

Bail Slip

The appellant Muthukuberan was enlarged on bail in CrI.M.P.No.1/2012 in CrI.A.No.401 of 2012 by order dated 25.7.2012.

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.04.2016

CORAM:

THE HONOURABLE MR . JUSTICE M.JAICHANDREN

AND

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Criminal Appeal No.401 of 2012

Muthukuberan

... Appellant

-Vs-

The State by
Inspector of Police
Madhuranthakam Police Station
Kancheepuram District

... Respondent

This Criminal Appeal has been preferred to call for the records and set aside the order passed by the learned Additional Sessions Judge, Chengalpattu, Kancheepuram District in S.C.No.287/2005 dated 18.06.2012.

For Appellant : Mr.A.Natarjan
Senior Counsel
for Mr.K.Pasupathi

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 first accused in S.C.No.287 of 2005 on the file of the learned Additional District and Sessions Judge, Kancheepuram District at Chengalput. There were two other

accused arrayed as the accused 2 and 3, who are the mother and grandmother respectively of the first accused. The trial Court framed as many as four charges against the accused. The first charge was against all the three accused u/s 4 of the Dowry Prohibition Act; the second charge was against all the three accused u/s 498(A) IPC; the third charge was against the first accused for offence u/s 302 IPC; and the fourth charge was against the accused 2 and 3 for offence u/s 302 r/w 109 IPC. By judgment dated 18.06.2012, the trial Court has acquitted the accused 2 and 3, but convicted the appellant for offence u/s 302 IPC alone and sentenced him to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default to undergo rigorous imprisonment for six months. The trial Court acquitted the appellant from other charges. Challenging the said conviction and sentence, the accused/appellant is 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 Mrs.Saraswathy. P.Ws.1 and 2 are the mother and sister respectively of the deceased. P.W.3 is the husband of P.W.2 and P.W.4 is the sister's husband of P.W.1. The deceased Saraswathy was married to the first accused on 12.08.2002. It is alleged that at the time of marriage, 40 sovereigns of gold jewels were given as presentation to the deceased and 10 sovereigns gold jewels were presented to the first accused. A sum of Rs.25,000/- was given to the first accused for purchasing a bureau and a cot. Silver vessels weighing about 4 kgs were also presented. The deceased had studied only upto fifth standard. According to the prosecution, the fact that the deceased had studied only upto fifth standard was duly intimated to all the three accused and only on knowing the same, they agreed for the marriage.

[b] It is further alleged that after marriage, all the three accused gave a book to the deceased and wanted her to read the same. The deceased expressed her inability. The deceased also did not know to draw kolam. This was the cause for the initial quarrel between these accused and the deceased. After some time of the marriage, on hearing about the above quarrels, P.W.1 and other family members of the deceased had gone to the house of the accused. At that time, it is alleged that the accused informed P.W.1 that when the gold jewels presented at the time of marriage of the deceased were weighed, they found that one sovereign gold was less. Therefore, they wanted the same to be compensated. All the three accused told P.W.1 to transfer title of a plot belonging to P.W.1. P.W.1 refused to transfer the same in the name of the deceased since she had another daughter, to whom also she should give some property.

[c] It is further alleged that thereafter, under the guise that the deceased was not able to cook properly, all the three accused started harassing her. After 20 days of the marriage, it is alleged that all the three accused informed P.W.1 that the bangles presented at the time were not good looking. P.W.1 therefore, gave Rs.57,000/- for purchasing new bangles for the deceased. After one month of the marriage, the deceased called P.W.1 over phone and requested her to come to the house of the accused. P.W.1 accordingly went there. During such visit, all the three accused joined together and made lot of complaints against the accused. P.W.1 further claims that she advised the deceased and asked her to lead a happy matrimonial life. Again after one week, on a phone call from the deceased, P.W.1 visited the house of the deceased in connection with a patta matter. At that time also, there was a quarrel between all the three accused and the deceased. This time, on the request made by the first accused, P.W.1, the uncle of the first accused by name Ragupathy and one Boopalan, came to the house of the accused and mediated between the accused and the deceased. They advised P.W.1 to leave the deceased at the house of the accused, assuring that they would take care of the deceased.

[d] Again after one week, the deceased called P.W.1 over phone. This time, P.W.1 along with her daughter P.W.2, went to the house of the deceased. When they visited the house of the deceased, in their very presence, all the three accused manhandled the deceased. The deceased wanted to leave the matrimonial home and return to her parental home. But, all the three accused requested P.W.1 and P.W.2 not to take back the deceased and leave her in the matrimonial home. The deceased told P.W.1 that there was no consummation of marriage between her and the first accused. Therefore, P.Ws.1 and 2 took the deceased to the house of P.W.2.

[e] One week thereafter, the accused took the deceased back to their house. On coming to know that the deceased had no existence of menstrual cycle, the accused 1 and 3 suspected that the deceased had become pregnant, took her to a private hospital and gave some tablets. When the deceased refused to take the same, as she was not willing to undergo abortion, the accused manhandled her again. She informed P.W.1 about the same over phone.

[f] The next day morning, P.Ws.1 and 2 and one Ravi [P.W.3], the husband of P.W.2 had gone to the house of the accused. At that time, Ragupathy and Boopalan informed P.W.1 that there was no sign of all the three accused allowing the deceased to continue in the matrimonial home. They requested P.W.1 and others to take back the deceased. Therefore, P.Ws.1 to 3 took the deceased to the house of P.W.2.

[g] After fifteen days of the said occurrence, again the first accused came and requested P.W.2 to take back the deceased with him. But, P.W.2 did not agree. On 28.12.2002, about 15 persons belonging to the accused [either friends or relatives] came to the house of P.W.2 at Kalpakkam. They requested P.Ws.1 to 3 as well as the deceased to forget the bitter past and to allow them to take back the deceased. At 11.00 p.m., at last, they agreed and accordingly, they took the deceased with them to the house of the accused. With reluctance, the deceased accompanied them. Thereafter, on the same day during midnight, the deceased again spoke to P.W.1 and informed that she was harassed, because the deceased had left behind all her jewels at the house of P.W.2. P.W.1 informed her that she would bring her jewels immediately.

[h] Finally, on 29.12.2002, at 5.00 a.m., Mr. Ragupathy referred to herein above spoke to the house of P.W.3 over phone. P.W.3 received the phone call. Mr. Ragupathy told P.W.3 that the deceased was missing. He was informed that the deceased would not have gone anywhere and wanted him to search for the deceased. After some time, P.W.1 and her family members contacted over phone and at that time, they were informed by the family members of the accused that the deceased had fallen into a well and died. P.Ws.1 to 3 and others immediately went to the house of the accused in a car.

[i] By the time they reached the house of the accused, the dead body of the deceased had been retrieved from the nearby well and the same was laid on a bench. P.Ws.1 to 3 found that there were blood stains on the wall and the floor of the house of the accused. The accused did not explain as to how and why the wall and the floor got stained with blood. This gave rise to some suspicion. Therefore, P.W.1 went to the Maduranthagam Police Station and made a complaint at 11.00 a.m. on 30.12.2002. P.W.17 - the then Sub Inspector of Police, on receipt of the said complaint, registered a case in Cr.No.957/2002 u/s 498(A) and 304 (b) IPC against all the three accused. Ex.P7 is the FIR. He forwarded Exs.P1 [complaint] and P7 [FIR] to the Court, which were received by the learned Judicial Magistrate at 5.55 p.m. on 02.01.2003.

[j] The case was taken up for investigation by P.W.18. She forwarded the copy of the FIR to the Executive Magistrate - the Revenue Divisional Officer, Maduranthagam requesting him to conduct inquest on the body of the deceased. P.W.16 - the then Revenue Divisional Officer, Maduranthagam conducted inquest of the body of the deceased, during which he examined P.Ws.1 to 3. Ex.P6 is his Report.

[k] P.W.18 prepared an Observation Mahazar and a Rough Sketch at the place of occurrence in the presence of P.W.9 and another witness. She examined P.Ws.1 and 2 and a few more witnesses including Ragupathy and recorded their statements. No recovery was made from the place of occurrence. The body was then sent for post-mortem. P.W.14 Dr.Murugesan conducted autopsy on the body of the deceased on 31.12.2002 at 11.30 a.m. He found the following injuries:

"ABRASIONS

- 1 Reddish brown colour 1 x 1 cm on the tip of nose
- 2 1 x 1 cm on the left nostril
- 3 1 x 1 cm on the inner side of the mucous surface of the left nostril
- 4 1 x 0.5 cm on the right side of the nasal septum
- 5 1 x 1 cm on the right side of the upper lip below the right nostril
- 6 1 x 1 cm on the left side of the upper lip
- 7 1 x 0.5 cm on the mucous membrane of left side of upper lip above 2nd incisor teeth
- 8 1 x 0.5 cm on the mucous membranes of left side of upper lip above the canine teeth
- 9 1 x 0.5 cm on the inner aspect of right side of lower lip
- 10 1 x 0.5 cm on the inner aspect of left side lower lip in the canine teeth
- 11 On dissection the underlying tissues were bruised.
- 12 2 x 1 cm on the outer and lower part of the right knee joint
- 13 1 x 1 cm on the front and lower part of left upper arm

CONTUSIONS

- 1 3 X 2 X 1cm on the inner aspect of upper part of right thigh
- 2 6 x 2 x 1cm on the front of lower part of left thigh

- 3 5 x 2 x 1 cm on the front of upper port of right forearm
- 4 6 x 2 x 1 cm on the front and outer aspect. left forearm O/D the underlying tissues were extravagated

POST MORTEM INJURIES

- 1 10 x 3 cm post mortem abrasion on the lower part of right leg 2 cm above the right ankle joint.
- 2 A oblivious 11 x 3 cm post mortem abrasion on the lower third of the left leg just above the ankle joint

Ex.P3 is the Post-mortem Certificate. He opined that the deceased would appear to have died of asphyxia due to smothering with multiple injuries with post-mortem drowning.

3. During the course of investigation, on 01.01.2003, at 10.00 a.m., at Arungunam Village, P.W.18 arrested the first accused in the presence of P.W.9 and another witness. On such arrest, the first accused gave a voluntary confession. But, no discovery of any fact was made out of the same. On the same day, at 11.00 a.m., at Arungunam Village, P.W.18 arrested the second accused in the presence of P.W.9 and another witness. On such arrest, she gave a voluntary confession, but no discovery of any fact was made out of the same. At 11.30 a.m., P.W.18 arrested the third accused in the presence of the same witnesses. All the three accused were sent to the Court for judicial remand.

4. Based on the opinion of the Doctor who conducted autopsy and the Inquest Report submitted by the Revenue Divisional Officer, P.W.18 altered the case into one u/s 498(A), 394(b) and 302 IPC and submitted the Alteration Report under Ex.P9 to the Court. On completing the investigation, she laid charge sheet against the accused u/s 498(A) and 302 r/w 109 IPC and Sec.4 of the Dowry Prohibition Act, against all the three accused.

5. Based on the above materials, the trial Court framed appropriate charges as detailed in the first paragraph of this judgmented. The accused denied the same. In order to prove the

case, on the side of the prosecution, as many as 18 witnesses were examined and 9 documents were exhibited. No materials objects were marked on either side.

6. Out of the said witnesses, P.Ws.1 to 4 have spoken about the demand of dowry repeatedly made by all the three accused and consequential harassment; the phone calls made by the deceased to P.W.1; and finally, the death of the deceased. P.W.1 has spoken about the complaint made by her to the police also. P.Ws.5 to 8 and 10 to 13 have turned hostile and they have not supported the case of the prosecution in any manner. P.W.9 has spoken about the Observation Mahazar and Rough Sketch prepared by P.W.18 at the place of occurrence. P.W.14 has spoken about the post-mortem conducted on the body of the deceased and his Final Opinion regarding the cause of death. P.W.15 has spoken about the chemical examination of the visceral organs of the deceased. She has stated that there was no poison detected in the internal organs. P.W.16 has spoken about the inquest conducted on the body of the deceased. P.W.17 has spoken about the registration of the case and P.W.18 has spoken about the investigation done and the Final Report filed.

7. 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 nor he did mark any document in his favour. His defence was a total denial.

8. Having considered all the above, the trial Court acquitted all the accused by judgment dated 08.03.2006. As against the said judgment of acquittal, no appeal was made by the State. However, P.W.1 - the mother of the deceased filed a revision in CrI.R.C.No.771 of 2006 before this Court challenging the said acquittal of all the three accused. A learned single Judge of this Court, by order dated 14.07.2011, found that the trial Court had failed to consider many materials which were placed by the prosecution. Thus, the learned single Judge found lot of infirmities in the judgment of the trial Court. Therefore, the learned Judge set aside the judgment of acquittal and remanded the case back to the trial Court for re-trial. The operative portion of the order of this Court by the learned single Judge is as follows:

"31. Accordingly, this criminal revision petition is allowed and the order of acquittal dated 08.03.2006 made in S.C.No.287 of 2005 on the file of the Additional District and Sessions Judge/Fast Track Court No.1, Chengalpet is hereby set aside. The matter is remitted back to the learned Additional District and Sessions Judge/Fast

Track Court No.1, Chengalpet for retrial. The Additional District and Sessions Judge/Fast Track Court No.1, Chengalpet, is directed to consider the evidence already on record and an opportunity should be given to the accused, if he filed any application for recalling the witness or to cross examine the witnesses. But, the prosecution is not entitled to let in any further evidence. The trial Court is directed to dispose of the matter within a period of three months from the date of receipt of a copy of this order. The respondents 2 to 4/accused are directed to appear before the trial Court on 17.08.2011."

9. After the above said remand order, almost all the witnesses were recalled and they were all further cross examined. After having considered the evidence comprehensively, by judgment dated 18.06.2012, the trial Court acquitted the accused 2 and 3 from all charges, however, convicted the first accused alone for offence u/s 302 IPC. The trial Court acquitted the appellant from the other charges. Challenging the said conviction and sentence, the appellant is now before this Court with this appeal.

10. We have heard the learned Senior Counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

11. At the outset, it needs to be highlighted that as against the acquittal of the accused 2 and 3 from the charges for offences 498(A), 302 r/w 109 IPC and Section 4 of the Dowry Prohibition Act, neither the State nor the victim has filed any appeal before this Court. Thus, the acquittal of the accused 2 and 3 has become final. Now what remains to be considered by this Court in this appeal, is as to "whether the conviction and sentence imposed on the appellant u/s 302 IPC simplicitor is sustainable or not?"

12. The learned Senior Counsel appearing for the appellant would submit that though it is alleged that the FIR was registered at 11.00 a.m., on 30.12.2002, the same has reached the hands of the learned Judicial Magistrate in the same town at 5.55 p.m. on 02.01.2003, i.e., after three days. According to the learned Senior Counsel, absolutely there is no explanation as to why there was such inordinate delay of about three days in forwarding the FIR to the Court.

13. The learned Additional Public Prosecutor would fairly submit that no evidence has been let in to explain the said delay. As per the law laid down by the Hon'ble Supreme Court in Thulia Kali vs The State of Tamil Nadu [1973 AIR (SC) 501], we are of the view that this inordinate delay in forwarding the FIR to the Court, which remains unexplained, creates initial doubt in the case of the prosecution.

14. Next comes the evidences of P.Ws.1 to 4, upon which the prosecution has to solely depend on. As we have already pointed out, P.Ws.1 to 4 are not only relatives of the deceased, but also highly interested in the case of the prosecution. It is not on that score we are inclined to reject the evidences of P.Ws.1 to 4. As per the settled law, because they are interested in the prosecution case and because they are also closely related to the deceased, their evidence requires only close scrutiny. Apart from that, the trial Court has rejected the evidences of P.Ws.1 to 4 as against the accused 2 and 3, though all these witnesses have spoken about individual overt acts of the accused 2 and 3 also. So far as the appellant is concerned, again, the trial Court has rejected the evidences of P.Ws.1 to 4 in respect of the charges u/s 4 of the Dowry Prohibition Act and consequentially Section 498(A) IPC. Thus, even in respect of the appellant, the trial Court has believed P.Ws.1 to 4 only in part. It is too well settled that as per the judgment of the Hon'ble Supreme Court in VADIVELU THEVAR vs STATE OF MADRAS (1957 AIR 614, 1957 SCR 981), when the witnesses are only partly believable, prudence requires corroboration from independent sources. Here in this case, absolutely there is no corroboration from any other independent source to corroborate the evidences of P.Ws.1 to 4. As we have already pointed out, the prosecution is left only with the evidences of P.Ws.1 to 4.

15. Now let us examine whether it will be safe to rely on the evidences of P.Ws.1 to 4 alone in order to sustain the conviction of the accused. It is the positive case of the prosecution that the accused committed murder of the deceased by smothering. Now let us examine whether the prosecution has proved that the deceased died a homicidal death by means of smothering. P.W.14 - Dr.Murugesan, who conducted autopsy on the body of the deceased has opined that the deceased would appear to have died of asphyxia due to smothering with multiple injuries with post-mortem drowning. He has further mentioned that there were also post-mortem injuries on the body of the deceased. So far as the injuries found on the deceased which are ante mortem in nature are concerned, it cannot be ruled out that while

falling into the well and by coming into contact with the side wall or the projections in the well, the deceased would have sustained those injuries. At any rate, according to the doctor, these ante mortem injuries were not the cause for the death. According to the defence, the death was due to drowning, whereas, according to the prosecution, the death was due to smothering. It is not necessary for the accused to prove his case, that the death was due to drowning with the same vigour in which the prosecution is expected to prove that the death was due to smothering. P.W.14 has been extensively cross examined by the defence with reference to various observations in respect of cause of death as found in the text books authored by eminent Doctors. P.W.14 the Doctor has admitted with reference to the dead body of the deceased in this case, that he was not able to disagree with the said observations found in the opinion expressed by leading authors. Since it is a case based on circumstantial evidence, it is for the prosecution to rule out the possibility of death due to drowning.

16. The learned Senior Counsel relied on the observations of the leading authors in Forensic Medicine to substantiate his contention that to rule out the death due to drowning, "Diatom Test" is a fool-proof test. In this regard, in the instant case, there was no Diatom Test conducted at all to find out, whether the death was due to drowning or due to smothering. The Doctor has opined in general terms that the death was due to asphyxia. It is common knowledge that asphyxia may be due to strangulation, may be due to suffocation, may be due to smothering, may be due to hanging and may be even due to drowning. Because of drowning, the deceased would have swallowed water and inhaled water into lungs, as a result, due to asphyxia, the deceased would have died. Whether the death in this case had occurred due to asphyxia due to drowning has not been ruled out by the prosecution by conducting Diatom examination for the water in the lungs and for the water in the well. Thus, scientifically the prosecution has failed to rule out the possibility of death due to drowning.

17. Simply because there were symptoms of asphyxia, the doctor without even ruling out the said asphyxia due to drowning, has opined that the death was due to asphyxia due to smothering. To sustain the opinion that the asphyxia was due to smothering, P.W.14 has not given any sound reasons. Thus in our considered view, the prosecution has miserably failed to rule out the possibility of the death due to drowning. As we have already pointed out, according to the accused, the deceased had fallen into the well and died due to drowning. The said defence has been proved by the accused by establishing the probabilities.

18. The learned Senior Counsel would next contend that P.W.1 has stated that there were blood stains on the wall and the floor of the deceased, but, in the observation mahazar and in the evidence of P.W.18, nothing has been stated that there were blood stains on the wall and the floor of the house, thereby indicating that the deceased had been attacked in the bed room of the accused. Had it been true that there were blood stains, the prosecution would have done well by summoning a Forensic expert to take swab of the blood stains, so as to draw DNA from out of the same and to prove that the blood stains were that of the deceased. Had this been done, certainly the prosecution would have been in a better position to scientifically prove that the deceased had been attacked and killed by means of smothering in the bed room. Absolutely there is no explanation by the prosecution as to why this was not done. It is in the evidences of P.Ws.1 to 4 that the deceased spoke on several days and on several occasions complaining against these three accused, making out circumstances, which resulted in the death of the deceased. This fact could have been proved by the prosecution by proving the call details from the service provider. This has also not been done to scientifically prove the said fact. Further, all these conversations between the deceased, P.W.1 and other family members were relating to the demand for dowry and consequential harassment, but the trial Court has rejected the prosecution allegation relating to demand of dowry and harassment. Therefore, the same cannot be re-opened by the prosecution without there being an appeal challenging the said findings of the trial Court.

19. When the major part of the evidence of P.Ws.1 to 4 who are interested witnesses has been rejected by the trial Court, which has become final, we find it difficult to act upon the evidences of P.Ws.1 to 4 alone, that too in the absence of clear proof of homicide to sustain the conviction of the first accused. Since the conviction is u/s 302 IPC, no presumption of homicidal death could be raised as it could be done in a case of offence u/s 304B IPC.

20. At this juncture, again we want to reiterate that the enormous delay in forwarding the FIR which creates doubt in the case of the prosecution remains unexplained. That doubt is further strengthened by the other facts, which we have discussed hereinabove. In view of the foregoing discussion, we hold that it is difficult to sustain the conviction of the appellant. We hold that the prosecution has not proved the case beyond reasonable doubts and therefore, the appellant is entitled to acquittal.

In the result, the appeal is allowed. The conviction and sentence imposed on the appellant by the trial Court are set aside and the appellant is acquitted of all the charges. The fine amount, if any paid, by the appellant shall be returned to him.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

gms

To

1. The Additional Sessions Judge,
Chengalattu,
Kancheepuram District
2. do thro the Principal Sessions Judge
Chengalpattu
3. The Director General of Police
Chennai
4. The District Collector
Kancheepuram
5. The Superintendent
Central Prison
Puzhal, Chennai
- 6.The Inspector of Police
Madhuranthakam Police Station
Kancheepuram District.
7. The Judicial Magistrate
Maduranthakam
- 8.The Public Prosecutor
High Court, Chennai.

Cr1.A.No.401 of 2012

PPA (CO)
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