

**BAIL SLIP**

Lakshmi, W/o.Sekar, (Sole Accused) is released on bail vide the Order of this Court dated 30.09.2016 made in CrI.MP(MD)No.8578/2016 in CrI.A(MD)No.332 of 2016.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders Reserved on	17.01.2018
Orders Pronounced on	23.01.2018

CORAM:

THE HONOURABLE DR.JUSTICE S.VIMALA
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI
CrI.A.(MD) No.332 of 2016

Lakshmi ... Appellant/Sole Accused
-vs-
State through the Inspector of Police,
Uthappanaickanoor Police Station,
Uthappanaickanoor,
Usilampatti Taluk,
Madurai District.
(Crime No.302 of 2009) ... Respondent/Complainant

Prayer: Appeal filed under Section 374 of the Code of Criminal Procedure praying to call for the records and set aside the judgment of conviction and sentence passed by the learned IV Additional District and Sessions Judge, Madurai in S.C.No.363 of 2010 dated 28.07.2016 as against the appellant above named.

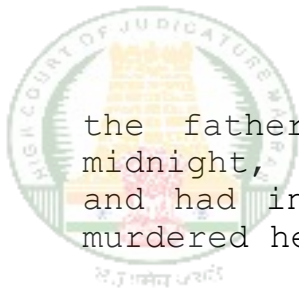
For Appellant : Mr.N.Anantha Padmanabhan
For Respondent : Mr.C.Ramesh
Addl. Public Prosecutor

J U D G M E N T

S.VIMALA, J.

By the judgment dated 28.07.2016 rendered in S.C.No.363 of 2010, the IV Additional District and Sessions Judge, Madurai had convicted the appellant / sole accused herein of the charge under Section 302 IPC and sentenced her to undergo life imprisonment and to pay a fine of Rs.2,000/- in default to undergo Simple Imprisonment for three months. Challenging the conviction, the sole accused has filed this appeal under Section 374 Cr.P.C.

2. The case of the prosecution is that the appellant is none other than the fourth wife of the deceased and on account of frequent cruelty and harassment to bring 5 sovereigns of gold from



the father of the accused, on 08.12.2009 at 2 O'clock in the midnight, the accused smashed the head of the deceased with stone and had inflicted cut injuries on his head with sickle, thus has murdered her husband.

3. The prosecution, in order to substantiate the offences against the accused, has relied upon the evidence of P.Ws.1 to 17, Exhibits 1 to 16 and M.Os.1 to 9.

4. The Trial Court, after considering the oral and documentary evidence adduced by the prosecution, has chosen to convict the accused giving reasons. The said conviction given by the Trial Court is under challenge in this appeal.

5. The prosecution case relies upon the extra-judicial confession allegedly given by the accused to the Village Administrative Officer and the previous dispute between the accused and the deceased, who were living as husband and wife. As they have been living under the same roof, invoking Section 106 of the Indian Evidence Act, the Trial Court has relied upon the circumstantial evidence and has chosen to find the accused guilty of murder. Therefore, the main issue to be considered is, the scope of Section 106 of the Indian Evidence Act and applicability of Section 106 of the said Act to the facts and circumstances of this case.

6. When the offence like murder is committed within the four walls of a house, the initial burden to prove the case would undoubtedly be upon the prosecution. But in such a case, the nature and the amount of evidence to be led by the prosecution cannot be of the same degree as is required in other cases of circumstantial evidence. The burden should necessarily be comparatively of lighter character.

7. The earliest cases on the point are decisions of Privy Council reported as *Attygalle v Emperor* (1936) 38 Bom LR 700 and *Stephen Seneviratne v The King* (1937) 39 Bom LR 1. In the said decisions, the Lordships of Privy Council were dealing with Section 108 of Ceylon Evidence Act, which corresponded to Section 106 of Indian Evidence Act. It was held that Section 106 of Evidence Act does not affect the onus of proof and throw upon the accused the burden of establishing his innocence.

8. The aforesaid decisions of Privy Council came to be considered by the Supreme Court in the decision reported in the case of *Shambhu Nath Mehra v State of Ajmer* reported in AIR 1956 SC 404, wherein it was observed as under:-

"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and

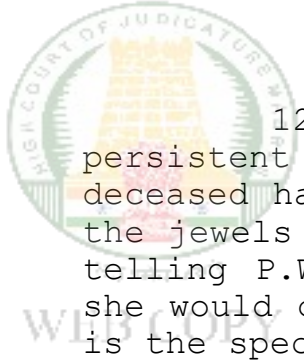


which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are *Attygalle v. Emperor* A.I.R. 1936 P.C.169 and *Seneviratne v. R.* [1936] 3 All E.R. 36, 49. ... We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

9. Now the point to be considered is, whether the prosecution has proved the murder in the way, in which it is alleged to have happened by the prosecution.

10. The admitted facts and disputed facts have to be considered in order to appreciate the applicability of Section 106 of the Indian Evidence Act.

11. The complaint regarding murder of the deceased has been given by the son of the deceased. The deceased is one Sekar. The occurrence is stated to have taken place at Paraipatti on 08.12.2009 at or nearing midnight. The accused is the fourth wife of the deceased. The deceased had married her after the death of his brother Raju (to whom she was his wife). Between Raju and accused, there had been two children, out of whom, a daughter was married. The deceased was demanding that the accused should get five sovereigns jewels for the purpose of being offered as dowry to the daughter of the accused.



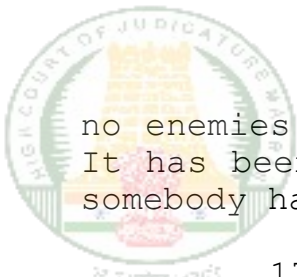
12. It is alleged by the prosecution that there had been persistent quarrel between the deceased and the accused and the deceased had been insisting the accused that the accused should get the jewels from her parents. It is stated that the accused had been telling P.W.1 that if the cruelty by the deceased is not stopped, she would certainly kill the deceased by smashing using stone. This is the specific case of the prosecution.

13. Wherever there is possibility of invoking presumption, there may be two circumstances. In some cases, certain basic facts have to be proved before invoking the presumption. In some other cases, presumption will be readily available and the prosecution would be interested in strengthening the presumption by adducing evidence. Under these circumstances, once there is a scope for invoking presumption, then the other side would be at liberty to rebut the presumption. Here is the case where even if Section 106 is invoked as against the accused, the prosecution has produced the evidence, which would have the effect of rebutting the presumption available under Section 106 of the Indian Evidence Act.

14. Under the circumstances, the Court has to critically analyze the evidence. In the evidence, the son of the deceased through his erstwhile wife would state in the complaint that there was a threat by the accused that she would kill the deceased if the deceased does not stop the cruelty of demanding the accused to get the jewels from her parents. But, in the evidence, he has stated that there was an altercation in the midnight and he was informed that the dispute got resolved at about 12 o'clock in the midnight. His evidence in the cross examination is that when he came at about 5 o'clock in the morning, there was nobody at home, excepting the dead father. When he went to the Police Station, he saw the accused inside the Police Station. This scenario creates the whole suspicion regarding the entire episode. If the accused was seen in the Police Station in the early morning, whether she went to the Police Station to prefer a complaint against anybody else or to confess the guilt or to give a complaint against her husband. What is her statement to the Police? The statement of the accused should have been recorded by the Police. What happened to that statement? This statement should have been the basis for the entire investigation. When the basic document is suppressed and when the origin of occurrence itself is suppressed, then the inference is that the whole episode is put under eclipse, and it is not brought to light in a fair way.

15. Even P.W.1 did not support the case of the prosecution that he preferred the complaint and he has stated that his signature was obtained in a written paper by the Police. Therefore, the basis on which the investigation commenced itself is cloudy.

16. Moreover, the admissions made by the son of the deceased would cast various doubts in the cause of death of the deceased. he has admitted that two to three murder cases are pending against the deceased. It is also admitted that though his father has



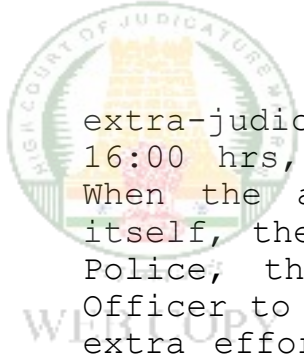
no enemies in the local, but he has enemies in the nearby villages. It has been suggested that only on account of pending murder cases, somebody has murdered his father.

17. Then the question is, what would be the reasonable conduct of the wife, when the husband is found murdered?. This is the crucial point, at which the inaction on the part of the Police has caused detriment to the case of the prosecution. According to the evidence, after the murder, when the son came without knowing the same, the wife was not at home. Then, where was she? Whether she was absconding, implying that it would indicate her subsequent conduct of escaping on account of crime committed. It is not a case of wife absconding. The Trial Court has relied upon the circumstance, but the question is, when the accused was found in the Police Station, for what she was found there? Either she might have gone there to prefer a complaint or she might have gone there to confess her guilt. But the prosecution has not given any explanation for not obtaining a statement from the accused. Equally, the accused also has remained silent during Section 313 Cr.P.C. questioning. But the questions asked in the 313 questioning are cluster of questions and not a separate question. In any event, as the accused persons rely only on their counsel, the instruction to them by and large is to deny the occurrence and the instruction is "Not to speak out" and "Not to disclose". This is what is contended by the learned counsel for the appellant, with regard to answer given by the accused during questioning under Section 313 Cr.P.C.

18. Under the circumstances, when both of them are silent, this Court is unable to conclude that the silence on the part of the accused alone is fatal.

19. With regard to the mode of death, there is serious lacuna. It is the specific case of prosecution that the death arose on account of the stone being used as a weapon. But, the Postmortem Report discloses only cut injuries, which indicate the use of sharp-edged weapons and not a blunt tools like stones. The prosecution wanted to improve the case by stating that initially stone was used and death was not instant and subsequently, Aruval might have been used. This theory cannot be accepted, as when a person is intending to cause a death would hit the head with so much of force, then at least there should have been a crush injury in the head. But, in this case, there is a cut lacerated injury, causing fracture on temporal, parietal and occipital bones. The Doctor has given the opinion that the death was on account of multiple injuries. But, there is no opinion as to whether those injuries could have been caused using stone. Neither there is an opinion those injuries would have been caused using Aruval. The medical opinion is not specific about the weapon that could have been used to cause the fatal injury.

20. The prosecution relies upon the extra-judicial confession, which was not believed by the lower Court itself. The



extra-judicial confession is stated to have been on 10.12.2009 at 16:00 hrs, whereas the occurrence had taken place on 08.12.2009. When the accused was found in the Police Station on 08.12.2009 itself, the statement that only fearing torture at the hands of the Police, the accused used the services of Village Administrative Officer to give extra-judicial confession is proved to be false. The extra effort to fix the wife as an accused has created reasonable doubts in the case of the prosecution.

21. Under the circumstances, the conviction and sentence which is based on suspicion and not upon legally acceptable evidence is liable to be set aside.

22. In the result, the Criminal Appeal is allowed. The conviction and sentence imposed on the appellant / sole accused by the learned IV Additional District and Sessions Judge, Madurai in S.C.No.363 of 2010 dated 28.07.2016 are set aside and she is acquitted of the charge levelled against her. The bail bonds, if any executed by the appellant / accused, shall stand cancelled. The fine amounts, paid by the appellant / accused shall be refunded.

Sd/-

Assistant Registrar(C.O)

/True Copy/

Sub-Assistant Registrar

To:

1. The IV Additional District and Sessions Judge,
Madurai.
2. The Principal Sessions Judge, Madurai
3. The Judicial Magistrate No.II, Usilampatti
4. The Chief Judicial Magistrate, Madurai
5. The Officer-in-Charge, Special Prison for Women, Madurai
6. The Inspector of Police,
Uthappanaickanoor Police Station,
Uthappanaickanoor,
Usilampatti Taluk,
Madurai District.
7. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

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JUDGMENT IN

Cr1.A.(MD)No.332 of 2016

23.01.2018