



CrI.A.(MD)No.363 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
02.01.2023	12.01.2023

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE SUNDER MOHAN**

CrI.A.(MD)No.363 of 2020

Seenivasan, S/o.Nagaraj

... Appellant

vs.

The State Rep. by
The Inspector of Police,
Theni Police Station,
Theni District.
(Crime No.600 of 2013)

... Respondent

Prayer :- Criminal Appeal filed under Section 374 (2) of Cr.P.C., to call for records relating to the judgment, dated 12.08.2016, made in S.C.No.18 of 2016, on the file of the Additional District and Sessions Court, Theni, and set aside the conviction and sentence imposed against the appellant/Accused No.1 and allow the Criminal Appeal by acquitting the accused.

For Appellant

: Mr.M.Jegadeeshpandian

For Respondent

: Mr.A.Thiruvadikumar
Additional Public Prosecutor



JUDGMENT

DR.G.JAYACHANDRAN, J.

WEB COPY

The appellant herein is the first accused in S.C.No.18 of 2016, on the file of the Additional District and Sessions Court, Theni. He was tried for offences under Sections 364-A, 302, 379 and 201 I.P.C. along with one Marichamy, who died during trial and hence, the charge against him got abated.

2. The trial Court on considering the oral evidences of P.W.1 to P.W.35, documents Ex.P.1 to Ex.P.34 and Material Objects M.O.1 to M.O.23, acquitted him from charge under Section 364-A I.P.C., convicted for the offences under Sections 379, 302 and 201 of I.P.C. and ordered to undergo sentences as below:-

Section	Conviction and Sentence
379 IPC	To undergo 3 years Rigorous Imprisonment.
201 IPC	To undergo 7 years Rigorous Imprisonment with a fine of Rupees Two lakhs, in default, further period of 2 years Simple Imprisonment.
302 IPC	To undergo Life Imprisonment with a fine of Rupees Three Lakhs, in default, further period of 3 years Simple Imprisonment.

3. The period of sentence to run consecutively in the order of Sections 379, 201 and 302 I.P.C. one after another. Further, the order of Solitary Confinement for a



period of 3 months in the total period of sentence, which shall be restricted to a spell of five days a month, either consecutively or in the alternative days, between 1st day to 20th day of every month.

4. The period of remand already undergone by the accused ordered to be set off under Section 428 Cr.P.C. Rs.5 lakhs awarded as compensation u/s 357(1) Cr.P.C to the wife of the deceased [P.W.3] and the same to be recovered from the wages to be earned by the convict in the prison at the rate of 20%, till the satisfaction of the compensation awarded.

5. The Criminal Appeal is directed against the above judgment and conviction.

6. The case of the prosecution runs thus:-

6.1. The deceased Govindarajan was running a Photo Studio at Theni along with his son-in-law Muralidaran [P.W.2] in the name of "Vijayabharathi Photo Studio". The accused persons Seenivasan (the appellant herein) and Marichamy (since deceased) deceptively allured the deceased to accompany them to the reserve forest near Theni - Annanji Bye-pass road promising him help to retrieve the stolen camera and the platinum objects.

6.2. On 02.09.2013 at 09.30 a.m., the deceased informing his daughter Smt.Vinothini [P.W.1] that he is going to Theni Lakshmipuram to fetch the Mason, left home in his TVS Scooty Pep Motorcycle, bearing Registration No.TN-60-



C-7804. Till the next day morning, he did not return home. When she contacted her father's Cell Phone No.9842649181, the phone was switched off. P.W.1 along with her husband P.W.2 went to the Theni Police Station and gave a complaint about missing of Govindarajan. In the complaint, informations about Govindarajan, which are necessary to identify him, were furnished. The Complaint [Ex.P.1] was registered at 13.00 hours in Theni Police Station in Crime No.600 of 2013 under the caption 'Man Missing'. On the same day, at about 03.30 p.m., P.W.2 received a call to his Cell No.9842173217 from the cell number of Govindarajan [9842649181]. The caller informed P.W.2 that Govindarajan has murdered a lady. He and his associates (totally 6 in numbers) have evidence for it. To stop them disclosing it, the accused demanded Rs.60 Lakhs (each Rs.10 Lakhs). The caller has also warned that the same should not be reported to the Police. The caller to impress upon the family members of the Govindarajan that he has evidence for the murder alleged to have committed, told P.W.2 that the TVS Scooty Pep Motorcycle of Govindarajan is parked near the Chinnamannur Bus Stand Petrol Bunk and under the mat of the said vehicle, he has kept the Memory Card containing proof.

6.3. P.W.2 along with his relative Sundararamanujam [P.W.4] went to Chinnamannur Bus Stand and spotted the TVS Scooty Pep Motorcycle of the deceased Govindarajan parked nearby. They collected the Memory Card kept under the Mat of the vehicle and came to the Studio of the deceased. With the help of Rajesh [P.W.6], an Assistant working in the Studio run the Memory Card under



recovery mode, they found a blurred picture of a lady wearing wig, draped in a green coloured saree and a clear picture of a man. P.W.2 went to the Police Station and informed about this and handed over the said Memory Card [M.O.9].

6.4. On 04.09.2013, at about 02.30 hours, Mr.Gopi, the Inspector of Police [P.W.33] recovered the TVS Scooty Pep Motorcycle [M.O.23] under Recovery Mahazar [Ex.P.3]. The Sections were altered from man missing to Section 364-A I.P.C. Alteration Report was forwarded to the learned Judicial Magistrate through Mr.Ravikumar, Grade I Police Constable [P.W.25].

6.5. Thiru.Murugesan, Special Sub-Inspector of Police [P.W.27] identified the photo of the man found in the Memory Card as Seenivasan, the person known to him as an accused while he was serving at Allinagaram Police Station during the year 2009. Based on this lead, on 06.09.2013, at about 09.30 a.m., Seenivasan was arrested. He confessed to the crime voluntarily and the same was recorded in the presence of Thiru.Chandrasekaran, Village Administrative Officer [P.W.7] and his Assistant. Based on the admissible portion of the confession of the first accused [Ex.P.4], the Investigation Team along with the Thasildar and others went to the scene of crime, collected the bloodstained soil [M.O.20] and ordinary soil [M.O.21], proceeded to the house of the accused and recovered Hero Honda Motorcycle, bearing Registration No.TN-60-J-3510 [M.O.11], two gold rings [M.O.7 and M.O.8]. The recovery was reduced into a Mahazar [Ex.P.5]. The bloodstained



clothes of Seenivasan, weapon and wig [M.O.12 to M.O.15] were recovered near the brick kiln based on the information given by the accused. The Recovery Mahazar is Ex.P.6.

6.6. Ravindran [P.W.34], the Inspector of Police, on 06.09.2013 at about 06.00 p.m., arrested the second accused and recorded his confession. Based on his confession, crowbar, spade and iron plate [M.O.16 to M.O.18] were recovered from the reserve forest concealed by the accused.

6.7. Meanwhile, Sundareswaran, Forest Officer [P.W.17], during his Patrol in the reserve forest on 07.09.2013 at 11.30 a.m., received an information from the Forest Range Officer that the Investigation Team with Revenue Officials have arrived at reserve forest 300 meters from Modern Nursery Division on Periyakulam Bye-Pass Road, in connection with a murder case, he went there and saw the body being exhumed on identification by the first accused. Post-mortem was conducted on the spot.

6.8. Azhagar, Scavenger [P.W.12], who exhumed the body along with Muthuraj, Suresh and Ranjith Kumar [P.W.13], had spoken about the exhuming of the male body wrapped in a Saree and the Post-mortem conducted on the spot.

6.9. Through Jebaraju [P.W.18], Police Constable attached to the Cyber Crime Branch has collected the call details of Cell Phone No.9842649181 used by the deceased and the same was marked as Ex.P.10.



WEB COPY

6.10. Dr.Juliana Jeyanthi [P.W.31] is the Post-mortem Doctor, who has conducted autopsy on the decomposed exhumed male body, had given her autopsy report marked as Ex.P.22, stating that the deceased would appear to have died of Injury No.1 and its complication thereof four to five days prior to autopsy. Ante-mortem injuries were noted over the body. Injury No.1 reads as below:-

"Cut injuries of sizes 4 cms x 2.5 cms x 1.5 cms, 5 cms x 2.5 cms x 2 cms, 5 cms x 2.5 cms x 2.5 cms, 6 cms x 3.5 cms x 2.5 cms and 4 cms x 2cms x 3 cms were seen one below the other, in front of the neck with surrounding dark red coloured bruise injuring the underlying muscles, vessels, nerves and trachea. Margins were regular."

6.11. The material recovered with bloodstain were sent for chemical analysis. To identify the dead body superimposition test was conducted by Pushparani, Assistant Director, Forensic Science Laboratory [P.W.28]. DNA test was conducted by Nirmalabai [P.W.29] and confirmed that the dead person is the father of P.W.1. The bloodstained soil recovered from the scene of crime and the shirt recovered near the body exhumed alone tested to be human blood and rest of the materials, the test went inconclusive. Further, the investigation has led collection of evidence of eyewitnesses Karnan [P.W.9] and Muniyandi [P.W.10], who had seen the accused persons along with the deceased near the scene of crime few hours prior to the occurrence.



WEB COPY

6.12. The incriminating evidence put to the accused persons under Section 313 Cr.P.C. questioning, received blanket denial, but no contra evidence.

6.13. The material evidence collected and placed before the Court without a pale of doubt, establishes that on 06.09.2013, a male body in a decomposed state was exhumed from the reserve forest near Theni - Annanji Bye-Pass Road, 300 meters from Agricultural Research Office. The superimposition test and the DNA test conducted had established that the body is of Govindarajan, Proprietor of Vijayabharathi Studio and he is the father of P.W.1.

6.14. From the complaint [Ex.P.1] initiated by P.W.1, it is proved that the deceased Govindarajan, who left on 02.09.2013 at 09.30 a.m. did not return home. Hence, a man missing complaint was given on 03.09.2013 and F.I.R. [Ex.P.21] came to be registered in Crime No.600 of 2013 at 13.00 hours.

6.15. Karnan [P.W.9] and Muniyandi [P.W.10] had seen the accused and the deceased together on 02.09.2013 at 09.30 a.m. and 11.30 a.m. respectively. Muniyandi [P.W.10] on returning back had seen only Accused Nos.1 and 2 at about 01.30 p.m. near the scene of crime from where the body of the deceased Govindarajan exhumed. The Memory Card [M.O.9] contains a Photograph of the first accused and a blurred picture of a lady draped with green coloured saree. From the scene of crime along with the body of the deceased, the green coloured saree, Chappal, broken cooling glass were recovered. The recovery of two gold rings, marked as M.O.7 and M.O.8, from the possession of the first accused, has been



identified by the witnesses as the gold rings worn by the deceased, were all incriminating circumstances fitted against the accused for holding him guilty.

WEB COPY

7. The learned counsel appearing for the appellant would submit that in the complaint, P.W.1 has not whispered about two gold rings when she has given the details about other particulars like, bald head, wearing cooling glass and the two wheeler number used by her father. Therefore, the accused cannot be incriminated with the recovery of two gold rings [M.O.7 and M.O.8] alleged to be recovered from his possession based on the confession statement.

8. It is true that in the complaint, the daughter of the deceased has not mentioned that her father was wearing two gold rings. Initially, when her father did not return to home, she has never suspected that her father would have been murdered for gain. She feared that her father has been missing for some other reasons, for which, she has given necessary particulars, like, the colour of the shirt worn by her father at that time, the vehicle in which he went, physical features of her father and his habit of wearing a tinted glass. These particulars are necessary to identify the missing person. Omission to say about two gold rings in the F.I.R. can never be fatal to the prosecution case.



9. It is well settled that F.I.R. is not an encyclopedia of the crime. In **Baldev Singh and another Vs. State of Punjab** reported in (1995) 6 SCC 593, it has been held as follows:

"10. The F.I.R. is not a substantive piece of evidence, it is only relevant in judging the veracity of prosecution case and the value to be attached to it depends on the facts of each case. Only the essential or broad picture need be stated in the F.I.R. and all minute details need not be mentioned therein. It is not a verbatim summary of the prosecution case. It need not contain details of the occurrence as if it were an encyclopaedia of the occurrence. It may not be even necessary to catalogue the overt acts therein. Non-mentioning of some facts or vague reference to some others are not fatal."

10. Karnan [P.W.9], Muniyandi [P.W.10] and Thiyagu @ Thiagarajan [P.W. 20] are the crucial witnesses for the prosecution, who had spoken about the presence of the deceased in the company of the accused persons during the relevant point of time. Karnan, Milk Vendor [P.W.9] had spoken that on 02.09.2013 at about 09.30 a.m., while he was taking tea in a shop near State Bank of India, Theni Branch, he saw the deceased coming in his TVS Scooty Pep Motorcycle, parked it near the State Bank of India A.T.M., two other persons came and had conversation with the deceased. Those two persons appear to be the accused persons. After sometime, he left the shop. The two persons, who were conversing with the deceased, overtook



him in their two wheeler following the TVS Scooty Pep Motorcycle driven by the deceased. They were proceeding on Periyakulam Road and turned towards N.R.T. Nagar. Four days later, he heard that Govindarajan was missing.

11. Muniyandi [P.W.10], who was working as Coolie, had deposed that he know both the accused and the deceased. On 02.09.2013 at about 11.00 a.m., his cycle tube got punctured. He was rolling the cycle along Periyakulam Road and took rest near the Nursery of the Agricultural Department. At that time, the deceased came in his TVS Scooty Pep Motorcycle followed by two accused persons in the two wheeler. They all went inside the forest area informing the witness that they are going in search of Herbs. After inflating the tube, he returned to his home crossing the Nursery. At that time, around 01.00 to 01.30 p.m., he saw the two accused persons alone walking along the footpath.

12. Thiyagu @ Thiagarajan [P.W.20], who was a Driver by profession, helped the first accused to dig a pit inside the reserve forest. This was done on 26.08.2013 at 11.30 a.m. A confession statement [Ex.P.12] under Section 164 Cr.P.C. was recorded from him by the learned Judicial Magistrate, Periyakulam.



13. According to the learned counsel for the appellant, Muniyandi [P.W.10]

has not identified the accused as the person he saw along with the deceased on the fateful day. The evidence of Muniyandi [P.W.10] is improbable, since he has not properly explained why he has crossed the scene of crime before and after the occurrence on the same day. Likewise, the evidence of Thiyagu @ Thiyagarajan [P.W.20] to show that the first accused has premediated the murder and disposed of the evidence even on 26.08.2013 itself is not reliable.

14. Karnan [P.W.9] and Muniyandi [P.W.10] are the independent witnesses and also the chance witnesses. Therefore, the likelihood of their presence near the scene of crime is probable and reliable. The presence of the appellant/first accused along with the deceased near the forest area soon before the death of the deceased, requires an explanation from him, who has the exclusive knowledge about it.

15. In the case of *State of West Bengal vs. Mir Mohammad Omar and others* reported in (2000) 8 SCC 382, the Hon'ble Supreme Court had an occasion to analyse the evidentiary value of last seen theory and application of Section 106 of the Indian Evidence Act. The said observation is extracted below, since analogy to the facts of the instant case can be drawn profitable.



WEB COPY

"35. During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.

36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

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.



WEB COPY

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 SCR 199 : 1956 Cri LJ 794] the learned Judge has stated the legal principle thus:

"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."

39. In the present case, the facts which the prosecution proved including the proclaimed intention of the accused, when considered in the light of the proximity of time within which the victim sustained fatal injuries and the proximity of the place within which the dead body was found are enough to draw an inference that victim's death was caused by the same abductors. If any deviation from the aforesaid course would have been



WEB COPY

factually correct only the abductors would know about it, because such deviation would have been especially within their knowledge. As they refused to state such facts, the inference would stand undisturbed."

16. Apart from that, Muniyandi [P.W.10] has also deposed that on the same day, at about 01.00 to 1.30 p.m., he had seen only the accused persons and not the deceased. He had seen them very close to the scene of crime, where the said Govindarajan was buried. Coming to the Memory Card [M.O.9], it is a primary evidence and it was recovered based on the information given by the accused, when he called Muralidharan [P.W.2] for ransom. His Photo in the Memory Card kept in possession of the accused ought to have been explained by the accused, who has the exclusive knowledge regarding the content of the Memory Card. So, it was suggested to Rajesh [P.W.6] that there is a possibility of manipulating the Memory Card, which is promptly denied by the witness. In case, if any manipulation is suspected, the accused ought to have let in positive evidence establishing manipulation. Mere suggestion will not take away weightage of the witness. Though the case appears to be based on circumstantial evidence, the circumstance implicating the accused and the accused alone.



17. It is pertinent to note that though the learned counsel appearing for the appellant now canvass about the evidentiary value of the Memory Card and the content found therein, when those documents were marked and produced before the Court for appreciation, the same was not objected or repudiated through contra evidence.

18. By way of written argument, the learned counsel for the appellant submitted that the Memory Card [M.O.9] ought not to have relied upon and it is not a trustworthy electronic record. The conviction of the accused is not solely based on the Memory Card [M.O.9], it is corroborative evidence to the material evidence, which implicates the accused in the crime. The said Memory Card was recovered from the footmat of TVS Scooty Pep Motorcycle left abandoned near the Theni Bus Stand Petrol Bunk. The accused has called Muralidharan [P.W.2] from the cellphone of the deceased and has informed about the TVS Scooty Pep Motorcycle parked near Theni Bus Stand Petrol Bunk and also the concealment of the Memory Card in the Mat of the said vehicle. This information exclusively within the knowledge of the accused, which he passed on to Muralidharan [P.W.2]. In the said Memory Card [M.O.9], the Photo of the accused has been surfaced when recovery mode was employed. Then, again, how could his Photo found place in the Memory Card is a fact within the knowledge of the accused and he has every right to explain. Unfortunately, he has not exercised that right to explain. Therefore, Section 106 of the Indian Evidence Act gets attracted.



19. The two gold rings of the deceased were recovered from the house of the accused. Vinothini [P.W.1], Muralidharan [P.W.2] and Anusuya [P.W.3], who are the daughter, son-in-law and wife of the deceased respectively, have identified the gold rings [M.O.7 and M.O.8] worn by the deceased Govindarajan.

20. The contention of the learned counsel appearing for the appellant that there was a delay in forwarding the altered F.I.R. also does not carry any merit, since the Alteration Report [Ex.P.26] has been sent to the Magistrate on 04.09.2013 and the same has been received by the Office of the Judicial Magistrate on 06.09.2013. There is no reason to suspect the delay as a source of manipulation. M.O.7 and M.O.8 Gold Rings being established as ornaments of the deceased and proof of recovery of those Material Objects from the residence of the accused. This proven fact requires acceptable explanation from the accused. However, he has failed to give any explanation.

21. In view of the above discussions and appreciation of evidence, the chain of evidence placed against the accused stands unbroken and nail the accused as the person, who has committed the murder of Govindarajan and buried him.



Crl.A.(MD)No.363 of 2023

22. There was a substantial argument on the sentence imposed by the trial

Court, which is not only to run consecutively, but also a solitary confinement for a period of three months without any cause.

23. This Court after giving anxious consideration to the said plea, holds that it is not a rarest of rare case or on extreme circumstance prevail in the Prison due to the presence of the said accused, which warrants solitary confinement. It is a case of murder for gain and destruction of evidence. The punishment imposed should be proportionate to the severity of the offence. Therefore, this Court while confirming the term of sentence for the offences under Sections 379, 201 and 302 I.P.C. and the fine amount imposed, hereby modify the term of sentence as concurrently instead of consecutively. Three months solitary confinement imposed is revoked. The period of sentence already undergone by the appellant/accused shall be set off under Section 428 Cr.P.C. If the compensation amount not paid to the wife of the deceased [P.W.3], the same should be recovered in the manner as stated by the trial Court.

24. With the above modification, the Criminal Appeal is partly allowed.

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
SMN2

[G.J., J.] [S.M., J.]
12.01.2023



Crl.A.(MD)No.363 of 2020

To

1.The Additional District and Sessions Judge (FTC),
Theni.

2.The Inspector of Police,
Theni Police Station,
Theni District.

3.The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai.

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



WEB COPY



Crl.A.(MD)No.363 of 2020

DR.G.JAYACHANDRAN, J.
and
SUNDER MOHAN, J.

SMN2

PRE-DELIVERY JUDGMENT MADE IN
Crl.A.(MD)No.363 of 2020

DATED : 12.01.2023