
(2007) 12 MAD CK 0002
In the Madras High Court
Case No : Criminal Appeal No. 199 of 2005

Murugesan	Vs	APPELLANT
State		RESPONDENT

Date of Decision : 06-12-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 109, 302, 34, 341

Citation : (2007) 12 MAD CK 0002

Hon'ble Judges : V. Periya Karupiah, J;D. Murugesan, J

Bench : Division Bench

Advocate : K.V. Sridharan, for the Appellant; V.R. Balasubramaniam, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

D. Murugesan, J.—The appellant is A-1 in S.C. No. 313 of 2003 on the file of the learned Principal Sessions Judge, Salem. In all three

accused were tried, but A-2 & A-3 were acquitted of all the charges. The appellant (A-1) was found guilty of the offence under Sections 302 and

341 IPC and sentenced to undergo imprisonment for life and also to pay a fine of Rs. 1,000/-, in default to undergo rigorous imprisonment for six

months for the offence u/s 302 IPC and to undergo simple imprisonment for one month and also to pay a fine of Rs. 500/-, in default to undergo

simple imprisonment for one week for the offence u/s 341 IPC. The appellant has preferred this appeal challenging the said conviction and

sentence.

2. The prosecution case as put forth before the Court below is as follows:

A-3 and the deceased are brothers. A-1 is the son of A-3 and A-2 is the brother-

in-law of A-1. Due to property dispute, all the three accused committed the murder of the deceased on 20.6.2002 at 9.00 a.m.

3. P.W.1, who is none other than the wife of the deceased, gave the complaint, Ex.P-1 to P.W.15, the Inspector of Police, Athur Police Station at about 12.00 noon on 20.6.2002 and the same was registered in Cr. No. 1087 of 2002 for the offence u/s 302 IPC. The printed First Information Report is Ex.P-24. P.W.15 made arrangements to send the express reports through the Head Constable, P.W.13 to the Court as well as to the higher police officials. He along with the police party proceeded to the scene of occurrence at 12.45 p.m., and prepared an Observation Mahazar, Ex.P-16 and also drew a rough sketch, Ex.P-25 in the presence of witnesses. He caused photographs of the scene of occurrence. He conducted inquest on the body of the deceased between 1.30 p.m., and 4.00 p.m., in the presence of panchayatdars and witnesses and prepared the inquest report, Ex.P-26. He thereafter sent the body of the deceased through the Head Constable, P.W.14 to Athur Government Hospital for conducting post-mortem.

4. P.W.2, Assistant Surgeon attached to the said hospital, commenced post-mortem at 4.35 p.m., on 20.6.2002 on the body of the deceased and he noted the following external injuries:

1. Irregularly lacerated left eye. Both eyelids.
2. Lacerated wound over the left occipital region 4 x 2cms x bone depth.
3. Contusion occupying left cheek.
4. Contusion occupying left side neck, left shoulder region.
5. Contusion occupying anterior surface of left side neck, left upper chest, left axillary region.
6. Contusion over the right shoulder region.

He issued the post-mortem certificate, Ex.P-3 with his opinion that the deceased would appear to have died of shock and haemorrhage due to injury to vital organ lung and multiple injury 6 to 12 hours prior to autopsy.

5. P.W.15, continuing with his investigation, seized the TVS Champ bearing Regn. No. TAM 7882-M.O.1, magnum leather bag-M.O.2, Tital

quartz watch-M.O.4 pen-M.O.5, Chappals-M.O.6, bloodstained earth-M.O.8 and sample earth-M.O.9 under the mahazar, Ex.P-17 in the

presence of witnesses. He examined the other witnesses and recorded their statements. He searched for the accused. He examined the Head

Constables, P.Ws.13 & 14 and recorded their statements on 21.6.2002. On information, he proceeded to Athur Salem Main Road and arrested

A-1 and A-2 on 22.6.2002 at 6.30 a.m., and seized the motor-cycle bearing Regn. No.TN-27-Z-0394-M.O.3 used by them. In pursuance of the

admissible portion of their confession, he recovered the bloodstained wooden stick, M.O.7 and the bloodstained shirt and pant, M.Os.10 & 11

under the mahazar. He brought A-1 and A-2 to the police station along with the seized material objects and remanded them to judicial custody. He

examined the other witnesses and recorded their statements. He sent the seized material objects for chemical examination through the Court on

4.7.2002. In the meantime, A-3 surrendered before the Court. He examined the post-mortem doctor, P.W.2 and recorded his statement. After

completing investigation on 30.10.2002, he laid the charge sheet against the accused for the offence under Sections 302 read with 34 and 109 IPC

before the Court.

6. In order to substantiate the charges against the accused, the prosecution examined 15 witnesses, marked 26 exhibits and produced 17 material

objects.

7. When the accused were questioned u/s 313 of the Criminal Procedure as to the incriminating materials appearing against them, they denied each

and every material as false. No witness was examined and no document was marked on their side. The learned trial Judge, however, found the

appellant guilty for the offences as stated earlier.

8. Mr. K.V. Sridharan, learned Counsel for the appellant would submit that the case of the prosecution rests only on the following circumstantial

evidence:

(i) The last seen theory as spoken to by P.W.7 and P.W.9 for having seen A-1 and A-2 riding the motor-cycle, M.O.3.

(ii) The seizure of the wooden stick, M.O.7 containing human blood and the bloodstained shirt and pant, M.Os.10 & 11 as per the admissible

portion of the confessional statements of A-1 & A-2 immediately after their arrest on 22.6.2002.

(iii) Apart from the above, the motive as spoken to by P.Ws.1 and 7.

9. Learned Counsel for the appellant has submitted that so far as P.W.7 is concerned, he is the son of the deceased and he was aged seven years at the time of occurrence and his evidence is totally unbelievable. The learned Counsel would say that P.W.7 has stated that he was dropped in the school by the deceased in his TVS champ, M.O.1 at about 8.30 a.m., on 20.6.2002 and on the way, he saw A-2 riding the motor-cycle, M.O.3 behind them and A-1, who was the pillion-rider, was having the wooden stick, M.O.7 in his hands. Though he has further stated that he was informed by a teacher that his father was attacked by somebody and he was lying on the roadside and he went and identified his father, he returned to the school without even staying there till his mother, P.W.1 arrived at the scene of occurrence. The conduct of P.W.7 throws a serious doubt about the truthfulness of his evidence. He would also submit that though the statement of P.W.7 u/s 161 Cr.P.C., was recorded on 20.6.2002 itself, it reached the Court only on 13.11.2002 and the delay in sending the statement has not been explained. He would also submit that though the statement of P.W.7 was recorded on the date of occurrence, he was not examined during inquest. So far as the evidence of P.W.9 is concerned, he is a petrol pump operator and he has only deposed that at about 7.30 a.m., on the date of occurrence he saw A-1 and A-2 in the petrol bunk and they filled petrol to the motor-cycle, M.O.3. Here again, his evidence cannot be relied upon, as his statement, though was recorded on 22.6.2002, reached the Court only on 13.11.2002 and there was no explanation whatsoever for the delay. So far as the recovery is concerned, the trial Court had acquitted A-2 solely on the ground that there was no recovery from A-2 and in that process, the trial Court has not taken into consideration the evidence of P.Ws.7 & 9 to implicate A-2 for the offence, but strangely the evidence of P.Ws.7 & 9 was believed by the trial Court solely on the ground of recovery to convict A-1. The incriminating material as to the recovery was not put to A-1 in the Section 313 Cr.P.C., questioning and in the absence of the same, the said incriminating material cannot be taken into consideration and the conviction on the ground of recovery is not safe. For the said proposition, the learned Counsel would rely upon the judgment of the Apex Court in Vikramjit Singh alias Vicky v. State of Punjab (2007) 1 SCC (Cri.) 732. He would also submit that a mere recovery is not sufficient to establish the case of the

prosecution in the absence of any other connecting incriminating materials. For the said proposition, the learned Counsel would rely upon the

judgment of the Apex Court in Ravinder Parkash and Anr. v. State of Haryana 2003 SCC (Crl.) 74.

10. So far as the motive aspect also, the learned Counsel would submit that it is an admitted case of the prosecution that P.W.1 and the deceased

were not living together for almost 15 years and the continuance of property dispute between the deceased and the accused could not have been

known to P.W.1 and the prosecution has only made an attempt to throw the motive through the evidence of P.W.1, who was ignorant of the

currency of the dispute, as she was living away from her husband for 15 years. Though P.W.7 has spoken about the previous enmity, his evidence

is also not consistent inasmuch as he has stated that he was not personally aware of any such dispute between the deceased and the accused.

Nevertheless, the evidence of P.W.7 cannot be taken into consideration for the reasons stated in support of the earlier submission. In the absence

of motive as well, the prosecution has failed to prove the circumstantial evidence without any missing link. Hence the appellant is entitled to

acquittal.

11. Mr. V.R. Balasubramaniam, learned Additional Public Prosecutor, on the other hand, would submit that P.W.7 is a child witness, as he was

aged seven years at the time of occurrence and 13 years at the time of deposition before the Court, and there is absolutely no reason for P.W.7 to

falsely implicate the accused and therefore his evidence must be taken as true. Equally, P.W.9 is a petrol pump operator and is an independent

witness. His evidence is categorical as to the last seen theory of A-1 and A-2. So far as the questioning u/s 313 Cr.P.C., is concerned, the learned

Additional Public Prosecutor relied upon the judgment of the Apex Court in State of Rajasthan v. Kashi Ram (2007) 1 SCC (Crl.) 688 and

submitted that unless the prejudice is shown, merely because the questions were not put to the accused on certain incriminating materials, that will

not affect the prosecution case. As far as the motive is concerned, the learned Additional Public Prosecutor would submit that the prosecution has

satisfactorily established the motive through the evidence of P.Ws.1& 7.

12. We have given our anxious consideration to the rival submissions. Going by

the evidence and materials, it is beyond dispute that the prosecution case stands only on circumstantial evidence. It has been repeatedly held by the Apex Court in number of cases that when the prosecution case stands on circumstantial evidence, there should not only be any missing link but also the link should be strong and important. This proposition of law is held by the Apex Court in the judgment in Sudama Pandey v. State of Bihar 2002 SCC (Cri.) 239, wherein it has been held that in circumstantial evidence, the prosecution must also prove the additional link if required in the given circumstances of the case. The circumstances also must be cogent and this law is held by the Apex Court in the judgment in Gambhir Vs. State of Maharashtra, .

13. Keeping the above principles of law in mind, we will have to consider the evidence adduced in this case. As mere existence of motive alone is not sufficient to sustain the case of the prosecution and the motive being a double-edged weapon should be considered very cautiously, we will deal with the motive aspect at the end of our discussion.

14. So far as the first circumstance as to the last seen theory as put forth by the prosecution is concerned, we have the evidence of P.Ws.7 & 9.

P.W.7 is the son of the deceased. He was aged 7 years at the time of occurrence and was a school going boy. He has spoken that on 20.6.2002

at about 8.30 a.m., while he was taken by his father in a motor-cycle to drop him in the school, he saw both A-1 and A-2 following them in

another motor-cycle, M.O.3 and A-1 was having a wooden stick, M.O.7 in his hands. According to him, one of the teachers of the school

informed him as to the occurrence and he was taken to the place of occurrence, where he identified the body as that of his father. Nonetheless,

according to him, he returned to the school. This conduct of a school going boy is totally unbelievable, especially when his father was brutally

murdered and the body was lying on the roadside. Secondly, according to the prosecution, the Section 161 Cr.P.C., statement was recorded from

him on 20.6.2002 but, strangely, he was not examined at the time of inquest. Further, from the perusal of the records it is seen that Exs.P-7 & P-8

were prepared much after the Section 161 Cr.P.C., statement of P.W.7 reached the Court on 17.7.2002. Likewise, Exs.P-16, P-19, P-20 & P-

21 were prepared much after the Section 161 Cr.P.C., statement of P.W.7 reached

the Court on 24.6.2002. There is absolutely no explanation by the Investigating Officer as to why the statement of P.W.7 recorded u/s 161 Cr.P.C., even as early as on 20.6.2002, was not sent to the Court immediately or at least along with Exs.P-16, P-19, P-20 & P-21 on 24.6.2002 or with Exs.P-7 & P-8 on 17.7.2002. The delay in sending the Section 161 Cr.P.C., statement to the Court throws a serious doubt about the evidence of P.W.7 as to whether he was in fact present on the date of occurrence. Hence, we are left with the evidence of P.W.9. The evidence of P.W.9 also cannot be believed for the simple reason that though his statement u/s 161 Cr.P.C., was recorded on 22.6.2002, it reached the Court only on 13.11.2002 and absolutely there is no explanation whatsoever as to the delay. As per his evidence, he would only say that he saw A-1 and A-2 in the petrol bunk while filling petrol for the motor-cycle, M.O.3 and he was not aware of the names of both the persons. Nevertheless, he implicates them. In these circumstances, we are not inclined to accept the evidence of P.Ws.7 & 9 as to the last seen theory. If the evidence of P.Ws.7 & 9 are disbelieved, the only evidence available for the prosecution is the recovery of the wooden stick, M.O.7, shirt, M.O.10 and pant, M.O.11 and the recovery is said to have been made solely on the basis of the admissible portion of the confessional statement of A-1. In such circumstances, the recovery being an incriminating material to prove the charges against A-1, the same should have been put to A-1 while he was questioned. It is not in dispute that though in Question No. 23, A-1 was asked about the exhibits marked for having sent the material objects for chemical examination, he was not put the incriminating material in Ex.P-13 as to the wooden stick, M.O.7 containing the human blood "A". The issue as to whether the failure to put all the incriminating materials to the accused would prejudice the accused and consequently the sentence could be sustained came up for consideration before the Apex Court in Vikramjit Singh alias Vicky case (supra). In paragraph 23, the Apex Court has held as follows:

It is a well-settled principle of law that the circumstances which according to the prosecution lead to proof of the guilt against the accused must be put to him in his examination u/s 313 of the Code of Criminal Procedure.

In that judgment, the Apex Court has also quoted with approval its earlier

judgment in Tara Singh Vs. The State, .

15. However, the learned Additional Public Prosecutor has relied upon the judgment of the Apex Court in State of Rajasthan v. Kashi Ram

(2007) 1 SCC (Crl.) 688 for the proposition that unless prejudice is shown, merely because incriminating materials were not put forth to the

accused u/s 313 of the Criminal Procedure Code, it will not be a ground to disbelieve the prosecution case. In our opinion, even in the said

judgment in paragraph 27, it is seen that the incriminating circumstances were put to the accused, but the response of the accused was a bald

denial and therefore, it was held that the mere non-mentioning of the name of P.W.2 would not cause any prejudice to the accused. In our opinion,

the said judgment relied upon by the learned Additional Public Prosecutor is of no assistance to the facts of this case. As the prosecution case

stands solely on circumstantial evidence and one of the circumstances being the recovery of the wooden stick said to have been used by the

appellant herein contained human blood or not is a vital incriminating material and the failure on the part of the Court to put a question as to such

incriminating material, certainly, would cause prejudice to the accused and the conviction on the basis of such incriminating material should be held

to be illegal. If the recovery also goes, there is no other evidence except the motive aspect. Even in case of recovery, the Apex Court has held that

a mere recovery alone would not be sufficient to sustain the conviction unless such recovery is corroborated by the other evidence. This

proposition of law has been held by the Apex Court in the judgment in Ravinder Parkash case (supra).

16. This leads us to the last question relating to the motive. As we have pointed out that motive by itself cannot be a ground for conviction,

nevertheless, as the motive has also been argued, we propose to discuss the said issue as well. P.W.1, who is the wife of the deceased, was

admittedly not living with the deceased for over a period of 15 years, as they were separated due to some misunderstanding. The motive as to the

persistent dispute between the deceased and the accused family may not be known to her, as she was not in touch with the deceased. Even

assuming that the motive as spoken to by P.W.1 is accepted, there is no corroboration as to the motive aspect by any other witness. Though a vain

attempt was made by the prosecution to put forth a word through P.W.7, even P.W.7 had disowned any personal knowledge as to the motive

between the deceased and the accused family. In the absence of any corroboration, we are not inclined to accept the evidence of P.W.7 as to the motive aspect.

17. In view of the above, the prosecution has miserably failed to prove all the circumstances that led to the conviction of the accused namely, the

last seen theory as well as the motive. That apart, the learned trial Judge, while acquitting A-2 by disbelieving the recovery has not also taken into

consideration of the evidence of P.Ws.7 & 9, but strangely has taken the evidence of P.Ws.7 & 9 into consideration for the purpose of convicting

A-1 alone. For all the above reasons, we are of the considered view that the conviction and sentence imposed on A-1 cannot be sustained in the

eye of law and are liable to be set aside. Accordingly, they are set aside and the criminal appeal is allowed. Fine amount, if any, paid by the

appellant is ordered to be refunded. Bail bonds shall stand terminated.