

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 3.6.2016

CORAM:

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

Crl.A.No.711 of 2013

Rajesh @ Rajesh Kannan ... Appellant

vs.

State, rep by its
Inspector of Police,
Nagore Police Station,
Nagai District.
Crime No.729/2007. ... Respondent

Criminal appeal preferred under Section 374(2) Cr.P.C.,
against the judgement dated 27.9.2013 passed by the District and
Sessions Judge, Nagapattinam in S.C.No.179 of 2009.

For Appellant : Mr.R.Thamaraiselvan

For Respondent : Mr.M.Maharaja, Addl.P.P.

JUDGMENT

(Judgement of the Court was delivered by V.Bharathidasan, J.)

The appellant in the appeal is the third accused in S.C.No.179 of 2009 on the file of the District and Sessions Judge, Nagapattinam. Totally, there were three accused. They all stood charged for the offence under Sections 364, 302 read with 34 and Section 201 of the Indian Penal Code. Since A1 and A2 died pending trial, Trial was conducted in respect of the third accused viz., the appellant alone. Pending trial, the other two accused viz., A1 and A2 died and hence, the charges levelled against them got abated. By judgment dated 27.9.2013, the Trial Court convicted the appellant for offence under Section 302 of the Indian Penal Code and sentenced him to undergo life imprisonment and also imposed a fine of Rs.500/-, in default, to undergo rigorous imprisonment for a further period of two years, sentenced him to undergo five years

rigorous imprisonment for offence under section 364 of the Indian Penal Code with a fine of Rs.300/- in default to undergo six months rigorous imprisonment and sentenced him to undergo two years rigorous imprisonment with a fine of Rs.200/- in default to undergo rigorous imprisonment for a further period of six months for offence under section 201 of the Indian Penal Code. Challenging that conviction and sentence, the appellant is before this Court with this appeal.

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

(a) The deceased one Sakthi Selvam was the third son of P.Ws.5 and 6. He was a Mason working alongwith his father PW5. The deceased is also a friend of A1 to A3. On 19.11.2007, the deceased, the appellant and another accused viz., A2, alongwith PW7 consumed alcohol at Vanchur and thereafter, they went to one Karpagam Textile Store at Nagore, for purchasing clothes for the deceased. In the above shop, one Meera was working. While purchasing clothes, there was a quarrel between the abovesaid Meera and the deceased and at that time A1 in this case came to the shop and he supported the said Meera and hence there was a quarrel between A1 and the deceased. PW7, who is closely related to the deceased, compromised them and sent the deceased to his house and due to the above quarrel, A1 to A3 decided to murder the deceased Sakthi Selvam and on the same night at about 8.00 pm, they brought the deceased in an auto driven by PW10, and all the accused attacked the deceased with Aruval and inflicted multiple injuries and caused his death and threw the body into the sea, near Sillady at Nagore.

(b) Subsequently, on 20.11.2007, at about 7.00 pm, PW1 Village Administrative Officer, Nagapattinam, received a telephonic message that a dead body is floating near Kaduvai river bridge. Immediately, he rushed to the spot alongwith the Village Assistant and found the body floating there. He lodged a complaint before Nagapattinam Police Station, under Ex.P1.

(c) PW20, Inspector of Police, Nagapattinam Town Police Station, registered a case in Crime No.400 of 2007 under section 174 of the Code of Criminal Procedure. FIR is Ex.P18. He sent the same to the Judicial Magistrate, Nagapattinam. Thereafter, he reached the spot where the body was floating, at about 8.45 pm and prepared an observation mahazar and a rough sketch (Exs.P7 and P8) in the presence of PW2, who was working as Security Officer, Nagapattinam Port. Then he conducted inquest in the presence of PW1 and other panchayatdars at about 9.45 pm and prepared inquest report Ex.P20. After the inquest, he sent the body to Nagapattinam Government Hospital. On the next day viz. on 21.11.2007, on receipt of information from the police,

P.Ws.5 and 6, the parents of the deceased, identified the body and PW5 gave a statement that all the accused in this case took the deceased in an auto and they murdered their son. PW20 recorded the statement, Ex.P12, from PW5 and based on that, he altered the crime into one under section 302 of the Indian Penal Code and the altered FIR is Ex.P21.

(d) PW3 is the Surgeon working in the Government Hospital, Nagapattinam, who conducted autopsy on the dead body and found the following injuries:-

"Body was found in river with multiple injuries. (1) Cut injury around neck. (2) Cut injury in R. forearm near elbow (3) Cut injury in R.hand. (4) Cut injury near L.knee. (5) Cut injury in L.forearm. (6) Cut injury near L.Scapula. (7) Cut injury L.temporal scalp (8) Cut injury R.Shoulder (9) Wound in Right arm. Brain region intact. Liver, kidney, Lungs, Heart appear pale. No fracture in pelvic, thorax, stomach intestine empty. No discharge from nose, mouth.

PW13 opined that the deceased would appear to have died of shock due to multiple injuries. He issued post mortem certificate, Ex.P9.

(e) In the meantime, PW20 recovered M.O.1 lungi, M.O.2 shirt, M.O.3 Banian and M.O.4 brief, belonged to the deceased. Subsequently, on 3.12.2007, A2 and A3 surrendered before Judicial Magistrate, Trichy and PW20 took them into police custody, on 5.12.2007, and A2 and A3 voluntarily gave confession statements and based on the disclosure statements of A2 and A3, PW20 recovered M.O.9 and M.O.10, Aruvals under Exs.P5 and P6 and recorded the statement of A3 the appellant. Based on the statement of A2 and A3, he came to know that the occurrence took place within the jurisdiction of Nagore Police Station, hence transferred the case to Nagore Police Station.

(f) Thereafter, PW21, who was working as Inspector of Police, Nagore Police Station, taking A1 into police custody, took him to the scene of occurrence. Once again, he prepared an observation mahazar Ex.P15 and a rough sketch Ex.P22, in the presence of PW22 and another witness. He also recovered M.O.7 aruval under Ex.P14. On 4.1.2008, he obtained statements from some other witnesses and sent the recovered material objects for chemical analysis and after completion of investigation, he filed charge sheet against all the accused for offence under sections 364, 302 and 201 of the Indian Penal Code.

(g) Based on the above materials, the Trial Court framed charges as detailed above and the accused denied the same as false. In order to prove the case of prosecution, as many as 21 witnesses were examined and 26 documents and 10 material objects were marked.

3. Out of the said witnesses, PW1 is the Village Administrative Officer of Nagapattinam, who has spoken about the receipt of telephonic message that a body was floating in Kaduvai river bridge. Immediately, after seeing the body, he lodged a complaint before PW20, the Inspector of Police, Nagapattinam Police Station, under Ex.P1, and he is also a witness to recovery of aruvals M.Os.9 and 10, based on the disclosure statements of A2 and A3. PW2 is also a witness to the observation mahazar, Ex.P7. PW3 is the Doctor working in the Government Hospital, who conducted post-mortem on the dead body and has opined that the deceased would appear to have died of shock due to multiple injuries. PW4 is the Chemical Analyst in the Regional Forensic Lab. He has spoken about the chemical analysis of material objects and his report, Ex.P11. PW5 is the father of the deceased. He has spoken about the missing of his son from 19.11.2007 and he identified the body of the deceased at the Government Hospital, Nagapattinam. PW6 is the mother of the deceased, who has spoken about the friendship between the deceased and the accused and she has also identified the body. PW7 is a close relative of the deceased and his evidence was that on 19.11.2007, the deceased, the appellant, and A2 consumed liquor at Vanchur and thereafter, they went to a Textile shop for purchasing clothes for the deceased. It is his further evidence that at that time, there was a quarrel between one Meera and the deceased and thereafter, A1 came to the shop and in support of the said Meera, he quarrelled with the deceased and he compromised the deceased and sent him to his house. He is the witness who has spoken about the motive. PW8 is a neighbour of A2. PW9 is an employee working in Kurinchi Bakery and he turned hostile. PW10 is an auto driver. His evidence was that on 19.11.2007, at about 8.00 pm, A2, hired the auto and took him to Thumbai Poo Madam Street, near Kurinchi Bakery, where he took another person and from there they proceeded to Peer road, where A1 and A3 got into the auto and he dropped them near Pallivasal Street. He identified the person whom A2 took at Thumbai Poo Madam Street as the deceased from the photographs of the dead body of the deceased, M.O.6. (series). PW11 is working in the Textile Store and he turned hostile. PW12 is the Village Administrative Officer, Nagore, and he is the attesting witness for recovery of M.O.7 aruval from A1, based on his disclosure statement, in Ex.P15. PW13 is the Photographer who took photographs of the dead body, marked as M.O.6.(series). PW14 is the Head Constable working in

Velipalayam Police Station, who submitted the FIR to the Judicial Magistrate. PW15 is the Head Constable, who handed over the FIR to the Inspector of Police at Nagore Police Station, PW21. PW16 is the Head Constable who took the body for post-mortem. PW17 is the Sub Inspector of Police, who altered the crime into one under section 302 of the Indian Penal Code. PW18 is the Head Constable who submitted the altered FIR to the Judicial Magistrate Court. PW19 is the Special Sub Inspector who submitted the material objects for chemical analysis. PW20 is the Inspector of Police, Nagapattinam Police Station, who initially investigated the crime and based on the statements of A2 and A3, found that the scene of occurrence falls within the jurisdiction of the respondent police Station, hence he handed over the case records to PW21. PW21 is the Inspector of Police, Nagoor Police Station who conducted further investigation and filed the charge sheet.

4. A2 in this case died during trial. When the above incriminating materials were put to A1 and A3 under section 313 of the Code of Criminal Procedure, they denied the same as false. Their defence was a total denial. They did not choose to examine any witness and mark any document. Subsequently, A1 also died and charges against him abated. Hence, A3 viz., the appellant, alone remained and faced the trial.

5. Having considered all the above, the Trial Court convicted the accused for the offence under sections 364, 302 read with 34 and section 201 of the Indian Penal Code and imposed sentences as stated in the first paragraph of the judgment. Challenging the above conviction and sentence, the accused is before this Court.

6. We have heard Mr.R.Thamaraiselvan, learned counsel for the appellant and Mr.Maharaja, learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

7. This is a case of circumstantial evidence. The Hon'ble Supreme court in TOMASO BRUNO v. STATE OF UTTAR PRADESH ((2015) 7 SCC 178 has held as follows:-

"13. In every case based upon circumstantial evidence, in this case as well, the question that needs to be determined is whether the circumstances relied upon by the prosecution are proved by reliable and cogent evidence and whether all the links in the chain of circumstance are complete so as to rule out the possibility of innocence of the accused.

14. There is no doubt that conviction can be based solely on the circumstantial evidence. But it should be tested on the touchstone of the law relating to circumstantial evidence. This Court in *C. Chenga Reddy & Ors. vs. State of A.P.*, (1996) 10 SCC 193, para (21) held as under :-

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

15. After referring to a catena of cases based on circumstantial evidence in *Shivu and Anr. vs. Registrar General, High Court of Karnataka & Anr.*, (2007) 4 SCC 713, this Court held as under:-

"12. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. {See *Hukam Singh v. State of Rajasthan*, (1977) 2 SCC 99; *Eradu v. State of Hyderabad* (AIR 1956 SC 316), *Earabhadrapa v. State of Karnataka* (1983) 2 SCC 330, *State of U.P. v. Sukhbasi* (1985 (Supp.) SCC 79), *Balwinder Singh v. State of Punjab* (1987) 1 SCC 16 and *Ashok Kumar*

Chatterjee [pic]v. State of M.P (1989 Supp. (1) SCC 560) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab*, AIR 1954 SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt."

8. Keeping the above principle in mind, let us now look into the circumstances relied on by the prosecution. The first circumstance relied by the prosecution is motive. PW7, a close relative of the deceased, has stated that on 19.11.2007, the deceased, appellant viz., A3 and A2 consumed liquor together and thereafter, they went to one Karpagam Textile Store at Nagore, where there was a quarrel between one Meera and the deceased and in support of the above said Meera, A1 in this case quarrelled with the deceased and he compromised them and sent the deceased to his house. From the evidence of PW7, it is crystal clear that it was only the deceased and A1 quarrelled between themselves and the appellant/A3 had nothing to do with the quarrel and absolutely there is no evidence to the effect that the appellant/A3 had any motive to murder the deceased. It is evident that before the quarrel, both the deceased, the appellant, alongwith A2 and PW7, consumed liquor together, and it is also the evidence of PW6, mother of the deceased, that the appellant is a close friend of the deceased. In the said circumstances, no motive could be attributed to the appellant in the absence of any other evidence.

9. The next circumstance relied on by the prosecution is the last seen theory. PW10, auto driver is said to have seen all the accused and the deceased travelling together in his auto on 19.11.2007 at about 8.00 pm. According to PW10, A2 in this case hired his auto and took him to Thumbai Poo Madam Street, near Kurinchi Bakery and from there, he took yet another person with him, whose identity is not known to him and thereafter, A2 took A1 and A3 in the auto and dropped them near Pallivasal Street. As per the evidence of PW10, he does not know the identity of the deceased, and subsequently, he identified the deceased from the photograph of the dead body of the deceased

(M.O.6.). PW10 has been examined by PW21 only on 14.12.2007, nearly after 25 days from the date of occurrence. Hence, it is highly doubtful whether PW10 would have really remembered the deceased, as he was taken by him in the auto during night time. Hence, it is not safe to rely upon the evidence of PW10 to arrive at a conclusion that the accused and the deceased were together before the occurrence.

10. The next circumstance relied upon by the prosecution is recovery of aruvals M.Os.9 and 10. PW1, Village Administrative Officer, is the attesting witness for recovery of aruvals under Ex.P6. As per the chemical analysis report (Ex.P25), no bloodstain was found in the aruvals. PW1, mahazar witness, is also not clear about the recovery. In his cross-examination, he has stated that he was not able to say at whose instance, aruvals were recovered. Hence, recovery is also doubtful. Even assuming that the recovery is proved, conviction cannot be imposed on the basis of recovery alone, in the absence of any other proved circumstances.

11. It is also pertinent to note that the deceased and the accused were close friends. It is the evidence of PW6, mother of the deceased, and PW7 that the deceased and the appellant/accused were friends. There is no chance for conspiracy and therefore, no motive could be attributed to the accused/appellant for committing murder of the deceased and no conviction can be imposed on the accused based on suspicion. The Honourable Supreme Court in KANHAIYA LAL v. STATE OF RAJASTHAN ((2014) 4 SCC 715) has held as under:-

"The theory of last seen - the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact and the situation bears great similarity to that in Madho Singh vs. State of Rajasthan (2010) 15 SCC 588."

12. The above judgment of the Honourable Supreme Court is squarely applicable to the facts of the present case. In the above circumstances, we hold that the prosecution has miserably failed to prove the guilt of the accused beyond any reasonable doubt. Therefore, the conviction and sentence imposed on the

appellant cannot be sustained and hence, the appellant is entitled for acquittal.

12. In the result, the criminal appeal is allowed. The conviction and sentence imposed by the District and Sessions Judge, Nagapattinam in S.C.No.179 of 2009 is set aside. The appellant is acquitted of all the charges. Fine amount, if any paid by him shall be refunded forthwith.

sd/-

Assistant Register

//True Copy //

Sub Assistant Register

ssk.

To

1. The Judicial Magistrate, No.2, Nagapattinam
2. - do - thoru the Chief Judicial Magistrate, Nagapattinam
3. District and Sessions Judge, Nagapattinam.
4. The Inspector of Police,
Nagore Police Station, Nagai District.
5. The Superintended of Central Prison, Cuddalore
6. The District Collector, Nagapattinam
7. The Director General of Police, Mylapore, Chennai-4
8. The Public Prosecutor, High Court, Madras.

Crl.A.No.711 of 2013

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VS 30/12/2016

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