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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	Pronounced on
10.04.2019	24.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE **P.N.PRAKASH**

AND

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

CRL.A[MD].No.324 of 2017

and

CrI.M.P. (MD) .No.795 of 2018

Kulanthairaj : Appellant/Sole Accused

Vs.

The Inspector of Police,
Puliyankudi Police Station,
Tirunelveli District,
Crime No.74 of 2016.

: Respondent

PRAYER: Appeal is filed under Section 374(2) of the Code of Criminal Procedure against the Judgment dated 31.07.2017 made in S.C.No. 494 of 2016, on the file of the learned Principal Sessions Judge, Tirunelveli.

For Appellant : Mr.C.Jeganathan

For Respondent : Mr.R.Anandharaj
Additional Public Prosecutor

JUDGMENT

P.N.PRAKASH, J.

The appellant is the sole accused in S.C.No. 494 of 2016, on the file of the learned Principal Sessions Judge, Tirunelveli. He stood charged for the offences punishable under Sections 364 and 302 of the Indian Penal Code. By Judgment dated 31.07.2017, 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 imprisonment for life.	Rs.1,000/- in default to undergo simple imprisonment for three months.



302 IPC	To undergo imprisonment for life.	Rs.1,000/- in default to undergo simple imprisonment for three 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. The deceased - Umadevi was the wife of the appellant and they have two children, viz., Mathesh and Archana. They were living in the first floor portion of the house belonging to Ullamudaiyar [PW-1], the elder brother of the deceased. In the ground floor portion of the house, Gomathithai [PW-2], the mother of the deceased and Sivakumar [PW-3], the younger brother of the deceased, were living. Ullamudaiyar [PW-1] was working in Pothys Textile Shop in Chennai. On 04.03.2016, after the children went to school, the appellant took his wife in his motorcycle to Thalaiyani rivulet for bathing, where it is alleged that he strangled her to death.

2.2. On the complaint [EX-P1] given by Ullamudaiyar [PW-1], Mahalingam [PW-12], Special Sub-Inspector of Police, registered a case in Crime No.74 of 2016, for woman missing at 13.00 hours, on 05.03.2016 and prepared the printed First Information Report, [EX-P10], which reached the jurisdictional Magistrate at 03.00 p.m, on 06.03.2016, as could be seen from the endorsement made therein. The investigation of the case was taken over by Iyyappan [PW-15], [hereinafter referred to as "the I.O"], who went to the house of Umadevi and prepared the Observation Mahazer [EX-P14] and Rough Sketch [EX-P15] and examined some witnesses and recorded their statements. On 06.03.2016, at 06.00 a.m, the I.O arrested the appellant and recorded his confession statement, in the presence of Sundari [PW-9], the Village Administrative Officer and Palpandi, Village Assistant, [not examined]. Based on the disclosure statement made by the appellant, the I.O went along with the appellant and the witnesses to a forest area, through which Kulasekaraperi river flows and from a nearby bush, the body of Umadevi was recovered. The I.O prepared the Observation Mahazer [EX-P7] and Rough Sketch [EX-P16]. At the place, where the body was found, the I.O seized a white towel [MO-10] under the cover of mahazer [EX-P6]. The I.O conducted inquest over the body of the deceased and the inquest report was marked as EX-P17. He despatched the body through Subbulakshmi Grade I Police Constable [PW-11] to the Government Hospital, Tirunelveli, for postmortem.

2.3. Dr.Sridharan [PW-13] performed autopsy on the body of the deceased and in his evidence as well in the postmortem certificate [EX-P12], he has stated as follows:-

<https://hcservices.ecourts.gov.in/hcservices/> The following ante-mortem injuries were noted

1. A horizontal, complete ligature mark of



size 36 X 3 cm seen around the neck at the level of 8 cm below chin and 10 cm above the supra sternal notch

2. Contusions: 7 X 4 cm on the left side of chin and 4 X 4 cm on right side of chin.

3. Abrasions: 7 X 4 cm on dorsum of left hand fingers except left thumb, 4 X 3 cm on left heel region and 5 X 4 cm on right heel region.

On bloodless dissection of neck:

Underlying soft tissues are congested and there is extravasation of blood noted in surrounding soft tissues. Hyoid bone: fractured in its left side at greater cornu.

Other findings:-

Pleural cavities and peritoneal cavity appear normal.

Heart and coronary vessels are soft. Larynx & Trachea: fine both present.

Stomach: contains about 200 gms of partially digested cooked rice particles with nil specific smell and mucosa early decomposition changes present. Small intestine: contains 100 gms of partially digested cooked rice particles with nil specific smell and mucosa show early decomposition changes. Lungs, Liver, Spleen and Kidneys: soft c/s congested.

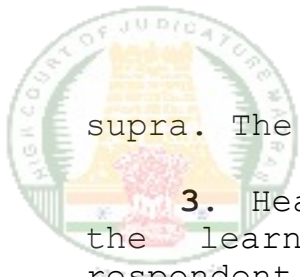
Bladder: empty, uterus: Normal c/s empty: Brain: pasty.

Opinion as to the cause of death; The deceased would appear to have died of asphyxia due to ligature strangulation.

Time of death: 2 to 3 days prior to autopsy.

".

2.4. The I.O filed an alteration report [EX-P18], altering the case from one Woman Missing to Section 302 IPC. After recording the statements of some witnesses and obtaining various reports, the I.O completed the investigation and filed final report in PRC.No.24 of 2016 before the learned Judicial Magistrate, Sivagiri. 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. 494 of 2016 and made over to the learned Principal Sessions Judge, Tirunelveli, for trial. The Trial Court framed charges against the accused, as detailed in Paragraph No.1, supra. When questioned, the accused pleaded "not guilty". To prove the case, the prosecution examined 15 witnesses, marked 19 exhibits and 13 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 31.07.2017, 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 facts that have been proved beyond cavil are as follows:-

- Umadevi was the wife of the appellant;
- Ullamudaiyar [PW-1] is the elder brother of Umadevi;
- Gomathithai [PW-2] is the mother of Umadevi;
- Sivakumar [PW-3] is the younger brother of Umadevi;
- The appellant took Umadevi to Thalaiyani rivulet for bathing;
- Umadevi was lastly seen alive in the company of the appellant by Gomathithai [PW-2];
- The death of Umadevi was homicidal.

5. The prosecution case is based on circumstantial evidence. Gomathithai [PW-2], the mother of Umadevi and the mother-in-law of the appellant, has stated that seven years prior to the incident, the deceased got married to the appellant and they have two children, viz, Mathesh and Archana; eight months prior to the incident, the appellant and Umadevi moved to the first floor portion of her [PW-2's] house; during the period of their stay, the appellant used to suspect the fidelity of his wife - Umadevi; On 04.03.2016, the appellant and his wife - Umadevi told her that they were going to Thalaiyanai for bathing in the rivulet and together they went by the motorcycle of the appellant; on the same day, around 03.00 p.m., the appellant alone returned; when she [PW-2] asked him about Umadevi, he told her that he dropped her *en route* and she will come back home by bus; she felt that there was something wrong; when she went into the kitchen and by the time she returned, the appellant had left open the first floor portion and gone somewhere; she called her son - Ullamudaiyar [PW-1], who was working in Chennai and informed him that Umadevi has not returned home; her son told her that he will immediately come home; her son - Ullamudaiyar [PW-1] came home on the next day and lodged the complaint [EX-P1]; on the next day, she was informed that the body of the deceased was located and she went along with her sons to Thalaiyanai rivulet and found the body; she identified the body of her daughter and the imitation jewellery worn by her, viz., ear rings [MO-4], bangles [MO-5], chain [MO-6], gold thali chain [MO-7], toe ring [MO-8] and thali thread [MO-9] were found on her body. Her evidence is corroborated by the evidence of Sivakumar [PW-3].

6. The learned counsel for the appellant submitted that in the cross-examination, Gomathithai [PW-2] has stated that on the day on which the complaint [EX-P1] was given, the dead body was seen by her. The learned counsel for the appellant built up his arguments on this answer and submitted that on 06.03.2016, the appellant was not arrested, but, he was arrested on 05.03.2016 and therefore, the case of the prosecution that the dead body was discovered only after the



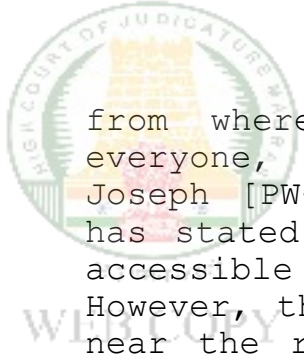
arrest of the accused on 06.03.2016 stood belied. He further contended that on 04.03.2016 itself, the investigation had begun, inasmuch as in the Observation Mahazer [EX-P14] and the Rough Sketch [EX-P15], the I.O has mentioned the date as 04.03.2016. He further contended that Sivakumar [PW-2] has stated that on the date on which the complaint [EX-P1] was given, the police told him that the body was recovered.

7. This Court gave its anxious consideration to the above submissions made by the learned counsel on either side.

8. The prosecution has proved beyond cavil that the appellant was living with his wife and two children in the first floor portion of his mother-in-law's [PW-2] house. His mother-in-law and the younger brother were living in the ground floor. When Gomathithai [PW-2] saw the appellant alone around 03.00 p.m., on 04.03.2016, she asked him as to where Umadevi was, for which the appellant gave an explanation that she had got down on the way and that she told him that she will return home by bus. However, the fact remains that the appellant had gone for bathing at 10.00 a.m., along with Umadevi to the rivulet and he has returned only at 03.00 p.m., in the afternoon. Even after his wife did not return home on 04.03.2016, he did nothing to search for his wife and instead, the appellant left open the first floor portion and went somewhere. Had it been true that his wife had gone missing, his natural conduct would have been to search for her and if no fruitful result was forthcoming, he would have made a police complaint. However, it is only Ullamudaiyar [PW-1], who gave the complaint [EX-P1] to the police.

9. The above conduct of the appellant is indeed very strange and is relevant under Section 8 of the Indian Evidence Act, 1872. This conduct of the appellant, coupled with the fact that pursuant to the disclosure statement made by him, the body was found, which is relevant under Section 27 of the Indian Evidence Act, 1872, shifts the burden under Section 106 of the Indian Evidence Act, 1872, on the appellant to satisfactorily explain as to what had happened to Umadevi, after he went with her to the rivulet for bathing. The evidence of Gomathithai [PW-2] shows that the imitation jewellery worn by Umadevi were intact. The postmortem certificate [EX-P12] shows that Umadevi had died due to strangulation and there were no stab or cut injuries found on the body of Umadevi. A towel [MO-10] was recovered at the place of occurrence.

10. The learned counsel for the appellant contended that Umadevi was wearing imitation jewellery and that is why, they were intact on the body. If the murder had taken place for gain, the offender would have taken away the ornaments worn by Umadevi, because, at that time, he would not have known that they were imitation jewellery. Thali of Umadevi was not an imitation jewel and it was a gold ornament. Thali [MO-7] was intact on the body of Umadevi. The silver ornaments were also available on the body. The learned counsel for the appellant lastly contended that the place,



from where the body was recovered, was easily accessible to everyone, as could be seen from the evidence of Joseph [PW-6]. Joseph [PW-6] has turned hostile and in the cross-examination, he has stated that the place, from where the body was recovered, was accessible to all people, who would come to the rivulet for bathing. However, the body was found in a secluded place amongst the bushes near the rivulet. Thus, absolutely, there is no material to show that the police had discovered the body even before the arrest of the appellant. Therefore, we are unable to place reliance on the statement of the hostile witness - Joseph that the body was discovered in a place accessible to public.

11. In such view of the matter, the stray statement of Gomathithai [PW-2] in the cross-examination that on the day of giving the complaint [EX-P1] itself, she saw the body cannot form the basis for acquitting the appellant by ignoring the overwhelming materials incriminating the appellant. Neither in the cross-examination of the witness nor in the examination under Section 313 of the Code of Criminal Procedure, the appellant has given any satisfactory explanation as to what had happened to his wife - Umadevi, after he took her for bathing to the rivulet.

12. At this juncture, it would be profitable to refer to the Judgment of the Supreme Court in **State of W.B Vs. Mir Mohammed and others [2000 (8) SCC 382]**, wherein it has been held as follows:-

"33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. 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 principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section 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



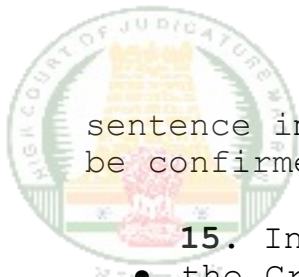
any explanation which might drive the court to draw a different inference".

In Suresh and another Vs. State of Haryana [2015 (2) SCC 227], it has been held as follows:-

"9. Apart from the above, this is a case where Section 106 of the Evidence Act is clearly attracted which requires the accused to explain the facts in their exclusive knowledge. No doubt, the burden of proof is on the prosecution and Section 106 is not meant to relieve it of that duty but the said provision is attracted when it is impossible or it is proportionately difficult for the prosecution to establish facts which are strictly within the knowledge of the accused. Recovery of dead bodies from covered gutters and personal belongings of the deceased from other places disclosed by the accused stood fully established. It casts a duty on the accused as to how they alone had the information leading to recoveries which was admissible under Section 27 of the Evidence Act. Failure of the accused to give an explanation or giving of false explanation is an additional circumstance against the accused as held in number of judgments, including **State of Rajasthan v. Jaggu Ram [(2008) 12 SCC 51 : (2009) 1 SCC (Cri) 317]**" .

13. Ullamudaiyar [PW-1] has stated that the appellant was working abroad and two months prior to the incident, he shifted his family to the first floor portion of his [PW-1's] house. In the Section 313 Cr.PC questioning, the appellant has admitted that he was working abroad, but, has specifically denied that he shifted his family to the first floor portion. However, he has not stated in which address he was living with his wife and children at the time of the incident. This fact is exclusively known only to him. He has not even suggested to Ullamudaiyar [PW-1] that he was living in a different address. Lastly, when Gomathithai [PW-2] asked the appellant as to where Umadevi was, he gave a false explanation by saying that she got down from the bike *en route* saying that she will come by bus. Therefore, we have no hesitation in holding that the prosecution has proved that the appellant had taken the deceased to Thalaiyanai rivulet and had done away with her.

14. As regards the conviction of the appellant under Section 364 IPC, we are of the view that the same cannot be sustained, because, there is no material to show that the appellant had taken Umadevi only with the intention to murder her, as he had not carried any weapon with him. The death of Umadevi is only on account of strangulation with a towel [MO-10], which normally they would have carried for use after the bath. Hence, the conviction and sentence imposed on the appellant under Section 364 IPC is liable to be set aside. However, for the foregoing discussions, the conviction and



sentence imposed on the appellant under Section 302 IPC is liable to be confirmed.

15. In the result,

- the Criminal Appeal is allowed in part;
- The conviction and sentence imposed on the appellant, vide Judgment dated 31.07.2017 made in S.C.No. 494 of 2016, on the file of the learned Principal Sessions Judge, Tirunelveli, for the offence under Section 364 IPC alone is set aside.
- The conviction and sentence imposed on the appellant under Section 302 IPC is confirmed.

Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS II)

// True Copy //

Sub Assistant Registrar(CS)

To

1.The Principal Sessions Judge, Tirunelveli.

2.The Inspector of Police,
Puliyankudi Police Station,
Tirunelveli District.

3.The District Collector,
Tirunelveli District.

4.The Director General of Police,
Mylapore, Chennai

5.The Superintendent,
Central Prison, Palayamkottai, Tirunelveli.

6.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

7.The Records Keeper,
Criminal Section, Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1cc to M/s.VEERA ASSOCIATES, Advocate, SR.No. 62688

CRL.A[MD].No.324 of 2017
24.04.2019