

Bail Slip

That the Appellant/Accused namely Prabhu S/o. Palaniappan @ Palanichamy was directed to released as per order of this Court on bail dated 05/02/2019 in CrI.MP.No.13144 of 2017 in CrI.A.665/2017.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.07.2019

Delivered on : 12.07.2019

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH
AND
THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

Criminal Appeal No.665 of 2017

P.Prabhu (M/33 years),
S/o Palaniyappan @ Palanichamy,
M.Edayapatti,
Palayampalayan Post,
Thuvarankurich, Trichy District. ... Appellant/Accused

Vs.

State represented by
The Inspector of Police,
15-Velampalayam Police Station
in Crime No.372 of 2015
Tiruppur District.

... Respondent/complainant

Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code to set aside the judgment and conviction passed by the learned II Additional Sessions Judge, Tiruppur, made in S.C.No.106 of 2016 for the alleged offence under Sections 302 and 380 of IPC and sentenced to undergo life imprisonment and pay a fine of Rs.10,000/- in default to undergo further one year rigorous imprisonment and to undergo seven years Rigorous imprisonment and to pay a fine of Rs.5000/- in default to undergo further 1 year Rigorous imprisonment.

For Appellant : Mr.R.Vivekananthan

For Respondent : Mr.R.Prathap Kumar,
Additional Public Prosecutor

JUDGMENT

M.M.SUNDRESH, J.

The appellant, who is the sole accused, charged for the offences punishable under Sections 302 and 380 IPC in S.C.No.106 of 2016 on the file of the II Additional District Sessions Judge, Tiruppur, and accordingly, convicted and sentenced to undergo life imprisonment and pay a fine of Rs.10,000/- in default to undergo further one year rigorous imprisonment for the offence under Section 302 IPC and to undergo seven years Rigorous imprisonment and to pay a fine of Rs.5000/- in default to undergo further 1 year Rigorous imprisonment for the offence under Section 380 IPC, seeks to set aside the same in this criminal appeal.

2.Case of the Prosecution:-

2.1. The appellant and the deceased-Selvam were friends. The appellant constructed a dwelling house adjacent to that of the deceased. He was alleged to have being in relation with a lady, which created animosity with the deceased. To wreck vengeance, the appellant has committed theft and thereafter, murdered him. Accordingly, on 04.07.2015 at about 2.00 a.m., the appellant met the deceased, took liquor together, intoxicated him due to excessive drinking, took advantage of by committing theft of 348 sovereigns of gold jewels and a cash of Rs.35,00,000/- and thereafter took the deceased to nearby place at about 3.45 a.m., pushed him down and attacked him on his head with an object made of with cement and brick.

2.2. As stated, the appellant and the deceased were friends. The deceased was the brother of P.W.1-Karthikeyan. The deceased along with P.W.2-Nallazhagu, who is the co-brother of P.W.1, and other relatives were running a pawn shop. P.W.4-Menaka is the wife of P.W.2. The deceased used to stay with P.Ws.2 and 4. As the deceased did not return home on the fateful day, P.W.4 informed her husband-P.W.2 and thereafter, she went to the shop. There was a customer waiting in the shop. She took the alternate key and opened the shop. She did not found the deceased. When she opened the locker found that jewels were missing. She informed the same to the P.Ws.1 and 2 accordingly. On their advise, she went home after informing the same to nearby persons about the missing jewels. Thereafter, P.Ws.1 and 2 came to the shop and displayed CCTV camera in the

presence of P.W.4. It was found that the deceased after placing the jewels in the locker on 03.07.2015 did not lock it. At about 12.00 a.m., he came back to the shop and opened the shutter. He also made an assignment to a unknown person waiting outside. Thereafter, CCTV was switched off.

2.3. The appellant gave multiple confession statements. Recoveries were made pursuant to the statements made. These statements have been made before P.W.7-Tahsildar, Tiruppur North and thereafter, before the police. Recoveries have been made in pursuant to the confession made as per Exs.P6, P7 and P.11 on three occasions. The witnesses have signed the seizure mahazer-Ex.P19. P.W.3-Deputy Superintendent of Police, Finger Print Division, compared the finger prints of the accused. After completion of the investigation, P.W.16-Investigating Officer has filed the Final Report.

3. The case was made over from the Magistrate Court to the Sessions Court, pursuant to which, charges have been framed. The appellant denied the charges put to him.

4. The prosecution examined 16 witnesses and marked Exs.P1 to P24 and M.Os.1 to 11. The defence did neither mark any document nor let in evidence.

5. Under Section 313 of the Criminal Procedure Code, incriminating materials were placed before the appellant, who denied them. The trial Court agreeing with the case of the prosecution, convicted for both the offences charged. Assailing the same, the present appeal has been filed.

6. P.W.1-Karthikeyan, as stated, is the brother of the deceased. He has stated about the absence of the deceased on the previous night, instruction given to P.W.4, phone call made by P.W.4 about the missing of the jewels and operating the CCTV. He has further deposed that the deceased kept the jewels in the locker and once again entered the shop at midnight. Thereafter a complaint was given by P.W.1 under Ex.P1 at 6.00p.m., on 04.07.2015. He has also stated that no complaint has been given immediately after the missing of the jewels were found.

1. P.W.2-Nallazhagu is the co-brother of the P.W.1. He has also deposed in tune with the evidence of P.W.1. P.W.4 is the wife of P.W.2. The gist of the statement given by her already been taken note of. Suffice it is to state that she has also stated that no complaint was given as per the instruction from P.Ws.1 and 2 and the CCTV was checked.

8. P.W.3-Police Officer, who was working in the Finger Print Department deposed that the finger print lifted from the place of occurrence was compared with that of the accused/appellant and found to be tallying. The chance finger print was lifted on 04.07.2015 and that of the accused was taken

on 13.05.2015 i.e., on the date of arrest. P.W.3 has retired on 31.08.2016. She is also the author of Ex.P4-Report dated 13.07.2015. This was sent by her to P.W.16 in pursuant to the arrest made on 13.07.2015. Curiously, this document dated 13.07.2015 was received by the jurisdictional Magistrate only on 01.12.2015. Further more, she is also the author of Ex.P5, which is the opinion given by her along with the finger prints taken enclosing the reasons. Though she had retired on 31.08.2016, she admits that Ex.P5 was signed only on 30.12.2016, obviously during the trial.

9. Taking note of the above, we directed the learned Public Prosecutor to produce the records from the office of the Finger Prints Bureau, Tiruppur District. We find that the aforesaid position is factually correct. We also do not find any record on receipt of the letter dated 13.07.2015 under Ex.P4 from P.W.3 to P.W.16.

10. On a query, the learned Additional Public Prosecutor has fairly submitted that Ex. P5 has been marked during trial as directed and warranted by the trial Court orally.

11. P.W.6-Chinnaiyan speaks about the presence of the deceased and the appellant on 02.07.2015. He has stated that both the deceased and the appellant asked him about the availability of the Tiffin in his hotel. Suffice it is to state that this evidence cannot be pressed very much by the prosecution to establish the Last Seen Theory, as the deceased was found alive through the CCTV on the early hours on 04.07.2015.

12. P.W.7 is the Tahsildar, Tiruppur North, before whom the confession statement was allegedly made by the appellant under Ex.P6. This statement was given after the arrest made by P.W.16-Investigating Officer, with whom the appellant is stated to have handed over six pockets of jewels. However, recovery was shown by a subsequent confessional statements made to the police in the presence of the witnesses. The confession statement was made for the first time before P.W.7 at about 9.45p.m., on 10.07.2015, but recovery was made based upon the subsequent statement made before the police under Ex.P8-Seizure Mahazar dated 11.07.2015 at 00.30 hours. To be noted, as per the evidence of P.W.7 and the confession statement under Ex.P6, the statement along with the recovery and the handing over was at 9.45p.m., on 10.07.2015. Before P.W.7 the appellant has stated that the remaining jewels have been kept by him in the house of mother's sister. However, only on a similar subsequent statement, recoveries have been made. Last of the confession statements was made under Ex.P11 dated 22.07.2015 followed by recovery under Ex.P12-Seizure Mahazar at about 01.15 hours. In one of the documents viz., Ex.P8-Mahazar, it is to be seen that under Exs.P12 and P13, the name of P.W.10 was inserted, as admitted by P.W.16-investigating officer.

13. The mahazar witnessess speak about the recoveries made. However, the statement recorded from all the witnesses under Section 161 Cr.P.C., in the month of July, 2015 were received by the Court only on 01.12.2015.

14. P.W.11 is the Doctor, who conducted post-mortem and issued Ex.P14-Post mortem Report. Though it is the case of the prosecution that the appellant took undue advantage of the influence of the alcohol due to excessive consumption by the deceased, Exs.P14 and P15, which are the post-mortem report and the final opinion would only say that no alcohol was detected in the viscera analysis.

15. P.W.16 is the Investigating Officer. He arrested the appellant/ accused on 10.07.2015 after registering the complaint given under Ex.P1 and Ex.P21-First Information Report. He has deposed that P.W.7 has handed over the jewels to him in pursuant to the confession statement made under Ex.P6. However, it appears that it was actually recovered as could be seen from Ex.P8 in pursuant to the confession made under Ex.P7. He has also acknowledged that he has registered the statement of P.W.3 on 22.07.2015 and thereafter sent and received by the Court on 01.12.2015. He has further stated that no document from P.W.3 has been sent to the Court. P.W.16, in pursuant to the registration of the complaint, went to the spot and prepared under Ex.P22-Observation Mahazar along with Ex.P24-sketch. Though the Observation Mahazar was prepared in the presence of one Ayyasamy and P.W.12-Ramasamy, Ayyasamy was not examined. It was followed by inquest on the very same day, which is marked as Ex.P23. Further recoveries have been made in pursuant to the further confession statement made by the appellant in the presence of P.W.10-Village Administrative Officer.

16. The trial Court convicted the appellant by placing reliance upon the recoveries made. Further reliance was made on the evidence of P.Ws.6 and 8. It was held that mere delay in giving the complaint itself cannot be a ground to acquit the accused. Thus, the trial Court was pleased to hold that the chain of events are sufficiently linked, leading to the guilt of the appellant. Accordingly, the conviction was rendered for the offences punishable under Sections 302 and 380 IPC.

17. The learned counsel appearing for the appellant submits that there is no recovery in the eye of law. The first confession statement was given before P.W.7. However, no recovery has been made in pursuant to it. Therefore, the exception provided under Section 27 of the Indian Evidence Act, 1872, is not available in the case on hand. The confession statement given before P.W.7 also cannot be accepted as the appellant was produced after the arrest. The deceased was not found to be under the influence of alcohol as well and hence the very basis of the case of the prosecution falls to the ground. The non production of the CCTV camera would vitiate the case of

the prosecution. There is no explanation as to how the appellant's finger print was found in the locker as against that of the deceased and P.W.4. The Cell phone, which was recovered, was not identified by any one of the witnesses. The evidence of P.Ws.6 and 8 for the Last Seen Theory cannot be accepted since P.Ws.1, 2 and 4 have stated that the deceased closed the pawn shop on that day and thereafter again opened, as could be seen from the CCTV.

18. There was no Test Identification Parade conducted to substantiate the evidence of P.Ws.6 and 8. P.W.8 has not mentioned anything about the time. There is a delay in filing Ex.P21-First Information Report. The statements under Section 161 Cr.P.C., were recorded on 04.07.2015 and thereafter in the same month, but received by the Court only on 01.12.2015. The evidence of P.W.3 and Exs.P3 and P4 having been marked during trial. There cannot be any document signed after retirement of an official. The submissions made are sprinkled with the following decisions.

- (i) Chinna Pillai and another Vs. State (2012 Supreme Court Cases online Madras 2909);
- (ii) Tomaso Bruno and another Vs. State of Uttar Pradesh ((2015) 7 Supreme Court Cases 178); and
- (iii) Elumalai Vs. State of Tamil Nadu, rep., by the Inspector of Police (Criminal Appeal No.880 of 2005 dated 06.03.2008).

19. The learned Additional Public Prosecutor appearing for the State submits that as the recoveries were proved, the Trial Court rightly convicted the appellant. The evidence of P.Ws.6 and 8 would be sufficient enough to sustain the conviction. Motive, even assuming not established, is not required in all circumstances. A mere delay by itself in giving the complaint would not be fatal to the case of the prosecution. Hence, the appeal has to be dismissed.

20. We are dealing with the case of circumstantial evidence. Therefore, we have to keep in mind the existence of circumstance, the inter connectivity between them leading to the needle of guilt pointing the accused alone. Though motive per se cannot be a sole factor required to be proved, in the case on hand, the prosecution has not established it. None of the witnesses speak and prove the same. It is the specific case of the prosecution that the appellant met the deceased, got him drunk, induced him to take the jewels and murdered him thereafter. We do not find any material to prove them. Ex.P4 clearly states that no alcohol was found. No poison or alcohol was found in the body of the deceased. Thus the very basis of the prosecution itself is not proved.

21. P.W.3-Finger Print Expert is the author of Exs.P3 and P4. Strangely, these documents were received by the Court only on 01.12.2015, though dated 13.07.2015. The report given under Ex.P5 was sent to the trial Court, which was signed by P.W.3 after her retirement. Admittedly, P.W.3 retired from her job on 31.08.2016. The report was signed by her on 30.12.2016. Straight away this report has been marked. Therefore, no reliance can be placed upon the same. The trial Court, in our considered view, ought not to have called for this report. The above facts has been verified by calling the records. There is no explanation on the side of the prosecution with respect to the finger print of the deceased and P.W.4. It is a specific case of P.Ws.1, 2 and 4 that the deceased kept the jewels inside the locker and thereafter once again went to the shop. Similarly, P.W.4 opened the locker and found that the jewels were missing. There is no mention about their finger prints. Therefore, the above said facts also would show that the prosecution has not established its case.

22. P.Ws.1, 2 and 4 once again spoke about the verification of CCTV. For the reasons known to the prosecution, CCTV has not been marked. As rightly submitted by the learned counsel appearing for the appellant, certainly adverse inference can be drawn. It is the case of the prosecution that CCTV shows the presence of the deceased. Therefore, the Last Seen Theory also loses its significance. The deceased was found to be in the shop on 03.07.2015 during night hours and on the early hours on 04.07.2019. It is nobody's case that the appellant was also found along with the deceased, though it has been stated that the deceased was making gesture to someone outside. The material objects shown as recoveries would include the stickers, bindis and hairpins. There is no explanation for their presence in M.O.S. 7 to 9, except the statement of the appellant in the confession. The prosecution has failed to prove as to how these materials were found in the place of occurrence. When the offence involved is punishable under Section 380 IPC the person who was present has never been explained. These factors would strengthen the presumption available under Section 114(g) of the Indian Evidence Act, 1872.

23. Much reliance has been made on the recoveries. If the appellant has given the confession statement before P.W.7, which also states that he handed over six pockets of jewels to the Investigating Officer, we do not understand the need for the subsequent confession statements. Even in the first statement given before P.W.7, it has been clearly stated that jewels were being handed over and the remaining jewels have been kept in the

house of the sister of the appellant's mother. Thus, we concur with the submission of the learned counsel for the appellant that when the exception carved out under Section 27 of the Indian Evidence Act, 1872, to the bar available under Section 25 is not to be extended to the present case in the light of the discussions made above. We do not find any discovery of a new fact, in pursuant to the subsequent confessions leading to recoveries.

24. P.Ws.1, 2 and 4 did not give any explanation for the delay in registering Ex.P21-First Information Report. The First Information Report ought to have been registered after finding that the jewels were missing in the locker. Admittedly, the deceased, P.Ws.1 and 2 were doing finance business by running a pawn shop. On a perusal of the records, we find that almost all the statements and the documents have been received by the jurisdictional Magistrate court, months after recording and receiving. These factors create very serious doubt on the version of the prosecution.

25. The evidence of P.Ws.6 and 8 also cannot be pressed into service so as to confirm the conviction rendered against the appellant. P.W.6 merely states that the deceased and the appellant came to the shop on 02.07.2015 at about 10.00p.m. Similarly, P.W.8 also made the same statement. He further stated that on 03.07.2015, he saw the deceased and the appellant. We find that no Test Identification Parade done. Secondly, the deceased, as discussed above, was found, seen thereafter in the CCTV on two occasions. P.W.8 also does not say about the time during which he saw the deceased and the appellant together. P.W.8 has stated that he has not seen the appellant before. We further find that the jewels recovered were not identified nor they were classified by their description. As stated earlier, we are unable to agree with the case, as projected by the prosecution. The trial Court, in our considered view, has not considered the above aspects as discussed by us. On the contrary, it merely relies upon the evidence produced by the prosecution, in a case of circumstantial evidence where many discrepancies are available. Thus, for the reasons stated, we are constrained to interfere with conviction and sentence rendered by the II Additional Sessions Judge, Tiruppur, in S.C.No.106 of 2016.

26. In such view of the matter, in our considered view, the conviction and sentence imposed by the trial Court against the appellant cannot be sustained in the eye of law. Accordingly, we hold that the prosecution has failed to prove the case beyond reasonable doubt. As such, the conviction and

sentence imposed on the appellant in S.C.No.106 of 2016 on the file of II Additional Sessions Judge, Tiruppur, are set aside and this Criminal Appeal is allowed. The appellant is acquitted of the charges under Sections 302 and 380 I.P.C. The fine amounts, if any paid, shall be refunded to him. The appellant is directed to be released forthwith, unless his custody is required in connection with any other case.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

- 1.The Judicial Magistrate No.I,
Tirppur.
- 2.Do thro the Chief Judicial Magistrate,
Tiruppur.
- 3.The IInd Addl. District and Sessions Judge,
Tippur.
- 4.Do thro the Principal Sessions Judge,
Tippur.
- 5.The Superintendent,
Central Prison, Coimbatore.
- 6.The District Collector,
Tiruppur.
- 7.The Director General of Police,
Mylapore, Chennai-4.
- 8.The Inspector of Police,
15-Velampalayam Police Station
in Crime No.372 of 2015
Tiruppur District.
- 9.The Public Prosecutor,
High Court, Chennai.

+1cc to Mr.Vivekananthan, Advocate, S.R.No.58807

Criminal Appeal No.665 of 2017

MG (CO)

RRS 05/08/2019