates to the 2nd accused is concerned.

11. Apart from that, the only piece of circumstantial evidence available against the 2nd accused is that on his arrest, he made a disclosure statement out of which the Motorcycle, a blood stained shirt and a pant were recovered. It cannot be true, in view of the fact that the 2nd accused was in the police custody even on 26.08.2003. Therefore, this circumstance also cannot be believed. Apart from these two circumstantial evidences, there is no evidence at all against the 2nd accused. Therefore, we hold that the prosecution has failed to prove the case against the 2nd accused and he is entitled for acquittal.

12. Now turning to the case against the 1st accused/1st appellant, we find some force in the argument of the learned Additional Public Prosecutor that the prosecution has proved the case against the 1st accused beyond all reasonable doubts. So far as the 1st accused is concerned, he is not a stranger to P.W.6. P.W.6 had seen the 1st accused, when he came to his house at 5.00 p.m. along with two other persons in the motorcycle. P.W.6 has categorically stated that he only directed one of the persons to carry him in the motorcycle to have a jolly ride so as to see that the deceased alone was in the house. We do not find any reason to reject the evidence of P.W.6 because on the earliest opportunity, he told P.Ws.1, 2 and 3 about the arrival of the 1st accused to the house in the motorcycle along with two other persons and asking one of the persons to take P.W.6 in the motorcycle and other facts. He had stated to P.Ws.1 to 3 that when he was dropped at the house, the 1st accused told him not to go and disturb his mother as she was sleeping. He has further stated that when he went into the house, he found his mother lying in a pool of blood. He immediately rushed to the house of P.W.2 and informed P.Ws.2 to 4 about the same. This conduct of P.W.6, a child, should carry weightage.

13. The learned Counsel for the 1st appellant/1st accused is not able to point out any ground so as to disbelieve the said witness. The only ground upon which an attempt has been made to disbelieve his evidence is that at the time of occurrence, P.W.6 was a child. Though P.W.6 was a child at the time of occurrence, we do not find any reason to doubt the veracity of P.W.6. We have carefully gone through the cross-examination of P.W.6 and also the other evidences to find out as to whether P.W.6 could have been tutored. We find no such material at all, on record. Therefore, in our considered view, the evidence of P.W.6 inspires the fullest confidence of this Court. Thus, from the evidence of P.W.6, it has been clearly established that at the time of occurrence, it was this accused, who came with two other persons and left the place of occurrence along with the other persons in the motorcycle.

14. The next circumstance is that P.Ws.7 to 9 had seen all the three accused moving at or about the time of occurrence or somewhere near the place of occurrence, in a motorcycle. P.W.7 is not a stranger to the 1st accused and he had no motive to depose against the 1st accused, though P.W.7 did not know the identity of the accused 2 and 3. P.Ws.7 and 8 have identified the 1st accused in the court as well as during the Test Identification Parade. So far as the 2nd accused is concerned, the identification of the 2nd accused in the Test Identification Parade was disbelieved because he was kept in the police station. The 1st accused was also kept in the police station as it is stated by P.Ws.1 and 4 to 7. Therefore, the identification made by these witnesses in the court as well as during Test Identification Parade, cannot be believed as against the accused 2. But, the identification of the first accused made by P.W.3 in court could be given weightage.

15. The next circumstance is the evidence of P.W.14, who had seen all the three accused together, when they came to his Barber shop at 9.00 p.m. and got his head tonsured. This act of the accused may naturally go to show his duty-mind.

16. The last circumstance relied on by the prosecution is that the 1st accused surrendered before the court on 03.09.2003 on his own. He was taken into police custody only on 13.09.2003. While in custody, he had disclosed that he pledged the M.O.1 Thali Chain to P.W.17. From P.W.17, it was recovered. P.W.17 has stated that on 27.08.2003, the 1st accused came and pledged the M.O.I Thali Chain to him. We do not find any reason to reject the evidence of P.W.17.

17. But the learned Counsel for the 1st appellant/1st accused would submit that the original records such as Ledgers etc. have not been recovered from the shop of P.W.17. But, on that score, we cannot reject the evidence of P.W.17, because the Pawn Receipt for pledging has been produced in evidence. Thus, we hold that

the prosecution has established that on 27.06.2003, the 1st accused was found in possession of the Thali Chain of the deceased.

18. The learned Counsel for the 1st appellant would further submit that P.W.1 has admitted during cross-examination that a chain was found hanging in the house. Referring to the same, he would submit that therefore, the story that the chain was pledged with P.W.17, cannot be true. But, we do not find any evidence to the fact that what was hanging was M.O.1 (Thali Chain). During cross-examination, P.W.1 has stated that a gold chain was hanging in the house. He has also stated that the accused had taken away the ''Thali Chain'' leaving behind the Thali with two gold balls which had fallen there. The other witness P.W.24 has stated that he only sold the said Thali chain to the father of the deceased. All these evidences, cumulatively, would go to prove the fact that M.O.1 belonged to the deceased and the same was worn by her lastly and the same was stolen away from her. Since, in this case, the murder and removal of the Thali Chain from the neck of the deceased had taken place in one and the same occurrence, as per Section 114 of the Indian Evidence Act, we have to presume that it was this accused, who caused the death of the deceased. Of course that presumption is rebuttable. But, we do not find any material on record to rebut the said presumption. Thus, this unrebutted presumption under Section 114 of the Indian Evidence Act is duly corroborated by the evidence of P.W.6 and from these circumstances, we hold that the prosecution has clearly proved that it was this accused, who murdered the deceased and also committed the theft of the M.O.1 Thali Chain. Thus, the trial court was right in convicting the 1st accused for murder as well as for theft.

19. Now, turning to the quantum of punishment, the trial court has imposed only minimum punishment, which in our considered view, does not require any interference at the hands of this Court.

20. In the result, the appeal is partly allowed in the following terms:

(a). The conviction and sentence imposed on the 2nd appellant/2nd accused are set aside and he is acquitted from all the charges. The bail bond, if any, executed by him shall stand discharged. The fine amount, if any, paid, shall be refunded to him;

(b). The conviction and sentence imposed on the 1st appellant/1st accused under Sections 302 read with 34 and 380 of IPC are confirmed and the appeal stands dismissed so far as the 1st accused is concerned.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

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To

1. The Inspector of Police,
Attur Police Station,
Attur, Salem District.
2. The Additional Sessions Judge,
Fast Track Court No.II, Salem.
- 3.The Public Prosecutor,
High Court, Chennai.
4. The Judicial Magistrate No.I
Attur
5. The Chief Judicial Magistrate
Salem
6. The Superintendent
Central Prison,
Coimbatore

1 cc to Mr. Philip Ravindran Jesudoss, Advocate, Sr. 13784

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JSV (CO)
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