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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	Pronounced on
09.04.2019	24.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH
AND
THE HONOURABLE MR.JUSTICE B.PUGALENDHI
CRL.A[MD].No.272 of 2017

T.Gandhi : Appellant

Vs.

The Inspector of Police,
Kumbakonam West Police Station,
Thanjavur District,
Crime No.494 of 2007. : Respondent

PRAYER: Appeal is filed under Section 374 of the Code of Criminal Procedure against the Judgment dated 19.12.2008 made in S.C.No.403 of 2008, on the file of the learned Additional Sessions Judge, [Fast Track Court No.1], Thanjavur.

For Appellant : Mr.A.Thiruvadikumar
For Respondent : Mr.M.Chandrasekaran
Additional Public Prosecutor

JUDGMENT

P.N.PRAKASH, J.

The appellant is the sole accused in S.C.No.403 of 2008, on the file of the learned Additional Sessions Judge, [Fast Track Court No.1], Thanjavur. He stood charged for the offences punishable under Sections 364 and 302 of the Indian Penal Code. By Judgment dated 19.12.2008, the Trial Court has convicted the appellant and sentenced him, as detailed below:-

Section of Law	Sentence of imprisonment	Fine amount
364 IPC	To undergo rigorous imprisonment for two years.	Rs.200/- in default to undergo simple imprisonment for one month.



302 IPC	To undergo imprisonment for life.	Rs.500/- in default to undergo simple imprisonment for two months.
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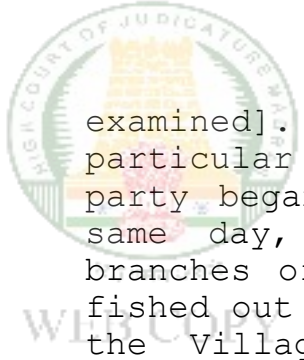
The sentences have been ordered to run concurrently. Challenging the said conviction and sentence, the appellant has come up with this Criminal Appeal.

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

2.1. Saravanan [PW-1] has two sisters, namely, Sankarai and Kavitha [PW-4]. Sankarai is married to Suresh [PW-2] and they were living in Door No.95/96, Uppukkara Street, Kumbakonam and Saravanan [PW-1] was living in Door No.117, Podhigai Nagar, Kumbakonam, which is not very far away from his sister's [Sankari's] house. The other sister of Saravanan [PW-1] - Kavitha [PW-4] is the mother of the deceased child - Velmurugan @ Vivek and she was living in Madurai. The father of Saravanan [PW-1] died and for the 41st day ceremony, his sister - Kavitha [PW-4] came with her son to Kumbakonam and was staying in her sister's [Sankari's] house in Uppukkara Street. The accused was an employee of Aariyabhavan Hotel, run by Saravanan [PW-1], situated at Kumbakonam and for some conduct, he was sacked from service by Saravanan [PW-1].

2.2. On 28.09.2007, the appellant, who was already sacked from service by Saravanan [PW-1], came drunk to Sankari's house around 06.30 p.m., and asked Kavitha [PW-4] as to why he was not informed about the death of her father. Kavitha [PW-4] did not entertain him inside the house, because, he was found in an inebriated condition and so, she asked him to go away. While going out of the house, the appellant saw Vivek playing with his friend - Ramesh [PW-7]. The appellant took Vivek with him on the promise of getting him crackers. Thereafter, the whereabouts of Vivek and the accused were not known to anyone. The family of Vivek panicked and searched for the child, but, in vain. In order to wreck vengeance, it is alleged that the appellant had kidnapped Vivek, murdered the child and threw the dead body in a stream on 28.09.2007. This is the prosecution story.

2.3. On 29.09.2007, Saravanan [PW-1] gave a written complaint [EX-P1] to the police, based on which, Singaram [PW-20], Sub-Inspector of Police, Kumbakonam West Police Station, registered a case in Crime No.494 of 2007, for the offence under Section 363-A IPC at 01.15 p.m, on 29.09.2007 and prepared the printed First Information Report, [EX-P16], which reached the jurisdictional Magistrate at 10.30 a.m, on 01.10.2007, as could be seen from the endorsement made thereon. A child hunt was launched, but, to no avail. The investigation of the case was taken over by Rajamani [PW-21], the then Inspector of Police, Kumbakonam West Police Station, [he was later referred to as "the I.O"]. He arrested the accused at 09.00 a.m, on 03.10.2007 and recorded his confession statement in the presence of witnesses - Balakrishnan [PW-17] and Subbarav [not



examined]. The accused took the police and the witnesses to a particular place in the river, where he pushed the child. The police party began the search and ultimately, around 12.00 noon, on the same day, the body of the child was found entangled amongst branches of a tree that had fallen across the river. The body was fished out by Rajamani [PW-21] in the presence of Seenivasan [PW-6], the Village Administrative Officer and Murugesan, the Village Assistant [not examined] and the observation mahazer [EX-P3] was prepared. From the shirt and pant [MO-1] and [MO-2], that were worn by Vivek, the body was identified by Saravanan [PW-1]. Inquest was conducted over the body of Vivek and the inquest report was marked as EX-P18. Thereafter, spot postmortem was conducted by Dr. Gowrishankar [PW-14], who, in his evidence as well in the postmortem report [EX-P7], has stated as follows:-

"Appearances found at the postmortem; A 8 years old male body was wet surrounding of the body in Vazhai thoppu of Sakkottai in Nattar river bank and lies on back with arm abducted at shoulder. Elbow flexed wrist extended legs flexed at hip and at knee. The body was cold and pale with sign of decomposition 1) Body found blotted 2) peeling of cuticle seen in patches all over the body moreover both legs 3) rigor mortis present all over the body. 4) Eye ball shrunk. 5) scalp hair found easily ripped off. 6) maggots seen all over the body moreover the face. 7). Liquefied brain matter slightly oozing through the skull suture lines. 8). decomposition smell seen emitting through the body. 9). Loosing of denture noted in jaws. The following antemortem injuries were noted.

1). Abrasion 2 X 1 cm noted over the lateral aspect of the right elbow.

2). Abrasion 2 X 1 cm over the back of the left elbow.

3. Laceration 2 X 1 X 0.2 cm seen over the back of right ear".

2.4. Internal examination was done and the hyoid bone was examined by Dr. S. Vijayalakshmi, Professor and Police Surgeon, Department of Forensic Medicine, Thanjavur Medical College, Thanjavur, who, in her report [EX-P8], dated 10.10.2007, has stated as under:-

"On Examination:- Hyoid Bone is seen as Three pieces namely, The body and the two greater horns separately because of postmortem separation. There is no evidence of any antemortem injury noted over the examined parts of the Hyoid Bone".

The lungs and sternum bone of Vivek were sent to the Regional Forensic Science Laboratory, Thanjavur Medical College Hospital, Thanjavur, for detecting the presence of diatom. The diatom report [EX-P11] reads as follows:-



"Report:-Did not detect diatom in either of items 1 or 2.

Note: The above two items were used up during examination".

After receiving all the reports, Dr.Gowrishankar [PW-14] gave final opinion, vide [EX-P7], wherein he has stated as follows:-

"Final opinion:-

The deceased would appear to have died of asphyxia due to occlusion of upper part of wind pipe by mud around 5 days prior to postmortem".

2.5. The skull was sent for superimposition test, along with the photograph of Vivek to the Tamil Nadu Forensic Science Laboratory and the test was performed by Dr.Prabhakaran, [PW-22], the Assistant Director, Anthropology Division, who, in his evidence as well in the report, [EX-P21], has opined as follows:-

Opinion:-

The skull, item 1 could possibly have belonged to the body seen in the photograph, item 2".

2.6. The I.O, thereafter, filed alteration report adding Section 302 IPC and the report was marked as EX-P20. Based on the confession statement of the accused, a bicycle [MO-3] was recovered by the police under the cover of mahazer [EX-P15]. After examining witnesses and obtaining various reports, the I.O filed final report in PRC.No.48 of 2008 before the learned Judicial Magistrate, Kumbakonam. On the appearance of the accused, the provisions of Section 207 of the Code of Criminal Procedure were complied with and the case was committed to the Court of Session in S.C.No.403 of 2008 and made over to the learned Additional Sessions Judge, [Fast Track Court No.1], Thanjavur, for trial. The Trial Court framed charges against the accused, as detailed in Paragraph No.1, supra. When questioned, the accused pleaded "not guilty".

2.7. To prove the case, the prosecution examined 23 witnesses, marked 22 exhibits and 3 material objects. No witness was examined on the side of the accused nor any document marked. When the accused was questioned about the incriminating circumstances appearing against him, he denied the same. The Trial Court, after considering the evidence on record and hearing either side, by Judgment dated 19.12.2008, convicted the accused, as detailed in Paragraph No.1 supra. The appellant is, therefore, before this Court.

3. Heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the respondent.

4. The prosecution case is based on circumstantial evidence. The prosecution has proved beyond doubt the following facts:-

- Kavitha [PW-4] is the sister of Saravanan [PW-1] and Sankari.
- Saravanan [PW-1] was running a hotel, in the name and style "Hotel Aariyabhavan", in Kumbakonam.
- The accused was an employee of Hotel Aariyabhavan, run by

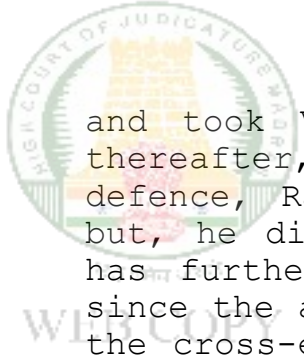
Saravanan [PW-1] and he was sacked from service by Saravanan [PW-1].

- Vivek was the son of Kavitha [PW-4] and they were residents of Madurai.
- Kavitha [PW-4] came to Kumbakonam with her son for her father's 41st day ceremony in the last week of September 2007 and stayed in the house of her sister - Sankarai in Uppukkara Street, Kumbakonam.
- Vivek went missing on 28.09.2007.
- The body of Vivek was fished out from the river on 03.10.2007 at 12.00 noon.
- The death of Vivek was homicidal.

5. The learned counsel for the appellant contended that the motive for the offence that is attributed to the appellant is too flimsy. He contended that just because Saravanan [PW-1] had sacked the accused from service, he would not have kidnapped and murdered the nephew of Saravanan [PW-1]. To appreciate the contention of the learned counsel for the appellant, it may be necessary to examine the evidence of Kavitha [PW-4].

6. Kavitha [PW-4] has stated that she is a resident of Madurai; Saravanan [PW-1] is her brother and Suresh [PW-2] is her brother-in-law [her sister's husband]; Vivek was her son; she knows the accused, since he was working as supplier in her brother's [PW-1's] hotel; her son also knows the accused; she came to Kumbakonam for the 41st day ceremonies in connection with her father's death and stayed in the house of her sister - Sankari; on 28.09.2007, while she was in her sister's house, around 06.00 p.m., the accused came and enquired about the death of her father; some time after he left, she came out of the house, looking out for her son and did not find him anywhere; she enquired with Ramesh [PW-7] with whom Vivek was playing; Ramesh [PW-7] told her that he saw the accused taking Vivek with him by saying that he will get him crackers; since the child did not return for quite some time, she panicked and informed her brother - Saravanan [PW-1] and brother-in-law - Suresh [PW-2] and the others; they all started searching for the child, but, in vain; on the next day, her brother - Saravanan [PW-1] gave a complaint to the police; four or five days later, it was informed by the police that a body was fished out from a river, but, she did not have the courage to go and see the body; her brother - Saravanan [PW-1] and the others went; the body was identified by Saravanan [PW-1]; the body was handed over later by the police. In the cross-examination, it was not suggested to her that the accused did not come at 06.00 p.m., as stated by her in the evidence.

7. Apart from the evidence of Kavitha [PW-4], we have the evidence of Ramesh [PW-7], who was studying in fifth standard at the time of giving evidence in the year 2008. Ramesh [PW-7] has stated that he knows Vivek, as he used to come from Madurai to his aunt's house at Kumbakonam; on 28.09.2007, Vivek had come to his aunt's house and they were all playing; around 06.00 p.m., the accused came



and took Vivek with him saying that he will get him crackers; thereafter, Vivek did not return. In the cross-examination by the defence, Ramesh [PW-7] has stated that Vivek was wearing a pant; but, he did not remember the colour. In the cross-examination, he has further clearly stated that he knows the accused very well, since the accused would bring food to the house of Vivek's aunt. In the cross-examination, he has also stated that he knew the name of the accused only through Vivek. The defence was not able to demolish the evidence of this child witness. The fact that Ramesh [PW-7] told everyone that the accused had taken Vivek with him on the promise of getting crackers finds place even in the complaint [EX-P1], which had reached the jurisdictional Magistrate, on 01.10.2007 itself. Till the accused was arrested by the police on 03.10.2007, he was in abscondance. Therefore, we have no reason to disbelieve the testimony of Ramesh [PW-7].

8. Next, we have the evidence of Veerasamy [PW-8] and Anandan [PW-9], who have stated that they are running a cycle shop, where they give cycles on hire; on 28.09.2007, the appellant, who is known to them, came to the shop and took a bicycle on hire and along with the accused, there was a small boy; the accused took the bicycle and did not return it; the Registers maintained in the cycle shop for giving the cycles on hire was marked as EX-P4 and EX-P5. The cycle [MO-3] was identified by the witnesses as belonging to them. In the cross-examination of Veerasamy [PW-8], he has stated that the name of the cycle shop will be painted on the chain guard, but, in [MO-3], the chain guard itself has been removed.

9. In the cross-examination, Veerasamy [PW-8] has also stated that on 04.10.2007, the police came to his shop, enquired him and collected the Registers [EX-P4] and [EX-P5] respectively. Thus, only after the arrest of the accused on 03.10.2007 and based on his confession statement on 04.10.2007, the police recovered the bicycle and the cycle shop of Veerasamy [PW-8] was identified. The most incriminating circumstance against the accused is that, until he was arrested, he was in abscondance and the whereabouts of the child were also not known to anyone. Only after his arrest, he showed the stream, where he pushed the child and the police searched the whole length of the river and thereafter, fished out the dead body, about four kilometres away, amongst the branches of a tree, which had fallen across the river.

10. There is no plausible explanation offered by the accused, when he was examined under Section 313 Cr.PC. The burden under Section 106 of the Indian Evidence Act, 1872, is on the accused to establish the facts, which are exclusive to his knowledge. The law on this aspect has been succinctly stated by the Supreme Court in Paragraph No.23 of **Tulshiram Sahadu Suryawanshi Vs State of Maharashtra**, [2012 (10) SCC 373], which reads as under:-

"23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved



facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in **State of W.B. v. Mir Mohammad Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516]** : (SCC p. 393, para 38)

"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In **Shambhu Nath Mehra v. State of Ajmer [AIR 1956 SC 404 : 1956 Cri LJ 794]** the learned Judge has stated the legal principle thus: (AIR p. 406, para 11)

'11. 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.' "

<https://hcservices.courts.gov.in/hcservices> 11. For the reasons stated above, the Judgment of conviction passed by the Trial Court warrants no interference. Thus, the Criminal Appeal must fail.



12. In the result,

- the Judgment dated 19.12.2008 made in S.C.No.403 of 2008, on the file of the learned Additional Sessions Judge, [Fast Track Court No.1], Thanjavur, is confirmed.
- The Criminal Appeal is dismissed.

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Assistant Registrar

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Sub Assistant Registrar

To

1. The Additional Sessions Judge,
[Fast Track Court No.1], Thanjavur.
 2. The Judicial Magistrate,
Kumbakonam
 3. The Inspector of Police,
Kumbakonam West Police Station,
Thanjavur District.
 4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
 5. The Section Officer,
Criminal Section, (2 copies)
Madurai Bench of Madras High Court,
Madurai.
 6. The District Collector,
Thanjavur District
 7. The Director General of Police,
Mylapore, Chennai
 8. The Superintendent,
Central Prison,
Tiruchirappalli
 9. The Superintendent of Police,
Thanjavur District
- +1 CC to Mr.A.THIRUVADI KUMAR, Advocate (SR-62295[F] dated 24/04/2019)

**JUDGMENT MADE IN
CRL.A[MD].No.272 of 2017
24.04.2019**