

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 05-08-2016

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

CRL.APPEAL Nos.613 of 2015 & 43 of 2016

Sivan @ Siva ..Appellant/Accused No.2
in Crl.A.No.613/2015

Murugan ..Appellant/Accused NO.1 in
Crl.A.No.43/2016

-vs-

State, represented by
The Inspector of Police,
Eriyur Police Station,
Dharmapuri District.
(Crime No.86 of 2012) ..Respondent/Complainant
in both appeals

Appeals filed under Section 374 (2) or Cr.PC
against the judgment, dated 19.08.2015, made in S.C.No.238 of
2014 on the file of Additional Sessions Court, Dharmapuri.

For appellant
in Crl.A.No.613/2015 : Mr.N.Sudarsan
For appellant
in Crl.A.No.43/2016 : Mr.John Sathyan
for M/s.C.Prabakaran.

For respondent : Mr.E.Raja,
Additional Public Prosecutor
in both Crl.A.

JUDGMENT

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

The appellants are accused 2 and 1 respectively in
S.C.No.238 of 2014 on the file of Additional Sessions Court,
Dharmapuri. They stood charged for the offences, as detailed
below :

Sl.No	Accused	Section of law
1	A-1	364 I.P.C.
2	A-2	364 read with 34 I.P.C.

Sl.No	Accused	Section of law
3	A-1 & A-2	397 I.P.C.
4	A-1 & A-2	302 I.P.C.
5	A-1 & A-2	201 read with 302 I.P.C.

By judgment, dated 19.08.2015, the trial Court convicted them as under :

Accused	Section of law	Sentence
A-1	364 I.P.C.	Life imprisonment
A-2	364 r/w.34 I.P.C.	Life imprisonment
A-1 & A-2	397 I.P.C.	Rigorous imprisonment for seven years each and fine of Rs.1000/- each ; in default, to undergo rigorous imprisonment for three months each.
A.1 & A.2	302 I.P.C.	Life imprisonment each and to pay of Rs.1000/- each; in default, to undergo rigorous imprisonment for three months each.
A-1 & A-2	201 r/w. 302 I.P.C.	Rigorous imprisonment for seven years each and fine of Rs.1000/- each; in default, to undergo rigorous imprisonment for three months each.

Challenging the said conviction and sentence, the appellants/accused are before this Court with these appeals.

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

2.1 The deceased in this case was one Mrs.Kannammal. P.W.14 is her husband and P.W.6 is her son. They were residing at Nagamarai village, Pennagaram Taluk, in Dharmapuri District. The deceased used to go for coolie work. It is alleged that the first accused had developed illicit intimacy with the deceased. It is further alleged that the deceased wanted money from the accused to purchase a JCB machine. At that time, the deceased disclosed that she had 6 to 7 sovereigns of gold jewels, which should be disposed of for the purpose of purchasing JCB machine. From the said statement of the deceased, the first accused came to know that the deceased had gold jewels. It is alleged that the second accused is his associate. They decided to do away with the deceased and to steal the jewels belonging to the deceased.

2.2. It is further alleged that on 20.03.2012 around 09.00 p.m., the first accused took the deceased to Sandapettai Pulimarathupallam Check Dam.. The second accused was waiting there for the arrival of the first accused and the deceased. The second accused was armed with a knife. The first accused took the deceased in his motorcycle bearing registration No.T.N.29AD8602 to the place of occurrence. It is alleged that the accused 1 and 2 killed the deceased and removed a gold chain from her neck and a pair gold earstuds from her ears. Then, the accused poured petrol and burnt the body. The half burnt dead body was thrown by them at a nearby bush and. then, the accused ran away.

2.3. The occurrence was not witnessed by anyone. P.W.1, the Village Administrative Officer, found the dead body on 22.03.2012 and then made a complaint to the police, upon which a case was registered. During investigation, it is alleged that P.Ws.6 and 14, namely, son and husband of the deceased, identified the dead body, from and out of the remaining jewels found on the body of the deceased. The accused were arrested, according to the prosecution, on 08.04.2012 at 05.40 a.m., in the presence of P.W.7 and another witness. On such arrest, it is stated that the first accused gave a voluntary confession, in which he made a disclosure statement Ex.P-5, which has led to the recovery of M.Os.7,9 and 10. M.O.7 is the gold chain and M.Os.9 and 10 are the earstuds and screws. M.O.8 the receipt for pledging M.O.7 chain was also recovered. On the disclosure statement made by the second accused under Ex.P-6, M.Os.6 and 9 and M.O.5, a cell phone, were recovered. On the disclosure statement made by the first accused, a cell phone and a purse allegedly belonging to the deceased were also recovered. On completing the investigation, chargesheet was laid against the accused.

3. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgment and the accused denied the same. In order to prove the case, on the side of the prosecution, as many as 21 witnesses were examined, 31 documents and 19 material objects were marked. When the above incriminating materials were put to the accused, they denied the same as false. On the side of defence, the wife of first accused was examined as D.W.1 and Exs.D-1 and D-2 were marked.

4. According to the defence taken by the accused, they were taken into illegal custody by the police as early as on 02.04.2012 itself. D.W.1, the wife of A-1, has deposed to the said effect. She has further produced a copy of the telegram sent by her on 02.04.2012 itself, alleging that the first accused was taken into custody on 02.04.2012 itself. Thus, according to defence, both the accused were not arrested

on 08.04.2012 and no recovery was made out of the same. Having considered all the above, the trial Court convicted the accused as detailed in the first paragraph of this judgment. That is how, they are before this Court with these appeals.

5. We have heard the learned counsel for the appellants and the learned Additional Public Prosecutor appearing for the State and also perused the materials carefully.

6. Though several grounds have been raised, the learned counsel for the appellants would submit that there is no proof that the dead body found by P.W.1 on 22.03.2012 was that of the deceased. P.Ws.6 and 14 have identified the dead body as that of the deceased only from and out of the remaining gold jewels found on the body of the deceased and the dress. From the records, we find that the skull of the dead body was sent for superimposition examination. The report is very much available which states that the photograph of the deceased tallied with the skull of the dead body. But, unfortunately, the photograph has not been identified by P.Ws.6 and 14 as that of the deceased. The Scientist, who conducted superimposition examination, has not been examined, but the report alone has been marked. In our considered view, that would not satisfy the legal requirements.

7. We have got experience that in a case where after the trial Court made judicial pronouncement of the death of an individual, the so called deceased appeared before this Court later and claimed that the judgment of the trial Court was illegal. Therefore, in our considered view, it is absolutely essential for the prosecution to prove that the dead body found by P.W.1 on 22.03.2012 was that of the deceased. It is not explained to this Court by the prosecution as to why the Scientist, who conducted superimposition examination, was not examined. There is also no proof that the photograph, which was used for comparison, was that of the deceased.

8. The learned counsel for the appellants would point out that M.Os.7,9 and 10 have not been identified by P.Ws.6 and 14 as that of the deceased (recovered articles have not been proved to be that of the deceased). Similarly, though it is alleged that a cell phone and a purse have been recovered on the disclosure statement made by the first accused, P.Ws.6 and 14 have not been called upon by the learned Additional Public Prosecutor, who conducted the case, to prove whether these two properties belonged to the deceased or not. Thus, as of now, there is no proof that the recovered articles on the disclosure statement made by the first accused belonged to the deceased and that they were stolen properties. It is not explained to this Court by the learned Additional Public Prosecutor as to why the learned Additional Public Prosecutor, who conducted trial, failed to prove that the properties recovered at the instance of the accused on the

disclosure statement made were the stolen properties. Thus, in our considered opinion, this is a sheer lapse on the part of the learned Additional Public Prosecutor, who conducted the case before the trial Court.

9. The learned counsel for the appellants would submit that D.W.1 has given evidence that the first accused was taken into custody on 02.04.2012 itself. There is no explanation as to what had happened to the said telegram given and with what result at the end of the police.

10. Above all, it is stated by P.Ws.6 and 14 that the dead body was identified by them as that of the deceased on 22.03.2012 itself. The Investigating Officer had obtained a complaint afresh from P.W.14 on 23.03.2012 for woman missing. It is not explained to the Court that when the dead body of the deceased had been identified as that of the deceased even on 22.03.2012 itself, how the Investigating Officer was satisfied that the wife of P.W.14 was still missing as on 23.03.2012. These anomalies have not been explained to this Court by the prosecution.

11. Unless there is proof that the dead body was that of the deceased by examining the Scientist and by proving photograph and unless the properties recovered from the accused are proved to be that of the stolen properties, it may be difficult for this Court to sustain the conviction. But, at the same time, for the recklessness on the part of the learned Additional Public Prosecutor, who conducted the case before the trial Court, we cannot allow the justice to be killed at the very altar of the temple of justice.

12. The learned counsel for the appellants would submit that if a further chance is given to the prosecution to rectify these anomalies, that would amount to filling up the lacunae. But, we do not think it so. It is not as if these materials were not available on record. These evidences were already on record and the accused had also been put on notice. It was only a sheer mistake on the part of the learned Additional Public Prosecutor, while conducting the trial, to bring on record these materials as evidence. Therefore, proving these evidences would not amount to filling up the lacunae. Hence, this argument is rejected.

13. In view of our foregoing discussion, we are of the view that we have no option but to set aside the conviction and sentence imposed on the appellant and to remand the matter back to the trial Court, for fresh disposal.

14. The learned counsel for the appellants submitted that the case may be transferred to the file of some other Court, as the same judge, who has earlier dealt with the matter, is presiding over the trial Court even now. In our

considered view, allowing the same judge to deal with the case would not amount to fair trial. Therefore, we are inclined to transfer the case to the file of learned Principal Sessions Judge, Dharmapuri, who, shall permit the prosecution to recall any witnesses or to summon any witnesses afresh and examine them. The learned Principal Sessions Judge, Dharmapuri, shall also permit the accused to recall any witness already examined and examine any defence witness afresh. Both prosecution and defence shall be at liberty to prove any documentary evidence also afresh.

15. The accused shall be released on bail on their executing a personal bond with two sureties each for a sum of Rs.25,000/- each to the satisfaction of the Principal Sessions Judge, Dharmapuri.

16. The learned Principal Sessions Judge shall dispose of the case within a period of three months from the date of receipt of a copy of this judgment. It is further directed that the learned Principal Sessions Judge shall not be influenced by any of the observations made hereinabove, while delivering the judgment.

17. In the result, these appeals are allowed; the conviction and sentence imposed on the appellants are set aside and the case in S.C.No.238 of 2014 on the file of Additional Sessions Court, Dharmapuri, is remanded back to the trial Court and the same shall stand transferred to the file of Principal Sessions Judge, Dharmapuri, for fresh disposal, as directed above.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional Sessions Judge,
Dharmapuri.

2.The Principal Sessions Judge,
Dharmapuri.

3.The Inspector of Police,
Eriyur Police Station,
Dharmapuri District.

4. The Judicial Magistrate, Pennagaram,
Dharmapuri District

5. -do- Thro' The Chief Judicial Magistrate,
Dharmapuri.

6. The Superintendent of Central Prison, Vellore.

7. The Public Prosecutor, High Court, Madras.

8. The District Collector, Dharmapuri.

9. The Director General of Police Chennai.

Copy to: The Section Officer,
Criminal Section, High Court, Madras.

+ 1cc to Mr. C.Prabakaran, Advocate sr.44671

+ 1 cc to Mr.N. Sudharsan, Advocate SR.13273

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NRJK(CO)
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