
(2011) 10 MAD CK 0244

In the Madras High Court

Case No : Criminal Appeal No. 181 of 2011

Nagu @ Nagarajan @ Karuppu Nagoor

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 28-10-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 174, 313
Penal Code, 1860 (IPC) — Section 302, 380

Citation : (2011) 10 MAD CK 0244

Hon'ble Judges : T. Sudanthiram, J;C. Nagappan, J

Bench : Division Bench

Advocate : Javid Khan for A-2 in CA 181/2011, Mr. S. Paneerselvam for A-4 in CA 332/2011 and Mr. S. Samuel Raja Pandian for A-5 in CA 504/2011, for the Appellant; V.M.R. Rajendiran Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

C. Nagappan, J.—These appeals arise out of the judgment dated 13.4.2010, made in Sessions Case No. 132 of 2009 on the file of the Additional District and Sessions Judge, Fast Track Court No. II, Chennai. For the sake of convenience, the appellants, namely Nagu @ Nagarajan @ Karuppu Nagoor, Subbu @ Subramaniam and Vellai Nagoor @ Nagoor Meeran, will be referred to as accused Nos. 2, 4 and 5 respectively, in the same order as they were arrayed before the learned Sessions Judge.

2. Accused No. 2 is the appellant in C.A.No. 181/2011; accused No. 4 is the appellant in C.A.No. 332/2011 and accused No. 5 is the appellant in C.A.No. 504/2011.

3. Totally there were five accused in the above said Sessions Case and all of them were convicted and sentenced as follows:

A-1 to A-5

Sec. 302 r/w 34 IPC

Sentenced to undergo life imprisonment and to pay a fine of Rs. 5,000/- each, i/d to undergo six months SI

A-1 to A-5

Sec. 450 IPC

Sentenced to undergo three years RI and to pay a fine of Rs. 5,000/-each, i/d to undergo three months SI

4. Accused No. 1 Rajan preferred independent appeal in C.A.No. 580/2010, challenging the conviction and sentence imposed on him, and that has already been disposed of on 24.11.2010. Accused Nos. 2, 4 and 5 aggrieved by the conviction and sentence passed by the trial Court, have preferred these appeals. Accused No. 3 Rajesh @ Mittai Rajesh has not preferred appeal so far.

5. The facts leading to the filing of these appeals, are as follows:

(a) P.W.2 Sekar is the son of deceased Karuppazhagi who was working as a Watchman in Ganesh Flats situated at No. 18, West Sivan Koil Street, Vadapalani, Chennai 26. P.W.1 Lakshmikantha was the President of the residents of the said premises and on 7.7.2008 at about 10.30 P.M., as usual he went around the building and found Watchman Karuppazhagi present at the gate. On 8.7.2008 at about 5.40 A.M., Srinivasa Rao, a resident of the building, informed P.W.1 Lakshmikantha that Watchman Karuppazhagi was found burnt dead. P.W.1 Lakshmikantha verified the same and went to R8 Vadapalani Police Station and lodged Ex.P1 complaint. P.W.18 Inspector Vimalan received the same and registered a case in Crime No. 1016/2008 u/s 174 Cr.P.C. and prepared Ex.P19 First Information Report, and dispatched the same. He went to the occurrence place and prepared Ex.P5 observation mahazar, in the presence of P.W.5 Venkatesh and another. Ex.P16 is the rough sketch drawn by him. He seized M.Os.1 to 7 from the occurrence place under Ex.P4 mahazar, in the presence of said witnesses. He conducted inquest and prepared Ex.P17 inquest report. He examined P.W.1 Lakshmikantha, P.W.11 Pushparaj and some other witnesses and recorded their statements. He sent the body to the Government Royapettah Hospital for postmortem with requisition.

(b) P.W.12 Dr. R.Baskaran conducted autopsy on the body at 1.00 P.M. on 8.7.2008, at Government Royapettah Hospital and issued Ex.P8 postmortem certificate, expressing opinion that the deceased would appear to have died of shock due to extensive deep burns.

(c) Accused No. 2 Nagu @ Nagarajan @ Karuppu Nagoor and accused No. 4 Subbu @ Subramaniam were arrested in the case registered in Crime No. 1036/2008, on the file of Kumaran Nagar Police Station, and they gave confession statements in the said case admitting their involvement in the present case. Based on that, P.W.18 Inspector Vimalan altered the present case into one under Sections 302 and 380 IPC and prepared Ex.P18 alteration report. He arrested accused No. 1 Rajan on 10.8.2008, and enquired him in the presence of

P.W.6 Ramesh and P.W.7 Gopal and recorded the confession statement given by him. Pursuant to the information furnished by accused No. 1, M.O.1 torchlight came to be recovered under Ex.P7 mahazar, in the presence of same witnesses.

(d) The Investigation Officer P.W.18 Inspector Vimalan received Ex.P2 letter, from P.W.3 Raja on 12.8.2008, stating that P.W.3 Raja along with P.W.4 Durai witnessed the occurrence, and on the same date, he examined both of them and recorded their statements. He examined P.W.6 Ramesh, P.W.7 Gopal and some other witnesses and recorded their statements. He arrested accused Nos. 2 to 5 in this case and enquired them. He gave requisition to conduct test identification parade and pursuant to Ex.P12, order of the Chief Metropolitan Magistrate, P.W.14 XV Metropolitan Magistrate Mr. Paramraj, conducted test identification parade. Ex. P11 is the identification parade proceedings. P.W.18 Inspector Vimalan gave requisition to record the statements of witnesses and P.W.15 XIX Metropolitan Magistrate Dr.J.Jeyanthi recorded those statements u/s 164 Cr.P.C. He completed the investigation and filed the final report against the accused.

6. In the trial of the case, the prosecution in order to sustain the charges framed against the accused, examined P.Ws.1 to 18 and marked Exs.P1 to P19 and M.Os.1 to 9.

7. The accused were questioned u/s 313 Cr.P.C. and they denied complicity. No witness was examined and no document was marked on their side.

8. The trial Court on consideration of oral and documentary evidence, found accused Nos. 1 to 5 guilty of the offences and awarded sentences as stated earlier. Aggrieved over the same, the present appeals have been preferred by accused Nos. 2, 4 and 5 respectively.

9. The prosecution case is that accused Nos. 1 to 5 committed criminal trespass at 4.00 A.M. on 8.7.2008, in Ganesh Flats situated at West Sivan Koil Street, Vadapalani, Chennai and poured petrol on Watchman Karuppazhagi and burnt him to death and also took a cash amount of Rs. 700/-and yellow colour torch light from him at the time of occurrence. To prove the occurrence, the prosecution examined P.W.3 Raja and P.W.4 Durai, as having witnessed the occurrence. P.W.3 Raja is a Platform Vendor of pooja articles and P.W.4 Durai is an auto driver. According to P.W.3 Raja, on 8.7.2008 at 3.30 A.M., he in the auto driven by his friend P.W.4 Durai, went to Ottapalayam to pick up his friend Geja for going to Koyambedu Market and on reaching there, they found Geja already left for Koyambedu Market in another auto and hence they returned via West Sivan Koil Street, and near a flat, they saw an auto parked and P.W.4 Durai stopped his auto and went and enquired the persons seated in the other auto, and P.W.3 Raja also got down from the auto and they saw four persons sprinkling some liquid from the bottle on a person lying on the cot inside the compound wall of the flat, and since they were threatened by the persons, they left in their auto and on the next day, they saw the news item in the newspaper that a watchman in the flat was burnt to death. It is the further testimony of P.W.3 Raja

that on 12.8.2008, he wrote Ex.P2 letter, to the Inspector, R8 Vadapalani Police Station, informing him about their witnessing the occurrence in the case and they were examined by the police on the same day. P.W.4 Durai has also corroborated the testimony of P.W.3 Raja regarding the occurrence. P.Ws.3 and 4 have identified accused Nos. 1 to 5 in the trial of the case and also in the test identification parade conducted in the case.

10. All the learned Counsel appearing for the accused Nos. 2, 4 and 5, have contended that the presence of P.Ws.3 and 4 in the place of occurrence is doubtful and they are only chance witnesses and their conduct would belie their testimonies and Ex.P2 letter, is also artificial and does not contain particulars regarding total number of persons seen by both the witnesses at the time of occurrence, and also their identity. It is the further submission of all the learned Counsel that accused No. 1 Rajan has already preferred appeal in C.A.No. 580 of 2010 and this Court allowed the appeal and acquitted him by judgment dated 24.11.2010, and the present appellants are also on the same footing and the benefit must enure to them also.

11. Per contra, learned Additional Public Prosecutor submits that P.W.3 Raja being a Platform Vendor, it is but natural for him to have gone to Koyambedu Market in the early hours of the day for purchasing the articles at a cheaper rate and he has engaged the service of his friend auto driver P.W.4 Durai for the said purpose and on the way, they happened to witness the occurrence and there is nothing unnatural in it. It is his further submission that due to fear of police, they did not go to Police Station immediately after the occurrence, and they had chosen to write Ex.P2 letter, informing the police about the occurrence and the delay has also been explained.

12. It is the testimony of P.W.3 Raja and P.W.4 Durai that on 8.7.2008 at 3.30 A.M., on their way to Koyambedu, they went to Ottapalayam to pick up Geja, friend of P.W.3 Raja, and on reaching there, they came to know that Geja had already left for Koyambedu in another auto and while proceeding to Koyambedu via West Sivan Koil Street, they saw an auto parked in front of a flat premises, and P.W.4 Durai enquired the persons seated in the other auto, and they scolded him in filthy words and P.W.3 Raja also got down from the auto and at that time, they saw four persons sprinkling liquid from the bottle on a person lying in the cot inside the compound wall of the premises, and since they were abused, they got frightened and went away in their auto and on the next day, they happened to know about the murder of the watchman in the premises through newspaper. From the testimonies of the above witnesses, it is seen that they happened to see the occurrence since they had gone to Ottapalayam on their way to Koyambedu to pick up Geja. The said Geja was neither cited as a witness nor examined in the trial and there is no reason stated for the same. It appears that only for the purpose of showing their presence in the West Sivan Koil Street, this version is introduced as rightly contended by all the learned Counsel for the appellants. If really the above witnesses have seen the accused on that day in

the occurrence place, sprinkling liquid from the bottle on the person lying on the cot inside the flat premises, on knowing about the murder of the watchman through newspaper on the very next day, they ought to have informed about their witnessing the occurrence, to the police or to some other person. That is not done. On the contrary, 35 days after the occurrence, they had chosen to write Ex.P2 letter, to the Investigation Officer stating about their witnessing the occurrence. The recitals in Ex.P2 letter, also appear to be unnatural and artificial. As rightly contended by all the learned Counsel for the appellants, neither total number of persons found in the occurrence place, nor their description is mentioned in the said recitals.

13. It is also relevant to point out that Ex.P2 letter, has come into being after the arrest of accused No. 1 Rajan and after the receipt of information about the involvement of accused Nos. 2 and 4 in the occurrence. According to the Investigation Officer, on 6.8.2008, accused Nos. 2 and 4 were arrested in another case in Crime No. 1036/2008, on the file of Kumaran Nagar Police Station, and on their confession, their involvement in the present case came to light and immediately, he altered the present case from Section 174 Cr.P.C. into one under Sections 302 and 380 IPC and prepared Ex.P18 alteration report, and dispatched the same. From the above, it is clear that the Investigation Officer had known about the involvement of all the accused in the present case on 6.8.2008 itself. In fact, he had effected arrest of accused No. 1 Rajan on 10.8.2008, and recorded his confession statement in the presence of P.W.6 Ramesh and P.W.7 Gopal. After the said events, Ex.P2 letter, has reached the hands of the Investigation Officer on 12.8.2008, and P.W.3 Raja and P.W.4 Durai came to be examined on the same day. It appears that after fixing the accused in order to connect them with the alleged crime, Ex.P2 letter, has come into play. In such circumstances, the testimonies of P.W.3 Raja and P.W.4 Durai, do not inspire confidence and are not trustworthy and no reliance can be placed on it.

14. Barring the above, the only other piece of incriminating material available in the case, is the recovery of M.O.1 torchlight. There is contradiction even with regard to the recovery of the said article. As per the recitals in the mahazar and the testimony of the Investigation Officer, M.O.1 yellow colour torchlight, came to be recovered on the information furnished by accused No. 1 Rajan in his confession statement, from his house, whereas the mahazar witness P.W.7 Gopal has stated in his testimony, that M.O.1 torchlight, came to be recovered on the information furnished by accused No. 1, from underneath Saidapet bridge. Hence the said recovery also is not proved.

15. In fact, this Court in the appeal in C.A.No. 580 of 2010 preferred by accused No. 1 Rajan, has disbelieved the testimonies of the eyewitnesses P.Ws.3 and 4 as well as the recovery of M.O.1 torchlight, and observed thus:

8. In order to substantiate the charges levelled against the appellant/A1 along with other accused, the prosecution marched P.Ws. 3 and 4 as eye witnesses. Both the witnesses claimed that they witnessed the occurrence. P.W.3 was a

plaintain and coconut vendor in the street. P.W.4 was an auto driver and friend of P.W.3. According to them, when they were travelling in an auto driven by P.W.4 and were crossing the street where the occurrence had taken place, they witnessed the accused persons pouring something on the deceased who was lying there. They stopped the vehicle and got down from the vehicle and enquiry the same but they were actually threatened by the accused and because of grip of fear they got into their vehicle and left the place. If really such an incident has taken place, after seeing the flash news in the newspaper that a person was burnt to death in that street, normally a person would not remain silent but would have spoken about the same to somebody. The circumstances which are noticed by the Court to disbelieve their evidence are that the investigator has claimed that he examined P.Ws. 3 and 4 only on 12.8.2008 i.e., after a month from the date of occurrence. P.Ws.3 and 4 have kept silent for a period of one month. The fact that P.Ws.3 and 4 had witnessed the occurrence came to the knowledge of the investigating officer only on receiving a letter from P.W.3. Both of them were examined on 12.8.2008 by the investigator but from the letter of P.W.3, it is seen that it was sent on 12.8.2008. If to be so, the letter could not have reached the Police Officer on that day itself. Even assuming the letter has reach on that day, the statement of the investigator that the statement of P.Ws. 3 and 4 were recorded on the same day is highly doubtful. Apart from that, both P.Ws.3 and 4 were actually residing within the jurisdiction of the concerned police, therefore, there is no need for them to write a letter and thereafter, go to the police station, instead, they can directly go to the police station and give a statement. Hence, their evidence is unbelievable.

9. Further, it is pertinent to point out that P.Ws. 3 and 4 were enquired by the Investigating Officer on 12.8.2008 only after the arrest of all the five accused. Thus, it would be quite indicative of the fact that after the arrest of the accused, the investigating officer has no evidence to offer, thus, Ex.P2 letter was created and P.Ws. 3 and 4 were called and their statements were recorded in order to suit the prosecution story. Thus, for all the above reasons, the evidence of P.Ws. 3 and 4 is unbelievable and hence, their evidence has got to be rejected.

10. Further insofar as the recovery of M.O.1 torch light is concerned, it is the case of the prosecution that not only torch light but also Rs. 700/-was taken away by the accused but Rs. 700/-was not recovered. It is highly doubtful and artificial whether the asailants would cause murder for stealing a torch light which was kept by the victim. Except proving the fact that Karuppalagi died out of homicidal violence, the prosecution is thoroughly lacking evidence to prove the nexus between the accused and the crime. But the trial Judge has taken an erroneous view and recorded that A1/appellant along with other accused were guilty of the above charges. Hence, the judgment of the trial Court has got to be made undone by upsetting the same.

We are in entire agreement with the views expressed in the above decision.

16. The trial Court has failed to appreciate the oral and documentary evidence in

proper perspective and its conclusion that the prosecution has established the guilt of accused Nos. 2, 4 and 5 is erroneous and the conviction and sentence imposed by it on them, are liable to be set aside.

17. Lastly, we have to consider the case of one other accused, namely accused No. 3 Rajesh @ Mittai Rajesh, who had not preferred any appeal challenging his conviction and sentence, till date. We, in these appeals, have come to the conclusion that the prosecution has failed to establish its case against the appellants/accused Nos. 2, 4 and 5, which finding is applicable to accused No. 3 also. The question then arises whether the benefit of this judgment of ours should be extended to the non-appealing accused, namely accused No. 3 Rajesh @ Mittai Rajesh, or not. The Supreme Court in a catena of cases, has held "Where on the evaluation of a case this Court reaches the conclusion that no conviction of any accused is possible, the benefit of doubt must be extended to the co-accused similarly situated though he has not challenged the order of conviction by way of an appeal." *Bijoy Singh and Another Vs. State of Bihar*, ; *Raja Ram and Others Vs. State of M.P.*, ; *Dandu Lakshmi Reddy Vs. State of A.P.*, ; *Suresh Chaudhary v. State of Bihar* -2003 SCC (CRI) 801; *Arokia Thomas v. State of Tamil Nadu* -(2006) 10 SCC 542 and *Bachan Singh and Another Vs. State of Bihar*, .

18. Following the dictum of the Supreme Court in the judgments noticed by us, we are of the opinion that since we have come to the conclusion that no conviction of any accused is possible based on the prosecution case as presented, it becomes our duty to extend the benefit of acquittal in these appeals to a non-appealing accused. Therefore Rajesh @ Mittai Rajesh, who is accused No. 3 before the Sessions Court in Sessions Case No. 132/2009 on the file of Additional District and Sessions Judge, Fast Track Court No. II, Chennai, will also be acquitted of all the charges of which he is found guilty by the trial Court.

19. For all the reasons stated above, these appeals are allowed and the conviction and sentence imposed on the appellants/accused Nos. 2, 4 and 5, namely Nagu @ Nagarajan @ Karuppu Nagoor, Subbu @ Subramaniam and Vellai Nagoor @ Nagoor Meeran respectively, as well as non-appellant accused No. 3 Rajesh @ Mittai Rajesh, by judgment dated 13.4.2010, in Sessions Case No. 132 of 2009 on the file of the Additional District and Sessions Judge, Fast Track Court No. II, Chennai, are set aside, and the appellants/accused Nos. 2, 4 and 5, namely Nagu @ Nagarajan @ Karuppu Nagoor, Subbu @ Subramaniam and Vellai Nagoor @ Nagoor Meeran respectively, as well as non-appellant accused No. 3 Rajesh @ Mittai Rajesh are acquitted of all the charges. The fine amounts if any paid, shall be refunded to them. The appellants/accused Nos. 2, 4 and 5, namely Nagu @ Nagarajan @ Karuppu Nagoor, Subbu @ Subramaniam and Vellai Nagoor @ Nagoor Meeran respectively, as well as non-appellant accused No. 3 Rajesh @ Mittai Rajesh are directed to be released forthwith, unless their custody is required in connection with any other case.