



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Wednesday, the Third day of April Two Thousand Nineteen

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PRESENT

The Hon`ble Mr Justice P.N.PRAKASH
and
The Hon`ble Mr Justice B.PUGALENDHI

CRL OP (MD) No.5190 of 2019
in
CRL.A (MD) No.SR36981 of 2019

STATE REPRESENTED BY
THE PUBLIC PROSECUTOR,
HIGH COURT, MADRAS-104
(NAGERCOIL
KOTTAR POLICE STATION,
Crime No.327/2012)

... APPELLANT/COMPLAINANT

Vs

1 NISANTH @ SIMSON
2 RAJESPANDIAN

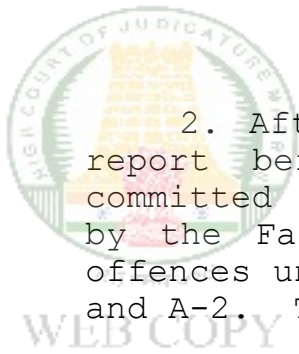
... RESPONDENTS/ ACCUSED
(A-1 and A-2)

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to grant leave to file an appeal to this Honourable Court against the Judgment of the acquittal of the respondents/ accused (A1 & A2) passed by the Sessions (Fast Track Mahila Court), Kanyakumari District at Nagercoil in S.C.No.100/2013, dated 22.02.2016.

ORDER: This petition coming on for orders upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of Mr.M.CHANDRASEKARAN, Additional Public Prosecutor for the Appellant, the court made the following order:-

[Order of the Court was made by **P.N.PRAKASH, J**]

It is the case of the prosecution that Nisanth @ Simson [A-1] and Rajespandian [A-2] are brothers and they are running a mobile shop in the name and style of Carbel Mobile World in the ground floor of a commercial complex in Nagercoil. The deceased, in this case, is one Kalaivani, who was working in Abi Private Employment Information Centre as a staff, which was located in the first floor of the same commercial complex. It is the case of the prosecution that on 24.02.2012, at about 2.30 p.m., when Kalaivani was alone in her office, Nisanth [A-1] and Rajespandian [A-2] approached her for sexual favour and when she refused, they murdered her and took away her thali chain.



2. After completing the investigation, the police filed final report before the jurisdictional Magistrate and the case was committed to the Court of Session in S.C.No.100/2013 and was tried by the Fast Track, Mahila Court, Kanyakumari, where charges for offences under Sections 447, 302 and 397 IPC were framed against A-1 and A-2. The accused pleaded not guilty.

3. To prove the case, the prosecution examined 32 witnesses, marked 38 exhibits and 17 material objects.

4. After considering the evidence on record, the trial Court, by judgment dated 22.02.2016, acquitted both the accused of all the charges. Thereafter, the State filed the present appeal against acquittal with a huge delay of 923 days, for condoning which, CrI.M.P.No.9316 of 2018 was filed by the State. Though the reasons for the delay were not satisfactory, yet, we condoned the delay and heard the Special Leave application.

5. It is trite that leave to appeal against acquittal is not automatic and only if the prosecution is able to prima facie show that the judgment of the trial Court suffers from perversity, leave can be granted.

6. This case is based on circumstantial evidence. The prosecution has relied upon two powerful circumstances, namely, the last seen theory and the recovery of the jewels of the deceased. To establish these two facts, the prosecution examined P.W.3, P.W.4, P.W.20, P.W.21, P.W.23 and P.W.24.

7. P.Ws.3, 4 and 5 were examined to show that they saw the accused coming out of the building complex with bloodstained clothes. However, P.W.-3 turned hostile and he did not support the prosecution case. As regards P.W.4 and P.W.5, the trial Court in paragraph No.44 has elaborately discussed their evidence and has given cogent reasons for disbelieving them. We may extract the relevant portion:

"44. Admittedly, P.W.4 Ayyapan and P.W.5 Vaikundamany are both related to PW1 Jeyaseelan who is none other than the elder brother of deceased Kalaivani and this fact of relationship is also admitted by Pws4 and 5 in their evidence. It is the evidence of PW1 that when he went to the place of occurrence soon after he received the information from PW2 Kannan he saw Pws4 and 5 at the place of occurrence. The 161(3) Cr.P.C. statement of both Pws4 and 5 and their further statements have been recorded only on 20.05.2012 and 08.06.2012 respectively. It is quite surprising to note that both Pws4 and 5 did not state anything both the accused even to PW1 or to the police immediately when it is the evidence of Pws4 and 5 that the police came within 15 minutes after both the accused ran away from that place when it is so, it is



highly unbelievable and unacceptable as to why Pws4 and 5 did not inform the police immediately. Though as per the case of the prosecution both Pws4 and 5 saw both the accused with bloodstain shirts, yet, PW5 in his evidence has stated that he did not see the accused with bloodstained shirts. Further PW4 in his evidence deposed that both the accused came from a lane near the cell phone shop with bloodstained clothes and it is his further evidence that both of them came in a hurried manner as if, dashing against the people. But contrary to the evidence of PW4, PW5 deposed that he saw both the accused hurriedly coming down from the steps. Apart from this, it is the evidence of PW4 that he saw both the accused running towards souther direction as far as she could see and they were running from Chettikulam junction towards Veppamoodu. But PW5 in his evidence stated that both the accused hurriedly came down from the steps and went out took a pulsar bike and proceeded towards Veppamoodu. It is the further evidence of PW5 during his cross examination that after the accused hurriedly came down from the steps, they came to the shop which is on the southern side and he further deposed that he did not see the accused proceeding towards north to Veppamoodu junction. So, the evidence of both PW4 and 5 is not only contradictory to each other but it also goes to prove that both the witnesses are not coming forward with the truth."

8. The prosecution examined P.Ws.20 and 21 to prove the arrest and recovery of the knife and gold chain from the accused. These two witnesses turned hostile and did not support the prosecution case. However, conviction can also be based on the evidence of the Investigating Officer, if the recovery has been proved satisfactorily. In this case, the prosecution projected that, after the thali chain was taken away by the accused, they pledged it with Muthoot Finance with the help of P.W.23 and P.W.24 and thereafter, they retrieved it from Muthoot Finance and kept it in their house. Thereafter the Thali chain was recovered from the house of the accused after arrest. However, P.W.23 and P.W.24 in their evidence have stated that A-2 was a close friend and he came to Chennai and wanted Rs.2 lakhs for his business purposes. Since they did not have the money, A-2 was willing to pledge the bracelet and gold chain that he was wearing and accordingly, he handed them over and that was pledged with Muthoot Finance. Thereafter, the pledged items were retrieved by A-2. It is the clear evidence of these witnesses that A-2 gave a chain, which he was wearing and it cannot possibly be a thali chain, because thali chain will be worn by women and not by men. Therefore, the trial Court was right in holding that the prosecution has failed to prove the recovery of the thali chain on the confession of A-2.

9. Yet another important circumstance in this case is that both accused were available as usual and were running their business for



three months even after the incident. They were arrested only later. Only in the police confession, it is stated that they went in the afternoon to the shop of the deceased and called her for sex and when she refused, they murdered her and took away her Thali chain.

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10. In V.Sejappa v. State [(2016) 12 SCC 150], the Supreme Court has held as under:

"23. In Muralidhar alias Gidda and Anr. v. State of Karnataka (2014) 5 SCC 730, this Court noted the principles which are required to be followed by the appellate court in case of appeal against order of acquittal and in paragraph (12) held as under:-

"12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in Tulsiram Kanu AIR 1954 SC 1, Madan Mohan Singh AIR 1954 SC 637, Atley AIR 1955 SC 807, Aher Raja Khima AIR 1956 SC 217, Balbir Singh AIR 1957 SC 216, M.G. Agarwal AIR 1963 SC 200, Noor Khan AIR 1964 SC 286, Khedu Mohton (1970) 2 SCC 450, Shivaji Sahabrao Bobade (1973) 2 SCC 793, Lekha Yadav (1973) 2 SCC 424, Khem Karan (1974) 4 SCC 603, Bishan Singh (1974) 3 SCC 288, Umedbhai Jadavbhai (1978) 1 SCC 228, K. Gopal Reddy (1979) 1 SCC 355, Tota Singh (1987) 2 SCC 529, Ram Kumar (1995) Supp 1 SCC 248, Madan Lal (1997) 7 SCC 677, Sambasivan (1998) 5 SCC 412, Bhagwan Singh (2002) 4 SCC 85, Harijana Thirupala (2002) 6 SCC 470, C. Antony (2003) 1 SCC 1, K. Gopalakrishna (2005) 9 SCC 291, Sanjay Thakran (2007) 3 SCC 755 and Chandrappa (2007) 4 SCC 415. It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following:

(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court;

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal;

(iii) Though, the powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by



the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and

(iv) Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court."

11. Thus, on reading the evidence of these witnesses, this Court does not find any perversity in the appreciation of their evidence by the trial Court for grant of special leave.

12. In the result, special leave stands refused and accordingly, this criminal original stands dismissed.

sd/-
03/04/2019

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1. THE SESSIONS (FAST TRACK MAHILA COURT),
KANNIYAKUMARI DISTRICT AT NAGERCOIL.

2. THE ADDITIONAL PUBLIC PROSECUTOR
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

COPY TO:

THE PUBLIC PROSECUTOR, HIGH COURT, MADRAS-104

ORDER IN
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Date : 03/04/2019