



BEFORE THE MADURAI BENCH OF THE MADRAS HIGH COURT

Reserved on : 08.12.2017

Pronounced on : 21-12-2017

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CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA

Criminal Appeal (MD) No. 238 of 2016

Farose Khan

.. Appellant

Versus

The State represented through
The Inspector of Police,
Kottaipattinam Police Station,
Pudukottai District.

.. Respondent

Appeal filed under Section 374 (a) of Code of Criminal Procedure against the Judgment dated 28.11.2013 passed in S.C. No. 82 of 2013 on the file of District Sessions Judge (Mahila Judge), Mahila Court, Pudukottai.

For Appellant	:	Mr. S.M.A. Jinnah
For Respondent	:	Mr. C. Ramesh Additional Public Prosecutor

JUDGMENT

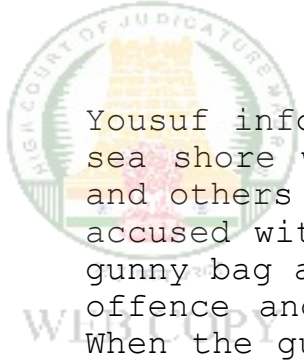
R. SUBBIAH, J

The appellant is the first accused in S.C. No. 82 of 2013 on the file of the learned District and Sessions Judge (Mahila Judge), Mahila Court, Pudukottai. He, along with the other accused/A-2 were charged for the offence punishable under Section 120-B, 369, 394 read with 302 of IPC, 302 and 201 read with 114 of IPC. After conclusion of trial, both the accused were convicted and sentenced to undergo imprisonment for various terms. As far as the appellant/first accused is concerned, he was convicted and sentenced to undergo imprisonment as below:-

Section of Law	Period of sentence	Fine
Section 120-B of IPC	To undergo rigorous imprisonment for a period of two years	---
Section 369 of IPC	To undergo rigorous imprisonment for a period of seven years	Rs.500/-, failing which to undergo simple imprisonment for a period of one year
Section 394 read with Section 302 of IPC	To undergo imprisonment for life	Rs.500/-, failing which to undergo simple imprisonment for a period of one year
Section 302 of IPC	To undergo imprisonment for life	Rs.500/-, failing which to undergo simple imprisonment for a period of one year
Section 201 read with Section 114 of IPC	To undergo rigorous imprisonment for a period of three years	Rs.500/- failing which to undergo simple imprisonment for a period of six months

2. However, the trial Court has directed that the sentences imposed on the appellant/A-1 shall run concurrently.

3. The deceased in this case is minor female girl Sahana Begum, aged 2 ½ years. PW1 is the grand father of the deceased. PW4 is the daughter of PW1 and mother of the deceased. According to the prosecution PW4 was given in marriage to one Sahabudeen and due to the wedlock, they were blessed with two sons and a daughter. The deceased is the daughter born to PW4 and Sahabudeen. According to PW1, he is residing in the same street where PW4 is also residing along with her children. Since his son-in-law Sahabudeen is employed in a foreign country, PW1 used to often go to the house of his daughter PW4 to look after her. On 28.03.2013, since it was the 12th wedding anniversary of PW4, she adorned the minor daughter with golden anklet, golden ear stud, golden bangle and covering chain. On that day, PW1 also came to the house of PW4, had lunch and slept over for some time. By 4.00 pm he woke up and came out of the house of PW4. At that time, he saw the deceased playing outside the house adorned with golden anklet, golden ear stud, golden bangle and covering chain in the neck and he proceeded towards the bazaar. At about 6.00 pm, PW4 called PW1 and stated that the deceased could not be seen any where. Therefore, PW1 made a frantic search for the deceased at Jamath and also enquired with the Villagers as to whether any one of them had seen the deceased. Thereafter, PW1 made an announcement from the Jamath through the public address system informing about the missing of the deceased. At that time, PW2 -



Yousuf informed PW1 that he saw the first accused going towards the sea shore with a gunny bag. On the basis of such information, PW1 and others went to the sea shore area where they have seen the first accused with a gunny bag. On seeing PW1 and others, he dropped the gunny bag and ran away by saying that he alone has not committed the offence and there are some other persons involved in the offence. When the gunny bag was untied, PW1 was shocked to see the deceased in an unconscious stage inside the gunny bag. PW1 also noticed that the golden ornaments which the deceased was wearing were missing and there were abrasions noticed below the ears, besides swelling near the neck of the deceased. Immediately, the deceased was taken to a Private hospital in Manalmelkudi where the Doctor, after examination, has declared the deceased brought dead. Thereafter, PW1 brought the deceased to the house. Later at about 12.15 pm, PW1 gave a complaint to PW18. On receipt of the complaint, PW18 registered a case in Crime No. 27 of 2013 for the offences under Sections 379 and 302 of IPC. Ex.P11 is the First Information Report registered against the first accused/appellant and others. The First Information Report was forwarded to the Judicial Magistrate Court, Aranthangi through PW14, Special Sub Inspector of Police and copies were forwarded to higher authorities. On receipt of a copy of First Information Report at 01.00 am, PW19, the Inspector of Police, Kottaiappattinam Police Station took up investigation and went to the scene of occurrence, where he drew a rough sketch (Ex.P12). He also drew an observation mahazar (Ex.P4) in the presence of Mohammed Marakayar (PW7) and one Mohammed Abubacker. Thereafter, PW19 conducted an inquest in the presence of Panchayatars between 01.45 am and 03.45 am and prepared an inquest report, Ex.P13. Thereafter, at about 04.45 am, PW19 sent the dead body of the deceased through Mr. Moorthy, Head Constable 1427 (PW15) with a requisition letter addressed to the Medical Officer (PW9), Aranthanti Government Hospital. Accordingly, PW9 conducted postmortem and issued Ex.P7, Postmortem Certificate wherein he opined as follows:-

"The body was first seen by the undersigned at 10.10 am on 29.03.2013. Its condition then was Rigor Mortis present in all four limbs. Post-mortem commenced at 10.10 am on 29.03.2013 at GH mortuary.

"Appearance found at the post mortem:-

2 ½ years old female body lies on back, symmetrical, pale in colour, well nourished.

Injuries:

1. 4 x 4 cm dried, abrasion right face
2. 3 x 3 cm dried abrasion left face below ear
3. 3 x 3 cm contusion left side neck below the ear
4. 1 x 1 cm dried abrasion below the left eye
5. 1 x 1 cm dried abrasion left forehead.

Eyes closed, White watery frothy present both nostrils. No ear, mouth discharge. Jaws clenched. Tongue inside. Teeth normal.



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External genitalia - Normal
No injuries, No swelling, Hymen intact
Hands empty. No fracture ribs
Heart - Chambers empty
Lungs - pale
Hyoid bone - intact
Stomach - 200 ml undigested rice materials.
Small intestine - empty
Liver, Spleen, Kidneys - normal
Bladder - empty
Uterus - in fanteile uterus
Skull - No fracture, Membrane intact.
Brain firm.

1. Stomach & contents
2. Small intestine & contents
3. Part of liver
4. Kidney
5. Preservative (NaCl)
6. Hyoid bone - sent for analysis

Postmortem concluded at 11.10 am on 29.03.2013
Death may occurred 12 - 20 hours prior to PM

- a) Reserved pending report of Chemical analysis
- b) The deceased would appear to have died of _____

TOXH 436/2013 dated 22.04.2013
Poison not detected

Bone case : 76/13 dated 06.04.2013
Hyoid bone intact.

Died of asphyxia due to compression."

4. Thus, as per the medical opinion given by the Doctor, PW9, the deceased died due to asphyxia owing to strangulation. Thus, the death was caused to the deceased due to a homicidal act.

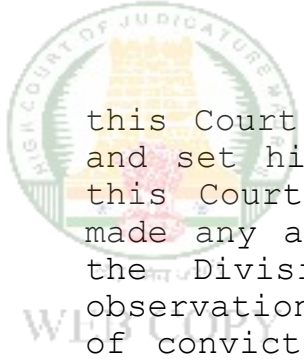
5. In continuation of his investigation, PW19 proceeded to the occurrence spot namely Seashore and drew an observation mahazar (Ex.P2) at about 5.00 am in the presence witnesses Mr. Mohammed Marakayar (PW7) and another witness namely Mohammed Abubacker. PW19 also drew yet another rough sketch namely Ex.P14 in the presence of the same witnesses. He also recorded the statement of Ibrahim Mohammed Yousuf (PW2), Mohammed Iliyas (PW3), Mohammed Marakayar (PW7) and Mohammed Abubacker. In the meantime, as per the directions of the Special Intelligence Wing attached to the District Police, Mr. Yacoob, Head Constable, PW16 came to the occurrence spot along with a sniffer dog to assist the investigation in the case. The sniffer dog went up to the house of the first accused and stopped there.



6. During the course of investigation, at about 11.00 am on 29.03.2013, PW19 went to the Government Hospital, Aranthangi and ascertained the cause of death of the deceased from the Doctor, PW9. Thereafter, PW19 proceeded to record the statement of Sahabuddin, Rizwana Begum (PW4), Habeeb Rehman (PW5), Mohammed Yousuf (PW6) and Mohammed Haneefa. On 30.03.2013, at about 01.30 pm, based on a tip-off, PW19 arrested the first accused/appellant herein in front of the Electricity Board Office, Avudayar Koil Road. On such arrest, the first accused/appellant gave a voluntary confession and it was recorded by PW19 in the presence of witnesses Pothiraj, Village Administrative Officer (PW8) and Ilayaraja. Pursuant to such confession, PW19 proceeded to the house of the first accused at Rahmath Nagar at about 03.45 pm where he recovered the jewels kept in a basket at the backyard of the house. PW19 prepared a mahazar for having seized the golden ornaments and sent it to the Court under Form No.95. PW19 thereafter sent the first accused/appellant to remand. In connection with the above said occurrence, PW19 made a manhunt for securing the second accused on the basis of the confession statement of the first accused/appellant. Accordingly, on 03.04.2013, PW19 arrested the second accused at Fishermen Colony Bus Stop, Kottaipattinam at about 2.00 pm in the presence of witnesses Raja Muniyasamy, Village Administrative Officer, PW11 and Tamilselvan. On such arrest, the second accused gave a voluntary confession statement which was recorded and thereafter, second accused was sent for remand. On 04.04.2013, PW19 recorded the statement of Arokiya Jothimani (PW12) and Abdul Nazzer (PW13). On 07.04.2013, PW19 recorded the statement of Mr. Muthiah (PW14) Special Sub-Inspector of Police and Moorthy (PW15) Special Sub Inspector of Police. On the same day, PW19 also recorded the statement of Yacoob (PW16), Head Constable attached to the Intelligent Wing who brought the sniffer dog to the place of occurrence on 29.03.2013. After completion of investigation, PW19 filed the charge sheet in the case against the accused 1 and 2 for the offences narrated hereinabove.

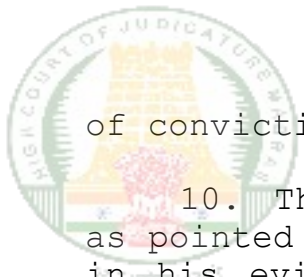
7. During the course of trial, in order to bring home the guilt of the accused, prosecution examined 19 witnesses as Pws 1 to 19, marked 14 documents as Exs.P1 to P14 and 9 Material Objects were produced. When the accused were questioned by the trial court as regards the incriminating materials made available against them in the form of deposition of witnesses and documentary evidence by the prosecution, they denied their complicity in the crime. The trial court, thereafter, on appreciation of the oral and documentary evidence, convicted and sentenced the accused/appellant herein for various terms, details of which are set out in the beginning of this Judgment.

8. The present appeal is filed only by the first accused. Even though the second accused was also convicted by the trial court, the second accused preferred an appeal before this Court in Crl.Appeal (MD) No. 12 of 2014 and by Judgment dated 21.08.2015,



this Court allowed the Criminal Appeal filed by the second accused and set him at liberty. Even in para No.4 of the said Judgment, this Court has observed that the first accused/appellant has not made any appeal against his conviction and sentence and therefore, the Division Bench of this Court refrained from making any observation regarding the correctness or otherwise of the Judgment of conviction and sentence imposed on the first accused/appellant herein.

9. The learned counsel for the appellant/first accused would contend that the prosecution failed to prove the guilt against the appellant/first accused beyond all reasonable doubts. According to the learned counsel for the appellant/first accused there are several material contradictions in the deposition of prosecution witnesses and they go to the root of the case projected by the prosecution. One such material contradiction is PW1 in his complaint, Ex.P1 has stated that at about 4.00 pm on 28.03.2013, while PW1 was coming out of the house of PW4, he saw the deceased playing in front of the house of PW4 adorned with gold jewels and at about 6.00 p.m. his daughter, PW4 called her over phone and informed about the missing of the child and while he was searching for the missing child, at about 07.30 pm PW2 informed him that he saw the first accused carrying a gunny bag and proceeding towards the sea shore. When PW1 and others saw the first accused, he dropped it and ran away by saying that he alone has not done it but others are also involved in it. On untying the gunny bag, PW1 found the deceased inside the gunny bag in an unconscious state. According to the learned counsel for the first accused/appellant, when the complaint was given as such, as mentioned above, when PW1 was examined before the trial court, he did not disclose about the information given by PW2 that he saw the accused with a gunny bag one hour before. Contra, PW1 in his evidence has stated that at about 6.00 pm he saw the deceased playing in front of the house, at about 7.30 pm, PW4 informed him about the missing of the child and during a search, at about 8.30 pm, he and others saw a person carrying a gunny bag near the house of first accused, adjacent to the seashore and on seeing PW1 and others, he dropped the gunny bag and ran away. Thus, PW1 gave two different version, one in his complaint, Ex.P1 and during the course of his examination as PW1 and therefore, such material contradiction would render the case of the prosecution vitiated. Further, the learned counsel for the appellant submitted that during the course of cross-examination, PW1 has deposed that he went to the police station and lodged a complaint at 8.00 pm itself. However, in his chief-examination, PW1 has stated that he and others have seen the gunny bag lying adjacent to the house of the first accused/appellant at 8.30 pm and on untying the gunny bag, they saw the deceased inside the gunny bag. When PW1 had seen the gunny bag itself at 8.30 p.m. he could not have given the complaint at 8.00 pm. This material contradiction in the deposition of PW1 during his chief examination as well as cross-examination would create doubt in the case projected by the prosecution. However, the trial court did not consider these material contradictions in the impugned judgment



of conviction.

10. The further contradiction in the case of the prosecution, as pointed out by the learned counsel for the appellant, is that PW1 in his evidence has stated that he had his lunch along with his grand daughter (deceased) at about 2.30 pm. However, in the postmortem report, it was clearly stated that there was undigested food particles contained in the abdomen of the deceased. If the version of PW1 is correct that he had lunch at 2.30 pm with the deceased, there may not be any possibility for availability of food particles in the stomach of the deceased at the time of postmortem. Further, soon after untying the gunny bag, the child was said to have been taken to a private hospital at Manalmelkudi and the Doctor, on examination, has stated that the child was brought dead. However, the Doctor who examined the child in the Private Hospital, Manamelkudi was not examined as a witness for the reasons best known to the prosecution. PW19, who is the investigation officer, also stated that he did not ascertain from the prosecution witnesses as to who was the Doctor who declared the deceased brought dead, what was the name of the hospital etc., PW17 also admitted that he did not enquire any one in the hospital with respect to the declaration declaring the minor child as brought dead. It is further contended that PW16 reached the occurrence Village along with a sniffer dog at about 9.15 am on 29.03.2013. If the version of the PW1 is correct that it was the accused who committed the murder of the deceased, there is no necessity for the Police Department to press into service the sniffer dog and this speaks volumes about the case projected by the prosecution and the manner in which investigation was conducted to fix the first accused/ appellant herein in the case.

11. The learned counsel for the first accused/appellant would further contend that PW5 deposed that he saw the deceased in the company of the first accused, who is his neighbour, at 5.30 pm, but PW1 himself states that at 6.00 pm he saw the deceased playing outside the house. Further, PW6 stated that at about 4.00 pm, he saw the deceased in the company of the first accused and when he questioned as to what he is talking with the deceased, first accused replied that she is the daughter of Sahabudeen and he is talking to her just like that. However, as mentioned above, PW1 himself was stated to have seen the deceased playing in front of the house adorned with golden ornaments intact at about 6.00 p.m. and therefore, it is stated that the occurrence was not proved by the prosecution in a manner required under law. The trial Court, without considering the above material contradictions, has convicted and sentenced the first accused/appellant and therefore, he prayed for setting aside the Judgment of the trial court.

12. On the contrary, the learned Additional Public Prosecutor appearing for the respondent would contend that the prosecution examined PW5 and 6 to prove the last seen theory in this case. It is mainly contended by the learned Additional Public Prosecutor that

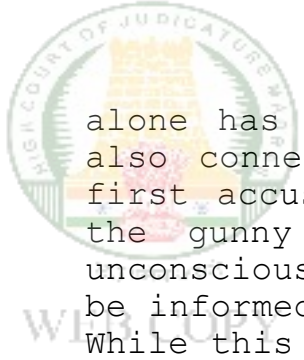


soon after the arrest, the first accused/appellant gave a confession statement and based on such confession statement, the jewels which the deceased was wearing at the time of the occurrence, were recovered from his house. The first accused/appellant has no explanation as to how the jewels, which the deceased was wearing at the time of her death, came into his possession and was kept in his house. Above all, even in the first information report, the name of the first accused/appellant was prominently mentioned by PW1. Further, to prove the guilt of the first accused/appellant, prosecution has examined the witnesses who have spoken about the specific overt act on the part of the first accused/appellant. Based on such incriminating materials made available against the first accused/ appellant, the trial Court has rightly convicted and sentenced the first accused/appellant for the offences complained of and therefore, the learned Additional Public Prosecutor prayed for confirming the Judgment of the trial court by dismissing the appeal.

13. We have heard the counsel for both sides and perused the materials placed on record. According to the prosecution, this is a case of murder for gain. The prosecution came to be launched against the first accused/appellant at the instance of PW1, who has given a written complaint under Ex.P1 dated 29.03.2013 regarding the death of his grand daughter. In Ex.P1, the name of the first accused/ appellant herein was prominently indicated by PW1.

14. At the outset, it has to be mentioned that there are contradictions and inconsistencies between the contents of the complaint given by PW1, Ex.P1 dated 28.10.2013 and the deposition of PW1 before the trial Court during his chief examination as well as cross-examination. Whether those contradictions are such that it would affect the case projected by the prosecution or not has to be examined.

15. PW1 is the grand father of the deceased and PW4 is the mother of the deceased. Both PW1 and PW4 are residing in the same Street. The first accused is also residing just opposite to the house of PW4. Since the husband of PW4 was employed in a foreign country, PW1 used to visit the house of PW4 very often to look after her. On 28.03.2013, since it was the 12th Wedding Anniversary of PW4, she adorned the minor daughter with golden anklet, golden ear stud, golden bangles and a covering chain. On 28.03.2013, PW1 came for a lunch to the house of PW4, had his lunch and slept for some time and at about 4.00 pm he woke up and went out of the house of PW4. At that time, according to PW1, he saw the deceased playing outside the house. However, at about 6 pm PW4 informed PW1 about the missing of the child. PW1 searched for the minor grand daughter frantically and also made announcement in the Public Address System in the Jamath about the missing of the girl child. While so, at about 7 pm, PW1 was informed by PW2 that he saw the first accused going towards the sea shore with a gunny bag. Therefore, PW1, PW3 and others went towards the Sea shore, where, on seeing PW1 and others, the first accused dropped the gunny bag by stating that he



alone has not committed the offence but there are others who are also connected in the act. By saying so, according to PW1, the first accused/appellant dropped the gunny bag and ran away. When the gunny bag was untied, PW1 saw the minor daughter in an unconscious state and she was taken to the Private hospital only to be informed by the Doctor that the minor baby girl was brought dead. While this is the sum and substance of the complaint given by PW1 in Ex.P1, during the course of his deposition, as PW1 before the trial Court, he deposed that PW4 informed him over phone at about 7.30 p.m. that the deceased could not be seen any where. During an intensive search for the deceased, PW1 saw a gunny bag lying adjacent to the house of the first accused and when it was untied, he saw the deceased in an unconscious state. However, in the deposition, PW1 has not stated that he was informed by PW2 that an hour before, he saw the first accused carrying a gunny bag and going towards the sea shore.

16. On appreciation of the complaint given by PW1 under Ex.P1 and his deposition as PW1 before the trial court, we can conclude that even though there are inconsistencies, the fact remains that in both Ex.P1 complaint and the deposition given by PW1, PW1 was firm that it was the first accused who had committed the crime. Further, in Ex.P1, complaint as well as in the deposition of PW1, he has stated that the deceased was kept in a gunny bag tied with a thread. This version of PW1 that the deceased was seen tied in a gunny bag remain unchanged in Ex.P1 as well as in the deposition of PW1. In fact, even in Ex.P1, the name of the first accused was clearly mentioned by PW1. Therefore, when the name of the first accused was mentioned at the earliest point of time by PW1 by stating that the deceased was seen in the company of the first accused, we see no reason to take into account the inconsistency with regard to the time mentioned in Ex.P1 complaint and in his deposition before the trial Court. Furthermore, it was clearly proved from the evidence of the prosecution that the minor girl was tied and carried away in a gunny bag. Even though there may be differences between the time at which PW1 saw the deceased playing in front of the house, the time from which the deceased went missing, the time at which a search made by PW1 and others, including the time during which information was given by PW5 about the accused in the company of the deceased, the fact remains that PW1 has firmly stated about the overtact on the part of the first accused in the crime and the complaint was given by PW1 by indicating his name. In fact, PW1 in his cross-examination has stated that he had given a complaint to police at 8.00 pm but in the chief examination he has stated that he saw the gunny bag adjacent to the house of the first accused/appellant only at 8.30 pm. This inconsistency in the deposition of PW1 with reference to time, in our opinion, cannot be given much credence to topple the case of the prosecution. Further, we find that PW1 in his evidence has stated that there were abrasions near the ears when he saw the deceased in an unconscious stage in the gunny bag. Such evidence of PW1 finds support from the medical evidence in the form of Postmortem report issued by the

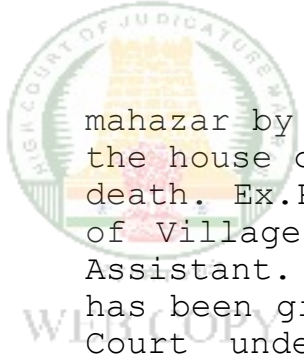


Doctor,, PW9 wherein it was mentioned that there are two abrasions below the ears of the deceased. Therefore, the description given by PW1 with regard to the injuries sustained by the deceased is supported by the medical evidence in the form of Postmortem report.

17. Next let us examine the credibility of the evidence given by other prosecution witnesses. PW2 is a Fisherman by profession and he belonged to the same Village where PW1, 4 and first accused are residing. PW2 in his evidence stated that when he, along with PW1 and others searched for the whereabouts of the deceased, they saw a gunny bag near the house of the first accused and when it was untied, they saw the deceased in an unconscious stage. PW3, who is also a resident of the same Village and who is a common neighbour of PW1, 2, 4 and the first accused, has also deposed that they saw a gunny bag adjacent to the house of the first accused and when it was untied, they saw the deceased in an unconscious stage. PW4 who is the mother of the deceased has deposed that she heard that the deceased was tied in a gunny bag kept near the sea shore. She has further deposed that she was informed that the deceased died.

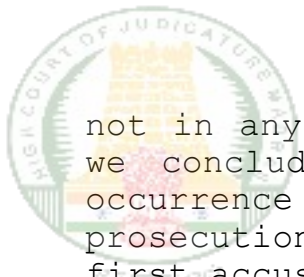
18. PW5 is a fisherman by profession and he is also a common neighbour of PW1, PW2, PW3, PW4 and the first accused. PW5 in his evidence has stated that on 28.03.2013 at 3.00 pm he went to his brother-in-law house and at about 5.30 pm when he returned to his home, he saw the deceased in the company of the first accused. Even in his cross-examination, he has stated that he saw the deceased in the company of first accused. Similarly, PW6, who is also a Fisherman by avocation, has deposed that on 28.03.2013, when he was returning to his home, at about 4.00 pm, he saw both the accused speaking to the deceased. When PW6 asked the accused as to what they are talking about with the child, they said she is the daughter of Sahabuddin. At that time, PW6 left a word of caution to leave the minor girl to the custody of her parents as she is adorned with lot of jewels. Later, on the next day, PW6 heard that the deceased died due to a homicidal act. During his chief-examination, PW6 has categorically stated that the death of the minor girl is attributable to both the accused. During cross-examination of PW6, when specific question was posed to him that he did not see the deceased in the company of the accused on 28.03.2013, as alleged, he stoutly denied it and affirmed that he had seen the deceased in the company of the accused. PW6 being a common neighbour of prosecution witness 1 to 5 and the first accused, no motive can be attributed against him to implicate the first accused in this case. Thus, on a cumulative reading of the evidence of prosecution, it can safely be concluded that it was the first accused who has committed the offence complained of and it was proved by the prosecution beyond any reasonable doubt by examining the prosecution witnesses. The prosecution has also proved the last seen theory by examining PW5 and 6 who have clearly deposed that they have seen the deceased in the company of the first accused prior to her death.

19. Above all, we find from records that Ex.P6 is recovery



mahazar by which PW19, Inspector of Police recovered the jewels from the house of 1st accused, which the deceased was wearing prior to her death. Ex.P6 was drawn by PW19, Inspector of Police in the presence of Village Administrative Officer (PW8) and K. Ilayaraja, Village Assistant. The description of the jewels so recovered under Ex.P6 has been given in detail by PW19 in Ex.P6 and they were sent to the Court under Form No.95. Such description given by PW19 was identified by PW4, Mother and affirmed that it was the jewels which the deceased was wearing prior to her death. During the course of his examination, PW8, Village Administrative Officer has categorically deposed that at the time of arrest of the first accused at about 1.15 pm, he was present along with PW19 and soon after his arrest, the first accused/appellant has given a voluntary statement to the effect that he will be in a position to identify the jewels which he had robbed from the minor girl. It is on the basis of such confession, PW19 along with PW8 went to the house of the first accused/appellant where the jewels were recovered under a Mahazar, Ex.P6 drawn at 3.45 p.m. During the course of cross-examination, nothing could be elicited from PW8 as regards his presence at the time of arrest and at the time when the jewels were recovered from the house of the first accused/appellant. Therefore, it is evident that the jewels, which the deceased was wearing prior to her death, were duly recovered by PW19 on the basis of confession given by the first accused. However, there is no contra evidence to show that the jewels were not recovered from the house of the first accused/appellant, as portrayed by the prosecution.

20. As regards PW16, Head Constable, who came to the occurrence Village with sniffer dogs, the learned counsel for the first accused/appellant would contend that when the name of the accused was mentioned by PW1 in his complaint, Ex.P1, there is no need for the investigating agency to bring the sniffer dogs and this would only indicate that the investigation agency decided to fix the first accused in the crime even though he has not committed the crime. This submission of the counsel for the first accused/ appellant cannot be accepted. The fact remains that till such time PW16 came to the occurrence Village, the first accused/appellant was not arrested. The investigation agency, in order to ensure that no stone is left unturned in effectively carrying out the investigation, sought the assistance of Sniffer dog as part of the investigation and it cannot be a ground for the first accused/appellant to find fault with the manner in which the investigation was proceeded with. Even though name of first accused was mentioned in Ex.P1 as a person who is suspected to have committed the crime, given the nature and magnitude of the offence complained of, the investigation team had pressed into service the sniffer dogs to ensure that they may get some evidence or clue in zeroing in on the person who committed the crime. Even as admitted by the defence, the sniffer dog ran upto the house of the first accused and stopped there. Though name of the first accused is mentioned in the complaint, Ex.P1, pressing into service the sniffer dog, as part of investigation strategy, in our considered view, will



not in any manner vitiate the case of the prosecution. Therefore, we conclude that presence of PW16 with the sniffer dog at the occurrence Village will not affect the credibility of the prosecution case and the argument advanced by the counsel for the first accused/ appellant is nothing but a misnomer.

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21. The learned counsel for the first accused/appellant would contend that in this case, there is no eye witness available to prove that it was the first accused who committed the offence. Further, according to the learned counsel for the appellant, the prosecution relied on circumstantial evidence to prove the alleged guilt of the first accused/appellant but the evidence leading to formation of such a chain is not complete and therefore, the entire case of the prosecution is vitiated. At this juncture, it would be useful to rely upon the decision of the Honourable Supreme Court in the case of (**State of Rajasthan vs. Kashi Ram**) reported in (2006) 12 SCC 254 wherein in para No.23 and 24, it was held as follows:-

"23.The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge his burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Naina Mohd. Re.* AIR 1980 Mad 218.

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in



the chain of circumstances which prove his guilt beyond reasonable doubt."

22. In this case, PW5 has categorically stated in his evidence that he had seen the first accused/appellant playing with the deceased just prior to the occurrence. Similarly, PW6 also stated in his evidence that he saw the first accused playing with the deceased at 5.30 pm on 28.03.2013. While so, the burden is on the first accused/appellant to show as to how and when he parted company with the deceased. However, in this case, no such explanation has been offered by the first accused/appellant and thereby the first accused/appellant failed to discharge the burden cast upon him under Section 106 of The Indian Evidence Act. In such view of the matter, we hold that such an absence of explanation on the part of the first accused/appellant establishes the incriminating chain operating against him beyond reasonable reasonable doubt. Consequently, we reject the argument of the counsel for the appellant that the prosecution failed to prove the circumstances leading to the guilty of the first accused/appellant.

23. Having regard to the entire evidence collected by the prosecution to prove the guilt of the accused, we are of the view that the prosecution has proved the guilt as against the first accused/appellant beyond all reasonable doubt and therefore, the Judgment passed by the trial court has to be affirmed.

24. In the result, we confirm the Judgment dated 28.11.2013 passed in S.C. No. 82 of 2013 on the file of District Sessions Judge (Mahila Judge), Mahila Court, Pudukottai convicting and sentencing the first accused/appellant. The Criminal Appeal is therefore dismissed.

Sd/-

Assistant Registrar (T&P)

/True Copy/

Sub Assistant Registrar

To

1. The District and Sessions Judge
(Mahila Judge), Mahila Court
Pudukottai.
2. The Judicial Magistrate, Aranthangi.
3. The Chief Judicial Magistrate, Pudukottai.
4. The District Collector, Pudukottai.
5. The Superintendent of Police, Pudukottai.



6. The Superintendent,
Central Prison, Trichy.
7. The Inspector of Police,
Kottaipattinam Police Station,
Pudukottai District.
8. The Director General of Police,
Mylapore, Chennai.
9. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy To:-

The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

RSH
TE/KKR/SAR-2 : 15/02/2018 : 14P/12C

Judgment in
Crl.A. (MD) No. 238 of 2016
21-12-2017