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Crl.A.(MD)NO.40 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 23.01.2025

Pronounced On: 26.02.2025.

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

AND

THE HON'BLE MS.JUSTICE R. POORNIMA

Crl.A.(MD)No.40 of 2021

Sethuraman

... Appellant/P.W.1

Vs.

1.The Inspector of Police,
Mathagupatti Police Station,
Sivagangai District.
(Crime No.65 of 2008)

... 1st Respondent / Complainant

2.Vaitheeswaran

... 2nd Respondent / Sole Accused

Prayer: Criminal Appeal filed under under Section 372 of Cr.P.C, to call for the records relating to the Judgment dated 11.12.2019 made in S.C.No.124 of 2009 on the file of the Principal District and Sessions Judge, Sivagangai and set aside the same as illegal and convict the accused.

For Appellant : Mr.R.Gandhi, Senior Counsel
for Mr.M.Sakthi Sriram

For Respondents : Mr.T.Senthil Kumar
Additional Public Prosecutor for R1
: Mr.Gopalakrishna Lakshmana Raju
for R2



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J U D G M E N T**(Judgment of the Court was delivered by G.R.SWAMINATHAN, J.)**

The second respondent herein was prosecuted for the offence of murder in S.C.No.124 of 2009 on the file of Principal District and Sessions Judge, Sivagangai. By the impugned Judgement dated 11.12.2019, he was acquitted. Questioning the same, the defacto complainant / P.W.1 has filed this appeal.

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

The accused Vaitheeswaran got married to Hemalatha (deceased) on 15.09.1996. They led their matrimonial life in Chennai. The family of the accused had a grievance that his in-laws did not discharge their obligations following the demise of his father. Since then, the accused was harassing his wife. Hemalatha was admitted in a hospital in Chennai. It was alleged that she tried to commit suicide. She underwent 23 days of treatment as an inhouse patient. After discharge, Hemalatha was taken in car from Chennai to Kottampatti. Once they reached Mathagupatti, the accused and his sister's husband Ilango insisted that they would take Hemalatha to his house in Nagarampatti.



Thereupon, Hemalatha and the accused were dropped at the house of the

accused in Nagarampatti. Sethuraman / brother of Hemalatha P.W.1

went to Kottampatti. He sent his sister Valli and niece Kannathal P.W.3

to Nagarampatti to visit Hemalatha. Valli and her daughter Kannathal

along with others went to Nagarampatti and saw Hemalatha on

23.05.2008. Though Hemalatha wanted to leave Nagarampatti and go to

Kottampatti, the accused and his brother-in-law refused to send her.

While others returned to Kottampatti, Kannathal stayed with Hemalatha.

Around 09:00 pm., Vaitheeswaran told her to leave. Kannathal left

Nagarampatti at 09:00 pm. Around midnight, information was received

that Hemalatha died. Immediately, P.W.1-Sethuraman and others went to

Nagarampatti and found that Hemalatha was dead. P.W.1 lodged Ex.P1

complaint before the Mathagupatti police station. At 11.30 a.m., on

24.05.2008, Crime No.65 of 2008 was registered under Section 174 of

Cr.P.C. P.W.11-Murugan- who was the Circle Inspector of Police,

within whose limits Mathagupatti Police Station fell, went to the scene of

occurrence at around 12.30 pm. He examined the witnesses and after

inspecting the spot, prepared the observation mahazer and rough sketch.

Inquest was conducted from 11.30 a.m to 15.30 pm. Ex.P12 is the

inquest report. The body was sent to the Sivagangai Government



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Hospital, Sivagangai for conducting postmortem. Since law and order issue arose, the postmortem was conducted at the Government Rajaji Hospital, Madurai. P.W.12 took over and continued investigation from 20.06.2008. He examined the medical witness and recorded his statement. He arrested the accused at 10.45 am on 19.07.2008 and recorded his confession. P.W.13 continued the investigation and filed the final report before the Judicial Magistrate No.1, Sivagangai. It was taken on file in P.R.C.No.8 of 2009. The copies were served on the accused. The case was committed to Sessions Court, Sivagangai in S.C.No.124 of 2009. It was made over to Principal Sessions Judge, Sivagangai. Charge under Section 302 of IPC was framed against the accused. The accused pleaded not guilty and claimed to be tried. The prosecution examined P.W.1 to P.W.13 and marked Ex.P1 to Ex.P18. On the side of the defence, Ex.D1 was marked. The incriminating circumstances were put to the accused under Section 313 of Cr.P.C. He characterized the same as false. The learned trial Judge after consideration of the evidence of the record, acquitted the accused vide Judgment dated 11.12.2019.



3. The learned senior counsel appearing for the defacto complainant submitted that the circumstances projected by the prosecution unerringly point to the guilt of the accused. He invoked Section 106 of the Evidence Act, 1872. He pointed out that the occurrence had taken place in the matrimonial home of the accused. Onus was cast on the accused to explain the circumstances in which Hemalatha had died. This is all the more so because, in Ex.P7- postmortem report, head injury had been noted. It is for the accused to explain as to how the head injury had taken place. The accused failed to offer any explanation during his examination under Section 313 of Cr.P.C. The learned senior counsel drew our attention to the recent decision of the Hon'ble Supreme Court reported in **2023 Live Law(SC) 861 (Balvir Singh vs. State of Uttarakhand)** in this regard. He called upon this Court to set aside the impugned Judgement and find the accused guilty for the offence under Section 302 of IPC.

4. Per contra, the learned senior counsel appearing for the accused submitted that there are too many gaping holes in the case of the prosecution. He pointed out that the prosecution has not exactly determined the time of death. He drew our attention to the testimony of

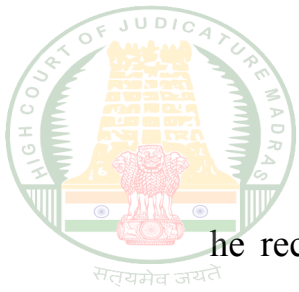


the postmortem doctor and claimed that chain of circumstances is not complete to enable this Court to fasten liability on the accused. He also submitted that the testimonies of the material witnesses projected by the prosecution are not reliable and do not command the confidence of this Court. He also reminded that since the accused had been acquitted, the presumption of innocence stands doubly fortified and therefore, this Court cannot interfere with the impugned Judgment merely because another view projected by the defacto complainant is possible. He also underlined the fact that the State Government did not file any appeal. He called upon this Court to sustain the impugned Judgment and dismiss the appeal.

5. The learned Additional Public Prosecutor broadly supported the stand taken by the defacto complainant.

6. We carefully considered the rival contentions and went through the evidence on record.

7. Ex.P1-complaint was lodged by P.W.1/ brother of Hemalatha (deceased). According to P.W.1, in the month of April 2008,



he received information that his sister Hemalatha attempted to commit

suicide by hanging herself. He therefore went to Chennai and saw her.

Hemalatha had been admitted in a private Hospital, Chennai. She was an inpatient for 22 days. She was even discharged. The doctors advised that she must go to her parents place. Therefore, Hemalatha was brought from Chennai Hospital to their village. When the vehicle reached Mathagupatti, the accused and his brother in law Elango insisted that Hemalatha should be taken to their house in Nagarampatti. Therefore, Hemalatha was taken to Nagaramapatti. The accused told P.W.1 that Hemalatha would be sent to her parental house on the next day. Therefore, P.W.1 sent his elder sister Valli and her daughter Kannathal/P.W.3 to Nagarampatti to bring Hemalatha. But the accused refused to send Hemalatha. Therefore, Valli and Kannathal returned. On 23.05.2008 at about 09.00 pm., P.W.1's brother Dr.Vijayan Mathamadakki(P.W.2) received phone call that Hemalatha was struggling for life. P.W.2 told P.W.1 to go to Nagarampatti and check on their sister. Thereupon, P.W.1 went Nagarampatti at about 9.30 pm in his two wheeler. He received information en-route that Hemalatha had passed away. P.W.1 and cousin Jeyakumar (not examined) went to the house of the accused and found Hemalatha dead.



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8. P.W.2-Dr.Vijayan Mathamadakki was a Government doctor working in Sivagangai. He also deposed that his sister was harassed physically and mentally. On 27.04.2008 at about 11.00 am., he received information from the accused that Hemalatha hung herself and attempted to commit suicide. Hemalatha regained consciousness after 15 days. P.W.2 told his brothers and sisters to bring back Hemalatha after she was discharged from the Hospital. When Hemalatha was thus being brought back, the accused forcibly took Hemalatha to Nagarampatti. P.W.2 sent his relatives and niece Kannathal to Nagarampatti to be of assistance to Hemalatha. In the early hours, on 24.05.2008 at around midnight, the accused informed P.W.2 over phone that Hemalatha had died. P.W.2 instructed P.W.1 to give complaint before the police station.

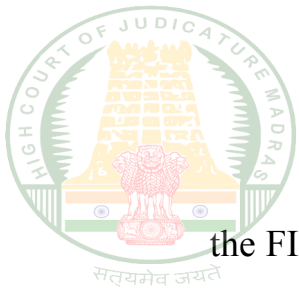
9. P.W.3-Kannathal is the daughter of Hemalatha's sister. She deposed that on 23.05.2008, she was with the deceased Hemalatha along with a few villagers. Since the accused compelled her to leave, they returned to Kottampatti a little past midnight. They received information from the accused that Hemalatha had passed away. They went to Nagarampatti where she saw Hemalatha lying dead. P.W.3 deposed that



after she came to know that her aunt Hemalatha had come to Nagarampatti from Chennai after discharge from the hospital, she went to Nagarampatti to see her aunt along with a few local villagers.

10. P.W.4-Paramasivan attested Ex.P5-Observation Mahazer and Ex.P11-Rough Sketch. P.W.5 is the Village Administrative Officer who deposed that the accused gave extra judicial confession before him on 19.07.2008. P.W.7-Dr.Natarajan conducted postmortem. In Ex.P8, he opined that the deceased would appear to have died on account of head injuries. P.W.9-Sathiyaseelan, Head Constable of Mathagupatti Police Station deposed that on 24.05.2008, he took the body to the Sivagangai Government Hospital. Since postmortem could not be conducted on that day, on 25.05.2008, the body was transferred to the Government Rajaji Hospital, Madurai. P.W.11, P.W.12 & P.W.13 are the investigating officers.

11. Ex.P1 is the complaint lodged by P.W.11. Ex.P9 is the FIR registered by Mathagupatti Police Station. FIR was registered at 11:30 am on 24.05.2008. It reached the Judicial Magistrate only on 29.05.2008 at 10:45 a.m. It is trite law that delay in forwarding a copy of



the FIR to the jurisdictional magistrate is not fatal to the prosecution case

unless the accused is able to demonstrate how this delay has prejudiced his case (*State of Rajasthan vs Daud Khan (2016) 2 SCC 607*). The requirement to dispatch and serve a copy of the FIR to the jurisdictional magistrate is an external check against *ante* dating or *ante* timing of the FIR to ensure that there is no manipulation or interpolation in the FIR. In the present case, no explanation has been given by the prosecution to explain this delay. Since the defence has particularly questioned the date, time and place of occurrence and has shown that it has caused prejudice to the accused, this delay of 4 days assumes considerable significance. According to P.W.1, he received information about the demise of his sister Hemalatha at 09:00 pm on 23.05.2008 from P.W.2. He reached the place of occurrence at 09:20 pm itself in his two wheeler. P.W.2 on the other hand deposed that he received information from the accused himself over phone that Hemalatha died at around midnight. P.W.3-Kannathal / niece of the deceased claimed that she was in the house of the accused at Nagarampatti till 09:00 pm and thereafter she was forced to leave the house. Thus, there is considerable discrepancy as to when the news of the occurrence reached the prosecution witnesses.



12. The learned senior counsel appearing for the defence drew

our attention to the testimony of the postmortem doctor. P.W.7 deposed that he conducted postmortem at 4:15 pm on 25.05.2008. The postmortem report was marked as Ex.P7 through P.W.7. It reads that the body was in a decomposed condition even at the time of postmortem.

The observations are as follows:-

“Appearances found at the postmortem:

Decomposed body of a female, aged about 34 years. Finger and toe nails blue. Face, chest, abdomen bloated. Eyeballs, tongue bulged out. Postmortem peeling and blebs noted all over the body in a patchy manner. Scalp hair comes off easily.

The following antemortem injuries are noted on the body:

1. Sutured Tracheostomy wound 6 X 1 cms X tracheal lumen deep noted on the front of lower part of neck.

On dissection of scalp, skull & dura:

Contusion scalp 7 X 8 cms noted on the left parieto occipital region 9 X 8 cms on the left fronto parietal region and 9 X 7 cms noted on the right occipital region. Brain liquefied and blood tinged.

Other Findings:

Peritoneal cavity – 50 ml of decomposed fluid; Pleural cavity-30 ml of decomposed fluid ; Pericardium-15ml of decomposed fluid; Heart-Flabby; Lungs-cut section decomposed; Hyoid bone-intact; Stomach-100 ml of decomposed fluid with smell of decomposition, mucosa decomposed; Liver, spleen & Kidneys-cut section decomposed; Small intestine-20 ml of decomposed fluid with smell of decomposition, mucosa decomposed; Bladder-empty; Uterus-normal, cut section empty; Brain-described.”



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13. P.W.7 admitted that the brain was in a liquefied condition.

He admitted that the brain will be in a pulpy condition for 2 to 3 days after the death. After 3 to 5 days, it reaches the liquefied condition. In this case, according to the prosecution, Hemalatha was found struggling even at around 09.00 pm on 23.05.2008. News of her demise reached at around midnight. Thus, according to the prosecution, the death should have taken place between 09.00 pm to 11.59 pm. The postmortem took place on 25.05.2008 at 04.00 pm. Thus, the postmortem had been conducted in less than 40 hours from the death of Hemalatha. If that be so, her brain should have been in a pulpy condition and not in a liquefied condition. P.W.7 deposed that the entire body of Hemalatha was found in a decomposed stage. The body condition of Hemalatha does not tally with the time of her death according to the prosecution. This throws considerable doubt on the prosecution case.

14. The court below had also noted that if Hemalatha had tried to commit suicide and was therefore admitted in a private hospital, Chennai, and thereafter, P.W.1 and others brought her back, they would not have permitted the accused to take Hemalatha to Nagarampatti. P.W.



1 admitted that the doctor in Chennai had insisted that Hemalatha should be taken to her parental house. P.W.1 also could not clarify the details of the vehicle in which she was brought back from Chennai. He only made a general statement that it belonged to a friend of the accused.

15. It is also relevant to note that the medical records of Hemalatha pertaining to her treatment in Chennai were also not brought on record. The doctor who had treated Hemalatha was also not examined. The date of discharge had not been conclusively established. The date of discharge assumes great significance because according to the prosecution witnesses, Hemalatha died on the same day when she was discharged. The accused challenged the prosecution version that Hemalatha died at Nagarampatti. It is true that the observation mahazer and rough sketch (Ex.P5 and Ex.P11) prepared by the police indicated that the dead body of Hemalatha was found in the house of the accused at Nagarampatti. One Paramasivam who had signed as witnesses in Ex.P5 as well as Ex.P11, was examined as P.W.4. Paramasivan is a practicing lawyer and is none other than the nephew of the deceased. Paramasivan hails from Baganeri and he was earlier residing at Kottampatti. He was not a resident of Nagarampatti. The omission on the part of the police to



prepare the observation mahazer and rough sketch in the presence of the local villagers strengthens the hypothesis projected by the defence.

16. This is all the more so because, the complaint as well as the FIR did not reach the Magistrate in time as already mentioned above. The complaint and the FIR reached the magistrate only after an inordinate and unexplained delay of four days. P.W.4 also deposed that he reached the spot at 5:30 am on 23.05.2008 and that the police came to the spot at 6:30 a.m. Even if we assume that the date was wrongly mentioned, but still there was a discrepancy about the time. Admittedly, FIR was registered only on 11:00 am on 24.05.2008. Therefore, the police could not have arrived at the spot at 06:30 a.m. P.W.4's evidence does not inspire our confidence. We therefore hold that the police have not proved the observation mahazer as well as the rough sketch.

16. In normal circumstances, the failure to prove the observation mahazer and rough sketch will not make much of a difference. But in this case, since the accused has specifically challenged the place of death of Hemalatha and contended that the death took place in the house of the accused at Nagarampatti, such a failure is fatal.



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17. The learned senior counsel for the appellant wanted us to invoke Section 106 of the Indian Evidence Act, 1872 against the accused. It reads as follows:-

"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".

18. In **(2021) 10 SCC 725 (Nagendra Sah Vs. State of Bihar)**, the Hon'ble Supreme Court categorically held that Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused.

19. It is not the case of the prosecution that at Nagarampatti, the accused alone lived. Since it has not been convincingly established that Hemalatha was taken to Nagarampatti when she was being brought from Chennai, and since there are serious discrepancies regarding the date and time of occurrence, we are not inclined to invoke Section 106 of The Indian Evidence Act and draw adverse inference against the accused.



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20. Even in *Balvir Singh vs. State of Uttarakhand*, reported in **2023 Live Law (SC) 861**, relied upon by the learned senior counsel appearing for the appellant, it was held that the application of Section 106 of the Evidence Act would not alter the burden of proof resting upon the prosecution. The prosecution case rests entirely on circumstantial evidence. Therefore, motive becomes relevant. Admittedly, the marriage between the accused and Hemalatha took place in the year 1996. Two children were born through wedlock. Hemalatha's death took place only in May 2008 ie., 12 years after the marriage. The children have also not been examined. Even their presence is not spoken to by any of the witnesses. The matrimonial home of the accused and Hemalatha was only in Chennai. No neighbor was examined to show that Hemalatha was subjected to harassment. Viewed in the light of these circumstances, the final opinion of the postmortem doctor that the death appears to have taken place due to head injury appears to be unconvincing. It is true that during postmortem, contusion was found in the skull of the deceased. During cross-examination, it was suggested to P.W.7 that contusion can be caused due to rough handling of the body during postmortem, P.W.7 answered in the affirmative to the said suggestion. When it is admitted



that immediately prior to the occurrence, the deceased was under treatment in a Hospital in Chennai for 22 days, and she was also in an unconscious state of mind for almost 15 days, it is absolutely necessary that the medical records pertaining to the treatment given to her in Chennai be placed on record. The prosecution ought not to have withheld the said records. Because of this failure on the part of the prosecution, we doubt the opinion of P.W.7 that the deceased would have died of head injury.

21. In view of the principles governing interference with the order of acquittal passed by the trial Court expounded by the Hon'ble Supreme Court in its decision reported in **2024 SCC OnLine SC 423 (Bhupatbhai Bachbhai Chavda v State of Gujarat)**, unless we record a finding that the view taken by the trial court is perverse, it is not open to us to reverse the finding of acquittal. We are not persuaded to hold that the trial Court had acted in perverse manner. The view taken by the trial court is very much a plausible view. We therefore decline to interfere with the order of acquittal of the Court below.



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22. The Criminal Appeal is dismissed.

[G.R.S., J.] [R.P., J.]
26.02.2025

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To:

- 1.The Principal District and Sessions Judge, Sivagangai.
- 2.The Inspector of Police,
Mathagupatti Police Station,
Sivagangai District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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G.R.SWAMINATHAN,J.

AND

R.POORNIMA, J.

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