

(1988) 08 MAD CK 0028
In the Madras High Court
Case No : Criminal Appeal No. 312 of 1984

Muthuramalingam

APPELLANT

Vs

Sub Inspector of Police, Arumuganery

RESPONDENT

Date of Decision : 18-08-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 27, 302, 324, 377

Citation : (1988) LW(Cri) 407

Hon'ble Judges : Janarthanam, J; David Annoussamy, J

Bench : Division Bench

Advocate : S. Sahn mugha Velayutham, for the Appellant;

Final Decision : Allowed

Judgement

Janarthanam, J.—The appellant, accused stands convicted for an offence under S. 302 of the Indian Penal Code and sentenced to imprisonment for life.

2. The case of the prosecution as called out from the records is briefly as follows: The accused and the deceased Esakimuthu were the residents of Arumuganeri village. The deceased was working as a server in the tea shop of P.W.1. The tea shop was situated on the southern side of Tiruchendur Road Opposite to the tea shop was an arrack shop, wherein P.W.2 was working as an Accountant. On 3. 3. 1982 at about 7:30 P.M. P.W.2 demanded two cups of tea from the shop of P.W.1. P.W.1 in turn supplied two cups of tea in two glass tumblers through the deceased, who, in fact went to the arrack shop and supplied the tea to P.W.2. At that time, the accused was sitting in the pial of the arrack shop. P.W.2 paid 60 N.P to the deceased for the supply of two cups of tea. The deceased returned from the arrack shop along with two glass tumblers and the money received.

3. P.W.3 is the wife of one Daniel Nadar, who was doing part-time job in the tea shop of P.W.1 by supplying water. Both P.W.3 and her husband used to take their bed in the house of P.W.1. P.W.3 had the opportunity of witnessing the taking of

the tea by the deceased to the arrack shop. When the deceased returned from the arrack shop, the accused had fun and frolic with the deceased by removing his hat and running here and there. The deceased also attempted to get back the hat from the accused. In that process the accused and the deceased were going towards east of Tiruchendur Road. Thereafter nothing was heard about the deceased and the accused P.W.1, in fact made a frantic search of his boy servant, the deceased, during night hours. He was unable to find him. He was thinking that the servant boy, the deceased, could have gone to certain film show and would return in the morning.

4. On the next morning at about 6:00 A.M. P.W.4 came to the tea shop of P.W.1 and informed of his having seen a person lying naked in the cemetery near Lakshmimanagaram grave-yard. Thereupon P.W.1 went to that place and found the deceased lying naked with injuries found on his person. He also found him thoroughly unconscious. Then he made arrangements for transporting the victim in order to save his life to the Government hospital at Kayal-patnam in order to save his life.

5. P.W.5, the doctor sent intimation to P.W.11, Grade-1 Constable, who in turn reached the hospital and found him, unconscious. He recorded the complaint, Ex.P.1 from P.W.1. Thereafter, he returned to the police station and registered the case in Cr. No. 65 of 1982 under S. 324 of the Indian Penal Code and prepared the First Information Report, Ex.P.20. At that time P.W.12, the Assistant Inspector of Police was making arrangements for "Masimagam Festival" in Tiruchendur. Therefore, P.W.11 handed over the copy of the First Information Report to P.W.12 at Tiruchendur. Thereafter P.W.12 took up investigation, reached the scene village and examined P.W.3 and P.W.4. On the same day, at about 12:30 P.M, he arrested the accused near Arumuganeri Bharathi Nagar Girls High School. The accused gave a voluntary confession and the same was recorded by him, the admissible portion of which is marked as Ex. P. 16. At the instance of the accused, M.O.5 was recovered from under Poovarasu tree near the scene of occurrence. He also recovered clothes worn by the accused, M.O.6 to M.O.9 under Ex. P.17. He then prepared the Observation Mahazar, Ex.P.18 besides drawing a rough sketch of the scene of occurrence, Ex.P.21. He also recovered the other material objects from the scene of occurrence.

6. On 4. 3. 1982, Esakki Muthu died in the hospital at 3:15 P.M. and P.W.6 sent the death intimation report, Ex P.6 to the police station. P.W.12, on receipt of the death intimation, altered the case under S. 377 and 302 of the Indian Penal Code and sent express First Information Reports to the concerned officials. He also examined on the same day, P.W.5, the Doctor and obtained Ex.P.5, Certificate by producing the accused before him for certain injuries sustained by him in the male organ on the date and time of occurrence. He took steps for causing the despatch of material objects to the chemical examiner. After completing the investigation, a report was laid under S. 173 of the Code of Criminal Procedure by the investigating Officer on 16-6-1982 against the accused for the offences

under Ss. 377 and 302 of the Indian Penal Code appeared to have been committed by him.

7. Learned Sessions Judge, Tirunelveli, upon committal, framed charge against the accused under S. 302 of the Indian Penal Code. The accused pleaded not guilty to the charges framed against him.

8. During trial, the prosecution examined 13 witnesses, marked 23 exhibits besides producing 14 Material Objects.

9. The accused, when questioned under S. 313 of the Criminal Procedure Code Statement denied the complicity in the crime. He had no witness on his side.

10. After consideration of the evidences and other materials produced before him, and after hearing the arguments of the State-brief counsel and the Learned Public Prosecutor he found the accused guilty under S. 302 of the Indian Penal Code, convicted him thereunder and sentenced to life imprisonment, giving rise to this present appeal.

11. The point for consideration is, whether the prosecution has proved its case beyond all reasonable doubts against the accused.

12. Admittedly, there is no direct evidence at all in this case connecting the accused with the crime. The case solely rests upon circumstantial evidence. In a criminal proceeding, the commission of an offence of which the accused is charged can be proved either by direct evidence alone or by the circumstantial evidence alone or by a combination of both. The expression "direct evidence" in the context means evidence of witnesses who have seen the commission of the offence by the accused. The expression "circumstantial evidence" means evidence as to the existence of all collateral facts and circumstances from which the commission of the offence by the accused can be reasonably inferred.

13. It is common experience that a serious crime is often committed in such circumstances, that no one has witnessed it or that it happened that the persons who have seen it or not traceable or available. In such circumstances, the prosecution is forced to rely entirely on the circumstantial evidence for the purpose of proving its case against the accused. But when a case solely rests upon circumstances, they are to be of such a nature, that they point out to the accused and him alone as being the offender, so that the possibility of an innocent man being falsely held guilty of an offence, which he has not committed, is entirely excluded. The question whether the facts and circumstances of this case are or not sufficient in their cumulative effect for the purpose of establishing that an offence has been committed has to be decided by the proved circumstances in the case connecting the accused with the crime. If the proved circumstances do not point out that the accused and him alone could have committed the offence then it is not possible at all to mulct or fasten criminal Suability upon the accused.

14. So far as the present case is concerned, the prosecution seeks to rely upon

the following incriminating circumstances. They are:

(i) The deceased left the tea shop at 7:30 P.M. on the fateful day in question, taking two cups of tea to hand over to P.W.2 in the opposite arrack shop:

(ii) The deceased went to the arrack shop with two cups of tea in two glass tumblers and handed over the tea to P.W.2 and at that time the accused was bodily present seated in the pial at the arrack shop. P.W.3, the wife of Daniel Nadar witnessed the deceased taking the tea cups to the arrack shop besides witnessing the fun and frolic the accused had had with the deceased in removing his hat, M.O.2 and running here and there and both the accused and the deceased going towards east in the Tiruchendur Road.

(iii) The next circumstance is that on the next morning of the fateful day, P.W.4 found the victim boy lying in an unconscious state, that too, in a naked condition, with his face downwards and his back exposing to the sky.

(iv) The next circumstance is that the Doctor, P.W.7 found injury No. 7 described in Post Mortum Certificate, Ex.P.9 indicating the commission of an unnatural offence of sodomy.

(v) Yet another circumstance is the arrest of the accused by P.W.12, his giving the admissible portion of the confession, Ex.P.16 leading to recovery of M.O.5, glass piece beneath the poovarasu tree near the cemetery in the same occurrence, recovery of M.O.6 to M.O.9 clothes of the accused and the recovery of nylon button, M.O.10 from the scene of occurrence.

15. If we delve deep into various circumstances as catalogued above and sift and analyse them, they would point out that anyone of the circumstances by itself or the cumulative effect of all the circumstances put together will not lead us anywhere for pointing out that the accused and him alone could have committed the heinous offence of murder. So far as the first circumstance is concerned, there is enough proof from the evidence of P.W.1 to P.W.3 that the deceased in fact took two cups of tea to be supplied to P.W.2 in the arrack shop at the relevant time and date in question. This proved circumstance itself by no stretch of imagination will serve as an incriminating piece of evidence pointing out that the accused could have had hand in the commission of the offence of murder.

16. Turning to the second circumstance, as to the supply of tea by the deceased to P.W.2 and the presence of the accused in the arrack shop, there is sample evidence and there is no dispute at all as to this. The question is whether this proved circumstance will serve any purpose as an incriminating factor so as to mulct criminal liability on the accused. This proved circumstance by itself in our view will not serve any purpose whatever at all.

17. Coming to the next circumstance of the accused and the deceased having had the fun and frolic of playing with the hat, M.O.2 removed from the deceased, it is spoken to by P.W.3. She also speaks about the deceased and the accused going towards east in the Thiruchendur Road, and, thereafter, nothing is heard

about them. The evidence of P.W.3 on this aspect is not above reproach and suspicion. If really P.W.3 had seen the accused and the deceased playing with the hat and going towards the eastern direction in the Tiruchendur Road, she could have very well stated this aspect of the matter to P.W.1 when he himself was frantically searching the whereabouts of the deceased during the night in question. The puzzling factor is that though P.W.3 and her husband were taking their bed in the house of P.W.1, she would keep her mouth shut up without disclosing this aspect of the matter to P.W.1. If at all, if there is any circumstance, of some relevance and significance besides being important it is the circumstance of the deceased being found in the company of the accused at or about the time of occurrence. In our view, the evidence on this aspect of the matter had been brought into being through the mouth of P.W.3 at a later stage of investigation so as to give a credible look and face lift to the case of the prosecution. If really this important pieces of evidence was available even on the day, when Ex. P1 complaint had been recorded by P.W.11 from P.W.1, P.W.1 could have spoken to this aspect of the matter in Ex.P.1. The complete absence of these materials in Ex.P.1 the earliest version, projected by the prosecution will throw a considerable doubt as to whether P.W.3 would have last seen the accused and the deceased alone in the sense of going towards the scene of occurrence at or about the time on the fateful day in question. In this view of the matter, we feel it is not safe to act upon the testimony of P.W.3 and consequently it goes without saying that this important circumstance of the accused and the deceased having been seen last prior to the time of occurrence has to be rejected out of consideration for the purpose of fastening any criminal liability upon the accused.

18. Reverting our attention to the factum of P.W.4 finding a boy hing naked near the cemetery in the scene of occurrence and informing the same to P.W.1, the same even assuming to be proved beyond any shadow of doubt, will not take us anywhere to serve as an incriminating factor connecting the accused with the crime. Therefore, we are not attaching any importance to this piece of circumstance.

19. As respects the circumstance of the Doctor, P.W.7 finding an injury in the anus of the deceased suggesting the commission of the offence of sodomy at or about the time of occurrence, we are of the view that this circumstance also is of no use to advance the case of the prosecution to any extent whatever. The medical evidence on record makes an irreparable dent on the case of the prosecution in the sense of destroying the theory of the victim being subjected to sodomy on the date in question. Unexpectedly the Doctor, P.W. 7 in the course of cross-examination categorically stated that the injury in the anus need not necessarily be caused to the deceased by his being a victim of sodomy. The prosecution also relied upon the injury found on the male organ of the accused as found by P.W.5, Doctor so as to make it appear that the injury on the accused had in his penis would have been the effect of his committing the offence of sodomy at the relevant time on the fateful day in question. But unfortunately,

during the course of cross-examination, the Doctor himself categorically admitted that the accused, a person capable of performing intercourse, could have sustained this injury otherwise also and not necessarily in the process of the commission of the offence of sodomy. As such, we are of the view that this circumstance also is not sufficient to point out that the accused had a hand in the commission of the crime of murder of which he is charged.

20. The last circumstance which remains for consideration is the arrest of the accused, his giving confession under S. 27 of the Indian Evidence Act, recovery of M.O.5 glass pieces at his instance, pursuant to the confession, recovery of M. O.6 to M. O.9 clothes worn by the accused and the recovery of M.O.10 nylon button from the scene stated to have been missing from the half pant worn by the accused. P.W.12 would say that the accused had been arrested on 4th March, 1982 at 12:30 p.m. near the Girls High School, Bharathi Nagar, Arumuganeri. His evidence would further reveal that the accused gave a confession, admissible portion of which was marked as Ex.P.16. It is only in pursuance of the confession, the accused is stated to have pointed out the place where M.O.5 was kept and subsequently the same was recovered by P.W.12. For making the recovery under S. 27 of the Indian Evidence Act, at the instance of the accused, the facts discovered must be solely traceable to the knowledge of the accused, in the sense of what was discovered was not in the immediate knowledge of others. So far as M.O.5 recovered in this case is concerned, it was found under the Poovarasa tree visible to one and all, who happened to go over there. On this aspect of the matter, the evidence of P.W.4 would make it fluidly clear that M.O.5 was found on the ground under the Poovarasa tree visible to one and all and the same was not kept concealed underneath the ground. In such state of affairs, the so called recovery of M.O.5 glass pieces stated to have been utilised in the commission of the crime could not at all be traceable to the exclusive knowledge of the accused so that it could be meant as a fact discovered under S. 27 of the Indian Evidence Act. As such what we feel is that this is nothing but a stage-managed show by the investigating agency to make it appear that M.O.5 had been recovered at the instance of the accused pursuant to his confession. Such being the case, we are not inclined to place any reliance on the confession statement of the accused and consequent recovery of M.O.5.

21. The arrest of the accused by P.W.12 on the next day of the occurrence, in the scene village itself, near the Girls High School as stated above, could not by any stretch of imagination improve or advance the case of the prosecution to any extent whatever, in the sense of making it appear that the accused having a guilty frame of mind after the commission of the offence, would try to conceal his presence from the purview of the police by absconding from the scene village. The recovery of the clothes of the accused, M.O.6 to M.O.9, immediately on his arrest, does not serve any purpose at all as those clothes stated to have been worn by the accused at or about the time of the occurrence do not contain any semen or human blood as disclosed by the report of the Serologist, Ex.P.13 for serving as an incriminating factor pointing out that the accused could have had a

hand in the commission of the crime.

22. As regards the recovery of M.O.10, yellow nylon button from the scene sought to be relied upon by the prosecution as a piece of incriminating circumstance, we are unable to attach any credence to such a piece of evidence. No doubt true it is, that in M.O.7 half pant worn by the accused, a button was found missing. The button M.O.10 recovered from the scene is sought to be connected to the button found missing from the half pant of the accused. There is practically no evidence at all and in the very nature of things to expect such a proof is to expect something in the vacuum. The fact that it is very difficult to prove such a fact will not take away the burden cast on the prosecution to discharge its onus of proving every incriminating fact against the accused beyond any shadow of doubt. The misfortune of the prosecution should never become the misfortune of the accused. As such, it is too much for the prosecution to say that the nylon button M.O.10 was the button traceable to the missing of the button in the half pant, M.O.7 of the accused. In view of what has been stated above, the last piece of circumstance will not serve any purpose at all as an incriminating factor connecting the accused with the crime.

23. In view of what has been stated above, we are of the view that the circumstances as catalogued above each by itself or the cumulative effect of all the circumstances put together will not point out that the accused and him alone could have committed the offence of murder. As such we are inclined to give the benefit of doubt to the accused. Consequently, the conviction and sentence are set aside; the appeal is allowed directing him to be set at liberty forthwith.