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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
17.09.2019	19.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

AND

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

Crl.A.(MD)No.485 of 2017

Uthiraselvam

: Appellant

Vs.

State Represented by
the Inspector of Police
Puthiyamputhur Police Station
Thoothukudi District
Crime No.31/2013

: Respondent

COMMON PRAYER: Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure against the judgment dated 19.12.2013 in S.C.No.186/2013 on the file of the II Additional Sessions Judge, Thoothukudi.

For Appellant
For Respondent

: Mr.S.Muthalraj
: Mr.M.Chandrasekaran
Additional Public Prosecutor

JUDGMENT

S.VAIDYANATHAN, J.

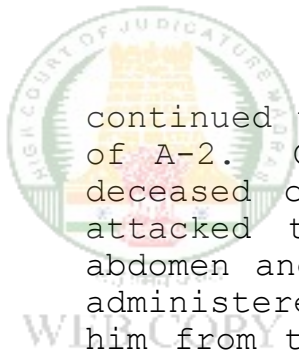
AND

N.ANAND VENKATESH, J.

This criminal appeal has been preferred by the appellant, who was ranked as A-1 before the Court below, against the judgment of the II Additional Sessions Judge, Tuticorin, in S.C.No.186/2013, dated 19.12.2013, convicting the appellant for offence under Section 302 IPC and sentencing him to life imprisonment and to pay a fine of Rs.1,000/-, in default, to undergo rigorous imprisonment for two months.

2. The case of the prosecution:

The second accused was having a relationship with P.W.-14 and out of the said relationship, the deceased child was born. Thereafter, A-2 had come out of the relationship with P.W.-14 and got married to A-1 and started living with A-1. The deceased child



continued to live with his grandfather (P.W.-13), who is the father of A-2. On 28.03.2013, at about 5.00 p.m., A-1 and A-2 took the deceased child from the house of P.W.-13. A-1 is said to have attacked the deceased child with hands and legs in the chest, abdomen and all over the body of the child and A-2 is said to have administered poison forcibly to the child and thereafter had pushed him from the bridge, thereby, A-1 and A-2 are said to have caused the death of the child.

3. Complaint and materials collected during investigation:

The Village Administrative Officer (P.W.-1) got the information regarding the murder of the deceased from the Village Assistant (P.W.-3). After confirming the same, a complaint (Ex.P-1) is said to have been given on 29.03.2013 to P.W.-15, who was the Head Constable and an FIR came to be registered (Ex.P.-18) under Section 174 of the Code of Criminal Procedure in Crime No.31/2013. It was handed over to the Head Constable (P.W.-16), who in turn, had handed over the same to the Investigating Officer (P.W.-18).

3.1. A-1 is said to have confessed regarding the incident to P.W.-2 under Ex.P.-19 and recovery was made under Ex.P-6 thereafter, which was signed by P.W.-7. Investigating Officer proceeded to the scene of crime and prepared observation mahazar (Exs.P-8 & P-9) and rough sketches (Exs.P.-20 and P.-21) in the presence of witnesses. The Investigating Officer recorded the statements of P.W.-4 and P.W.-5, who claimed to have seen the occurrence, when they were going near the bridge to attend nature's call. The Investigating Officer conducted inquest over the body of the deceased and prepared the inquest report (Ex.P-22) and gave a requisition to conduct the postmortem under Ex.P-3 through P.W.-16.

3.2. The clothes (M.Os.-5 and 6) were removed from the body of the deceased and the body was handed over for postmortem to P.W.-16 and after completion of the postmortem, the body was given to the relatives to perform the funeral rites. The material objects were sent for chemical analysis, which was done by P.W-9 and both the accused persons were arrested and based on the confession of the appellant, M.O.-1 and M.O.-2 were seized in the presence of P.W.-7. The Investigating Officer also collected the postmortem report (Ex.P-4) from P.W.-6 and also the viscera report (Ex.P-5) from P.W.-9. The FIR was altered from Section 174 Cr.P.C. to one under Section 302 IPC. After completion of the investigation, the final report was laid before the concerned Court against A-1 and A-2.

4. The II Additional Sessions Judge, Tuticorin, framed a lone charge against both the accused persons for offence under Section 302 IPC. The prosecution examined P.W.-1 to P.W.-18 and marked Ex.P-1 to Ex.P.-24 and M.O.1 to M.O.6.

5. After completion of the examination of the prosecution witnesses, the incriminating materials collected against the accused persons during trial, were put to them and they were questioned

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10. This Court has carefully considered the submissions made on either side and also assessed the oral and documentary evidence.

11. The relevant portions of the judgment passed by this Court in Crl.A.(MD) No.119/2017 are extracted hereunder:

"10. There appears to be three versions with respect to the body of the deceased concerned. P.W.13 has stated that he found the body near the Bridge. From the information given by P.W.3 to P.W.1, a complaint was given. Further, P.W.13, even in his chief examination has stated that he found the body at the burial ground. He along with other villagers took it to hospital. Therefore, there is a contradiction between the evidence adduced by P.Ws.3 and 13. P.W.18, who is the investigation officer in clear terms stated that it is the appellant, who brought the body to the hospital. It was recorded by a Doctor by name Jeyaganesan, who was the author of the accident register. Further, he admits that an intimation was given from the hospital. However, he further stated that the death was not known till the receipt of Ex.P.1, the complaint given by P.W.1. P.W.12, who is running a private hospital in his chief examination had also stated that the appellant came to see him along with the body of the deceased. On examination and having found the deceased was no more, he advised her to go to the Government Hospital. It is thereafter, the appellant must have gone to the Government Hospital.

11. Therefore, the very case of the prosecution, in our considered view cannot be accepted as correct. To confirm the evidence of P.W.18, we perused the case diary produced by the learned Additional Public Prosecutor. To our shock and surprise the accident register found in the case diary is in tune with the statement made by P.W.18. The accident register did show that it was indeed the appellant who brought the child. It was registered by Dr. Jeya Ganesan and thereafter sent to the mortuary. Perhaps, that is the reason why the accident register was not marked and the doctor concerned not examined. This would show that the case as projected by the prosecution as against the appellant is false. After all, it is the duty of the prosecution to place all the materials before the Court to satisfy a fair investigation leading to a fair trial which is a fundamental right conferred on one who is charged with an offence.

12. Considering the principles governing the fair trial and after taking note of the earlier decision



1], the Hon'ble Supreme Court in ***Rettiram v. State of M.P.*** [(2012) 4 SCC 516] was pleased to hold that a fair trial is the heart of the criminal jurisprudence. The following paragraph would be apposite:

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"39. The question posed by us fundamentally relates to the non-compliance of such interdict. The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.

40. In *Mrs. Kalyani Baskar v. Mrs. M. S. Sampooram* [(2007) 2 SCC 258], it has been laid down that 'fair trial' includes fair and proper opportunities allowed by law to the accused to prove innocence and, therefore, adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed and the courts should be zealous in seeing that there is no breach of them.

41. In this regard, we may fruitfully reproduce the observations from *Sidhartha Vashisht v. State (NCT of Delhi)* [(2010) 6 SCC 1] wherein it has been so stated: - (SCC pp. 79-80 para 197)

"197. In the Indian Criminal jurisprudence, the accused is placed on a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places 19 (2007) 2 SCC 258 20 (2010) 6 SCC 1 human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and



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the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."

[emphasis supplied]

42. It would not be an exaggeration if it is stated that a 'fair trial' is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity that is governed by Rule of Law. Denial of 'fair trial' is crucifixion of human rights. It is ingrained in the concept of due process of law. While emphasising the principle of 'fair trial' and the practice of the same in the course of trial, it is obligatory on the part of the Courts to see whether in an individual case or category of cases, because of non-compliance of a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred."

13. Law presumes the innocence of an accused until he is proved guilty. A suspicion though very strong can never be a substitute for a proof. The said exposition of law can be seen from the judgment of the Hon'ble Apex Court in **Kailash Gour v. State of Assam [(2012) 2 SCC 34]**. The apposite paragraphs are hereunder:

"39. It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between the accused "may have committed the offence" and "must have committed the offence" which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognised as a human right which cannot be wished away. See

<https://hcservices.ecourts.gov.in/hcservices/> **Alendra Singh v. State of M.P. [(2004) 10**



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SCC 699] and Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [(2005) 5 SCC 294].

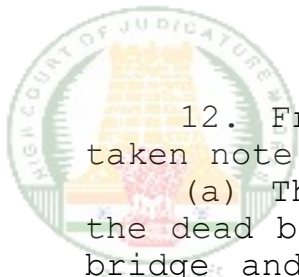
40. To the same effect is the decision of this Court in S.Ganesan v. Rama Raghuraman [(2011) 2 SCC 83], where this Court observed:

"39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India."

The above views were reiterated by this Court in State of U.P. v. Naresh [(2011) 4 SCC 324., SCC p. 335, para 34"

14.The occurrence was on 28.03.2013. A1 was arrested on 15.05.2013. Ex.P.5 Viscera Report is dated 05.04.2013. This report states about the presence of poison. Perhaps, this indicates the belated arrest of the appellant, who very much present in the locality, on 15.05.2013, followed by the so called recovery. Till such time the needle of suspicion was not on the appellant. P.Ws.4 and 5 being the eyewitnesses have not spoken anything against the appellant except her speaking to A1. They only saw A1, attacking, strangulating and pushing down the deceased in the absence of the appellant. Under those circumstances, we are unable to believe the recovery made. Further, P.W.11 has stated that the confession statement has been signed by himself and one Moorthy. The said Moorthy has not been examined. According to him, he followed the appellant after her arrest. He has also stated that he has signed both near the bridge as well as in the police station. Therefore, the evidence of P.W.11 does not inspire confidence, especially in the light of the discussion made above and the evidence of P.W.18 in particular.

15.The Court below has held that non-furnishing of the accident register copy is not a relevant factor. Unfortunately, the Court below has not considered the evidence of P.W.18 in its perspective, particularly on the aspect of the Accident Register, which strikes at the very foundation of the prosecution theory. Therefore, we are of the view that the judgment rendered by the trial Court deserves to be set aside."



12. From the above judgment, it is clear that this Court has taken note of the following facts:-

(a) There are three versions with respect to the identity of the dead body, where, P.W.-3 states that he found the body near the bridge and P.W.-13 states that the body was found at the burial ground and from there it was taken to the hospital. Therefore, there is a contradiction between the evidence of P.W.-3 and P.W.-13;

(b) The Case Diary revealed the fact that the child was taken to the hospital by the accused persons and the entry was made in the Accident Register and on examining the child, it was found to be dead and thereafter, Dr.Jeya Ganesan had sent the body to the mortuary. This Accident Register has been intentionally concealed;

(c) By concealing the material evidence, the prosecution has not conducted a fair investigation and thereby has denied a fair trial to the accused persons.

13. It is true that the Division Bench, which had dealt with the appeal filed by A-2, has made it clear that the observations and discussions made in the judgment confines itself only to A-2 and it cannot be inferred that the same will apply to A-1 also. In view of this observation, this Court will now assess, whether there are independent materials available against the present appellant and the observations made by this Court, while acquitting A-2, will also equally apply to the case of the present appellant.

14. It is the case of the prosecution that the deceased was taken in a motorcycle by the appellant on 28.03.2013 at about 5.15 p.m. and it was stopped near the bridge on the eastern side of Sundaralingam Colony. Thereafter the appellant is said to have kicked the deceased in his chest and abdomen and strangled him with a towel and he was also administered poison by A-2 and thereafter he was pushed down the bridge. Prosecution has examined P.W.-4 and P.W.-5 in this regard. These two witnesses have specifically stated that they saw the deceased along with A-1 and A-2 and they have also spoken about the overt-act of A-1. These two witnesses are chance witnesses, who came near the bridge to attend nature's call. These witnesses have also identified the towel that was used for strangulation (M.O.-1) and also the motorcycle belonging to the appellant (M.O.-2).

15. The injuries have also been spoken to by P.W.-6, who is the Doctor and in the postmortem report, marked as Ex.P-4, the following injuries were found:

"The following ante mortem injuries were noted in the body:-

1.Three circular partly healed wounds with the diameter of 0.4 cm each seen in the scrotum and based of the penis.

2.An abrasion of size 1 cm x 0.5 cm seen over the left arm.

<https://hcservices.ecourts.gov.in/Accessories> 3.An abrasion of size 1 cm x 0.5 cm seen over the



back of left forearm.

4.A contusion of size 15 cms x 10 cms x 0.5 cm seen in the right lower chest and flank.

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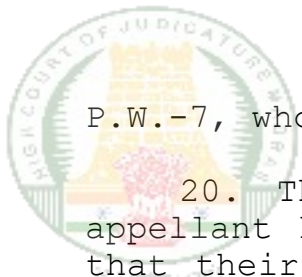
Opinion: The deceased would appear to have died of shock and hemorrhage due to blunt injury to the right side of abdomen. Organophosphorus insecticide was detected in the viscera analysed. Death would have occurred 15-36 hrs prior to the autopsy."

16. The postmortem report also states that the deceased had died due to shock and hemorrhage due to blunt injuries on the right side of the abdomen. It is also important to note that organophosphorus insecticide was also detected in the viscera and the same has been confirmed by the viscera report marked as Ex.P-5. These two reports concur with the evidence of P.Ws.4 and 5.

17. It is true that the child was first taken to Dr.Jeya Ganesan and there was an Accident Register available. This has been taken note of by the Division Bench, while considering the appeal filed by A-2. This Doctor was not examined as a witness and the Accident report was also not marked before the Court. It is to be seen, whether that by itself will completely discredit the other materials that have been collected by the prosecution in this case.

18. At this juncture, it will be relevant to take note of the motive that has been attributed for the crime. P.W.-14 was having a relationship with A-2 and out of the said relationship, the deceased was born to them. Later, both of them got separated. P.W.-13 is the maternal grandfather of the deceased and it seems that P.W.-14 has paid a maintenance of Rs.2 lakhs and this was in possession of P.W.-13. This is spoken to by P.W.-10 and P.W.-13. Thereafter, A-2 got married to the present appellant and they were living at Parampur. A-2 visited her father (P.W.-13) frequently to see her son and this was not liked by the appellant. Therefore, the appellant had decided to do away with the child. The evidence of P.W.-10 and P.W.-13 speaks about this motive behind the crime. What is clear from their evidence is that the appellant was not happy with the fact that there was already a child for A-2 and he felt that the child was a disgrace to the family and therefore, he had developed an ill-will and hatred against the child. To that extent, this Court can rely upon the evidence of P.W.-10 and P.W.-13.

19. The Investigating Officer, examined as P.W.-18, has deposed that on 29.03.2013 at about 9.00 a.m., P.W.-2 produced the appellant (A-1) with a statement recorded from him (Ex.P.-19) along with the special report (Ex.P-2). This is an extra judicial confession, which is said to have been given by the appellant to P.W.-2. Based on the confession of the appellant, P.W.-18 had proceeded to the scene of crime and had recovered M.O.-1 and M.O.-2 under Ex.P.-7 in



P.W.-7, who attested both in Ex.P-6 and Ex.P.-7.

20. The fact that the deceased child was present with the appellant has been spoken to by P.W.-4 and P.W.-5. Even assuming that their evidence regarding the overt-act attributed against the appellant is completely disregarded, it is for the appellant to explain as to how the child had sustained injuries and as to how poison was administered to it, as per the viscera report.

21. It will be useful to rely upon Section 106 of the Indian Evidence Act for this purpose and the same is extracted hereunder:

"106.Burden of proving fact especially within knowledge. - When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

22. A Division Bench of this Court had an occasion to consider the scope of Section 106 of the Evidence Act in **Ramar v. State rep. by the Inspector of Police, Tirumangalam Taluk Police Station, Madurai, (2018-2-L.W.(Crl.) 885)**, in which, one of us (Justice Mr.N.Anand Venkatesh) is a party.

23. The relevant portions of the judgment is extracted hereunder:

"23.It will be useful to refer to a judgment of the Hon'ble Supreme Court rendered in Tulshiram Sahadu Suryawanshi Vs State of Maharashtra in CRIMINAL APPEAL No. 507 of 2008, while dealing with Section 106 of the Evidence Act, which is as follows;

"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 utilized. 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."

24.The above observation made by the Hon'ble Supreme Court is attracted to this case. It has not been disputed that the deceased died in the matrimonial home. It is not the case of the appellant that the offence was committed by somebody else. The appellant and the deceased were only present in the house at the time of occurrence. The cause of death of the deceased, as reflected by postmortem certificate and the evidence of PW.12 reflects stab injury, oblique cut injury, etc., therefore, the burden shifts on the appellant to explain before the Court as to how the deceased sustained such injuries, more particularly, since the story sought to be projected by the appellant does not fall in line with the medical evidence. In this case, the appellant has failed to explain those injuries on the deceased, even though it is the appellant, who had the special knowledge as to what really happened in the scene of occurrence. No specific question questions have been put to PW.12 with regard to one stab injury and two cut injuries found in the body of the deceased and PW.12 has specifically stated that those injuries could be caused by MO.5 and MO.6.

25.That apart, in this case, the serology report, which was marked as ExP.29, shows that the blood group found in the material objects tallied with the blood group of the deceased which is "Group-A". It needs emphasis to also mention the vegetable cutter, MO.5 and twisted rod, MO.6 also contained the bloodstains of the deceased. These overwhelming materials, which were provided by the experts, makes it even more incumbent on the part of the appellant to discharge the burden cast upon him under Section 106 of the Indian Evidence Act. However, the appellant has miserably failed to discharge that burden and therefore, it leaves this Court with no other option, except to take adverse inference against the appellant. The appellant has not even explained, when he was questioned under Section 313 of CrPC, regarding these incriminating materials."

24. From the above judgment, it is clear that the Court can presume the existence of a fact, which it thinks likely to have happened. While doing so, the principles under Section 106 of the Evidence Act can be utilised. Where the prosecution has proved that P.W.-4 and P.W.-5 have seen the deceased child with the appellant, it is for the appellant to explain the injuries sustained by the child and the poison that was found, as per the viscera report. The



appellant has failed to explain it, even when he was questioned under Section 313 of the Code of Criminal Procedure. Therefore, this Court can always take adverse inference against the appellant, since the appellant has failed to give any explanations regarding the injuries and the poison that was found in the deceased.

25. In view of the above, this Court is of the considered view that the prosecution has proved the case beyond reasonable doubts against the appellant. The acquittal of A-2 will not have any bearing insofar as the case of the appellant is concerned and it was also made clear in the judgment in Crl.A(MD) No.119/2017.

26. This Court does not find any ground to interfere with the judgment passed by the Court below and the judgment of the Court below convicting and sentencing the appellant for offence under Section 302 IPC is hereby confirmed.

27. In the result, this criminal appeal is dismissed.

Sd/-

Assistant Registrar (C.O)

// True Copy //

Sub Assistant Registrar(CS)

To

- 1.The II Additional Sessions Court,
Thoothukudi District.
- 2.The Inspector of Police
Puthiyamputhur Police Station
Thoothukudi District
- 3.The Additional Public Prosecutor
Madurai Bench of Madras High Court,
Madurai.
- 4.The Superintendent, Central Prison,
Trichy.

Judgment made in
Crl.A. (MD)No.485 of 2017
19.09.2019

CS(01.10.2019) 12P 5C