

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

and

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

Criminal Appeal No.869 of 2016
and
Crl.M.P.No.14143 of 2016

Albert Anthonymsamy @ Settu ... Appellant/Accused

- Vs -

State rep by the Inspector of Police,
Denkanikottai Police Station,
Krishnagiri District.
(Cr.No.307 of 2014) ... Respondent/Complainant

Prayer:- Appeal filed under Section 374 of the Code of Criminal Procedure against the judgment passed by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri in S.C.No.112 of 2015 dated 12.04.2016.

For Appellants : Mr.K.Gandhi Kumar

For Respondent : Mr.P.Govindaraj
Additional Public Prosecutor

J U D G M E N T
सत्यमेव जयते

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

The appellant, sole accused in S.C.No.112 of 2015 on the file of the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri stood charged for offences under Sections 376, 302 and 379 I.P.C. The trial Court by judgment dated 12.04.2016, acquitted the appellant from the charge under Section 376 I.P.C., however, convicted him for the offence under Sections 302 and 379 I.P.C. and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for six months for the offence under Section 302 I.P.C. and to pay a fine of Rs.5,000/- in default to undergo

simple imprisonment for six months for offence under Section 379 I.P.C. 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:

2.1. The deceased in this case was one Mrs.Nisha @ Rameshwari. She was a widow. She was working in a bakery shop at Vettukattuvalasai village in Erode district. The accused hails from Seshurajapuram village in Denkanikottai taluk. For some time, he was also staying in Erode district and was working in a private concern. He had a friend by name Alimuthu. Some time before the occurrence, there was a missed call to the mobile phone of Alimuthu. Mr.Alimuthu responded and came to know that the caller was the deceased Mrs.Nisha.

2.2. Mr.Alimuthu and Mrs.Nisha used to talk to each other over phone and after sometime they stopped taking over phone. The accused came to know about the same. He received the mobile phone number of the deceased from Alimuthu and started talking to her. In such a way, the accused and the deceased were talking frequently through the mobile phone. In that process, the accused came to know that the deceased was having sexual relationship with her employer. The accused therefore developed a desire to have sex with the deceased. The deceased was aged about 40 years, whereas, the accused was hardly aged 19 years.

2.3. On 30.05.2014, the deceased called the accused over phone and informed him that she was in need of Rs.2000/-urgently. The accused assured to give her Rs.2000/-. By the time, the accused had joined a private company in Hosur. Therefore, he wanted the deceased to come to Hosur to receive the amount.

2.4. On 01.07.2014, at 07.00 p.m. the deceased along with her younger daughter (child) came to Hosur bus stand, from where, she contacted the accused. The accused went to the bus stand in a motorcycle bearing registration No.TN 70 K 5481 and took the deceased and the child to various places and finally to a nearby forest area. When the accused wanted to have sexual intercourse with the deceased, she declined. This resulted in a brawl between them. Finally the accused strangled her and when she fainted, he took her deep into the forest and had sexual intercourse with her and dropped a stone on her head. Then, he removed the jewels belonging to the deceased from her person such as brass thali, a pair of brass ear stud and a cell phone. Then he took the child in the motorcycle abandoned the child at a distant place and fled away.

2.5. The occurrence was not witnessed by anyone. The child aged about 3 ½ years was sleeping at that time. It is alleged that the occurrence had taken place around 03.00 a.m. on 02.07.2014. P.W.1 the Village Administrative Officer of Sallivaram village was informed by his assistant around 06.00 a.m. on 02.07.2014 that a woman seriously wounded was lying near the forest. P.W.1 immediately rushed to the place of occurrence and found the deceased lying unconscious with number of injuries on her body. Immediately, he made arrangement for 108 ambulance and took her to the Government hospital at Hosur and admitted her as inpatient.

2.6. At 09.00 am. on the same day, P.W.1 went to Denkanikottai police station and made a complaint. At that time, neither the identity of the deceased nor that of the assailant was known. Based on the said complaint, P.W.16 the then Sub Inspector of Police registered a case in Crime No.307 of 2014 under Section 207 I.P.C. Ex.P10 is the F.I.R. and Ex.P1 is the complaint. He forwarded both the documents to Court, which was received by the learned Magistrate at 05.40 p.m. on 02.07.2014.

2.7. P.W.18 took up the case for investigation. He immediately rushed to the Government hospital at Hosur. But the deceased continued to be unconscious and therefore, he could not examine her. Then, he went to the place of occurrence and prepared an observation mahazar and a rough sketch in the presence of witnesses. While so, the deceased who was undergoing treatment in the hospital died at 05.10 p.m. on the same day. Therefore, P.W.18 altered the case into one under Section 302 I.P.C. He conducted inquest on the body of the deceased. Though he took out all efforts, the identity of the deceased was not known. Then, he forwarded the body for postmortem.

2.8. P.W.17 Dr.Thunder Chief conducted autopsy on the body of the deceased on 03.07.2014 at 01.45 p.m. He found the following injuries:

"External Injuries: (1) 11x9 cm on right side of face and forehead. (2) 6x2 cm on front of upper part of neck. (3) 2x2 cm on right side of chin. (4) 3x2 cm on left side of jaw. (5) 4x2 cm on left side of face near ear. (6) 4x2 cm on front of mid neck. (7) 1x0.5 cm on back of left arm. (8) 1x1cmxbone deep laceration on right eyebrow. (9) 2 cm sutured wound with 2 intact sutures on right side of face. On removal of sutures margins

were irregular. (10) both eye lids were swollen. (11) Swelling of right side of face. On dissection, right side facial muscles and sub cutaneous fatty tissues shows diffuse reddish contusion.

Dissection of Thorax and Abdomen: Rib cage was intact. Heart was normal in size; chambers contained fluid blood. Valves, great vessels and coronaries were normal. Lungs were normal in size, cut section:normal. Stomach contained 10 grams of dark brown semi solid material with no specific odour, mucosa was normal. Liver, spleen and kidneys were normal in size, cut section : normal. Urinary bladder was empty. Uterus was measuring 6.0x4.5x2.0 cm, cut section:cavity empty. Pelvic bone was intact.

Dissection of Head: Scalp:Diffuse dark red scalp deep contusion over right fronto parieto temporal region. Right temporalis muscle was contused. Vault and Duramater were intact. Brain was normal in size. Sub Dural Hemorrhage and sub arachnoid hemorrhage seen all over the brain surface, cut section was pale. Base was intact.

Dissection of neck: 4x2x0.5 cm reddish contusion was seen in the front of upper part of neck muscle. Blood vessels, bony and cartilaginous structures were normal. Hyoid bone was intact. Spinal column was intact."

He collected the vaginal fluid for chemical examination and the report revealed that there were no spermatozoa. He opined that the death of the deceased was due to shock and hemorrhage due to head injuries.

2.9. P.W.18 during the course of investigation collected the bloodstained clothes from the body of the deceased and forwarded the same also to Court. On 11.07.2014, P.W.18 arrested the accused in the presence of P.W.1 and another witness. While in custody, he made a voluntary confession, in which, he disclosed the place where he had hidden a thali made of brass, four nanakuzhal, brass thali coins two numbers, one set of brass ear studs and a cell phone. He also disclosed the place where he had hidden Hero Honda Splendor Motorcycle. In pursuance of the same, he took the police and the witness to the place of occurrence and produced M.Os.4 to 8 jewels, cellphone and M.O.9-

motorcycle. P.W.18 recovered the same under a mahazar. Thereafter, P.W.18 took efforts to find out the identity of the deceased. During investigation he came to know that the dead body was that of the deceased. On completing the investigation, he laid chargesheet against the accused.

2.10. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgment. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 18 witnesses were examined, 17 documents and 15 material objects were marked.

2.11. Out of the said witnesses, P.W.1 VAO has stated that he found the deceased lying unconscious at the place of occurrence and took her to the Government Hospital. He has spoken about the complaint made to the police. He has also spoken about the arrest of the accused on 11.07.2014 and consequential recoveries of M.Os.4 to 9 from out of the disclosure statement made by the accused. P.Ws.2 to 8 who are all residents of the locality where the dead body was found have stated that they do not know anything about the occurrence. They have also stated that they do not even know the identity of the deceased.

2.12. P.W.9 has stated that on 01.07.2014, he along with P.W.10 and one Jagan were proceeding in a lorry towards Anchetty, three persons namely a male, a female and a child were standing by the side of the road. By gesture, they wanted P.W.9 to stop the lorry. Accordingly, P.W.9 stopped the lorry and enquired what they were doing around midnight. They told that they came in a motorcycle but unfortunately the petrol in the motorcycle was exhausted. The male person (who was later on identified as the accused) told him that he was working in Titan company in Hosur. He wanted help from P.W.9. Accordingly, P.W.9 allowed to travel in the lorry and when the lorry reached Anchetty petrol bunk, all the three got down from the lorry. Then, P.W.9 and others proceeded further. On 03.07.2014, he found the photographs of the dead body in the newspaper. He identified the dead body as that of the woman who travelled in the lorry on 01.07.2014 along with a male. But, he has not identified the accused as the one who travelled in the lorry along with the deceased.

2.13. P.W.10 has stated that he travelled in the said lorry driven by P.W.9. He has also spoken about the same facts as spoken by P.W.9. He has also not identified the accused in Court. P.W.11 has stated that he was a resident of Anchetty. He has further stated that on the crucial date, he drove a tempo lorry carrying tomatoes to Anchetty. When they were one kilometers before Anchetty around 03.00 - 04.00 a.m. a small

child was standing in the middle of the road. In yet another tempo driven by P.W.12 also came to the spot. Noticing the child, he too stopped the tempo. At that time, the accused suddenly came there in the motorcycle. He told them that the child was his child and leaving the child by the side of the road, he went to pass urine. Then, he took the child in a motorcycle and went away. P.W.12 has stated that he noticed the number of the vehicle as TN-70-KA-5481. Thereafter, he came to know that the dead body of the women was found there.

2.14. P.W.13 is the brother of the deceased. He has identified the dead body from the clothes recovered from the body and from the photographs of the dead body. P.W.14 is yet another relative of the deceased. He has also spoken about the identity of the deceased and he has further stated that the child was in a home. P.W.15 the learned Magistrate has stated that he recorded the statement of few witnessed under Section 164 Cr.P.C. P.W.16 has spoken about the registration of the case on the complaint of P.W.1. P.W.17 has spoken about the postmortem conducted and his final opinion regarding the cause of death. P.W.18 has spoken about the investigation done and the final report filed.

3. 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 anyone nor mark any documents. His defence was a total denial. Having considered all the above the trial Court convicted the appellant as detailed in the first paragraph of this judgment and that is how the appellant is before this Court with this appeal.

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

5. This is a case based on circumstantial evidence. There is no controversy over the fact that the deceased was lying unconscious with the head injury near Anchetty forest at 06.00 a.m. on 02.07.2014. There is also no controversy that P.W.1 took her to the Government hospital and admitted her, where she died at 05.30 p.m. on the same day. From the medical evidence, it has been established that the death of the deceased was a homicide. So far as the identity of the deceased is concerned, P.Ws.13 and 14, the brothers of the deceased, identified the dead body from the photographs and from the dress materials. The identity of the deceased was also not seriously disputed by the accused. From these evidences, we hold that the prosecution has clearly established that the death of the deceased was a homicide. Now the question is who is the perpetrator of the crime.

6. As we have pointed out, until the dead body was identified by P.Ws.13 and 14 on 11.07.2014, the identity of the deceased was not known. However, the accused was arrested on 11.07.2014 itself. The accused was not known to anyone previously. In order to prove that it was this accused who was the perpetrator of the crime, the prosecution relies on the evidences of P.Ws.9 and 10. P.Ws.9 and 10 have stated that on 01.07.2014, midnight, six kilometers before Anchetty, when they were proceeding in the lorry, a male, a female and a child were standing by the side of the road. The male, by means of gesture wanted to stop the lorry and accordingly the lorry was stopped. They further stated that they sought help and accordingly all the three travelled in the lorry and got down near the petrol bunk at Anchetty. But P.Ws.9 and 10 have not identified the accused in Court as the one who travelled in the lorry. Therefore, the evidences of P.Ws.9 and 10 would not help the prosecution in any manner.

7. The learned Additional Public Prosecutor would submit that they identified the accused before the police, since such identification made before the police is not substantive and the same is hit by Section 164 Cr.P.C., we cannot give any weightage for the same.

8. Then comes the evidences of P.Ws.11 and 12. They have stated that when they were proceeding in two tempo vans carrying tomatoes around 03.00 a.m. on the crucial date, they found the child standing on the middle of the road. Then the accused came in the motorcycle and took the child. They have identified the accused in Court. But, there was no test identification parade conducted and they did not disclose about the occurrence immediately. They were examined only after the arrest of the accused. Thus, in the absence of prior test identification parade, the identity of the accused made by them for the first time in the Court cannot be given any weightage. Therefore, it is difficult to believe the evidence of P.Ws.11 and 12 also.

9. Then comes the evidence of P.W.1 the Village Administrative Officer and P.W.18 the investigation officer who have stated that the accused was arrested on 11.07.2014 and on his disclosure statement, the personal belongings of the deceased namely M.Os.4 to 8 were recovered from his possession. But no witness has identified M.Os.4 to 8 that they belonged to the deceased. Thus, absolutely there is no evidence that these properties were stolen properties. Though P.Ws.13 and 14 the brothers of the deceased were examined, they did not identify these properties that they were worn by the deceased lastly. Thus, the recovery of M.Os.4 to 8, assuming to be true, will

have no evidentiary value because there is no proof that they are stolen properties.

10. Except these circumstances, there is no other evidence to prove any other circumstance to conclusively prove that it was this accused who caused the death of the deceased. Though, it is stated that the accused and the deceased had frequently spoke over mobile phone and on the last day also the deceased came to Hosur only on the telephonic call made by the accused, the call details have not been collected and proved by following Section 65(B) of the Evidence Act. Absolutely, there is no evidence that there was any telephonic contact between the accused and the deceased. Thus, we find no evidence at all against the accused to prove the alleged guilt of the accused.

11. We cannot afford to convict the accused on mere surmise. But the trial Court in paragraphs 14 to 16 of the judgment has extracted the statements of P.Ws.9, 11 and 12 recorded under Section 164 Cr.P.C. and has relied on the same as though they are substantive evidence. This is not permissible in law. A perusal of the judgment of the trial Court would go to show that the trial Court has not given reasons for the conclusion that it was this accused who caused the death of the deceased instead of that, the trial Court has concluded that the accused was the perpetrator of the crime based only on mere surmise. Therefore, we are unable to sustain the conviction and judgment of the trial Court and the appellant is entitled for acquittal.

12. In the result,

(i) the appeal is allowed and the conviction and sentence imposed on the appellant by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri in S.C.No.112 of 2015 dated 12.04.2016 is set aside and the appellant is acquitted.

(ii) The fine amount, if any paid, shall be refunded to him.

(iii) Since the appellant is in jail, he is directed to be set at liberty forthwith, unless his detention is required in connection with any other case. Consequently, the connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate,
Denkanikottai.
2. Thro' The Chief Judicial Magistrate,
Krishnagiri.
3. The Sessions Judge,
Fast Track Mahila Court, Krishnagiri.
4. The Inspector of Police,
Denkanikottai Police Station,
Krishnagiri District.
5. The Superintendent,
Central Prison, Vellore.
6. The District Collector,
Krishnagiri District.
7. The Director General of Police,
Chennai-4.
8. The Public Prosecutor,
Madras High Court.

Crl.A.No.869 of 2016 and
Crl.M.P.No.14143 of 2016

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