

(2016) 08 MAD CK 0127

MADRAS HIGH COURT

Case No: Crl.Appeal No. 39 and 341 of 2015.

Palanisamy - Appellant @HASH
The State, rep. by The Inspector
of Police, Aappakudal Police
Station, Bhavani, Erode District.
(Crime No.52 of 2013)

APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 5, 2016

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302, Section 394, Section 449

Citation: (2016) 4 MLJ Criminal 513

Hon'ble Judges: S. Nagamuthu and V. Bharathidasan, JJ.

Bench: Division Bench

Advocate: Mr. G. Prabhakaran, Advocate, for the Appellant in Crl.A. No. 39 of 2015; Mr. A. Thiyagarajan, Advocate, for the Appellant in Crl.A. No. 341 of 2015; Mr. E. Raja, Additional Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

S. Nagamuthu, J. - The appellants are the accused 2 and 1 in S.C.No.41 of 2014 on the file of Fast Track Mahila Sessions Court, Erode. They stood charged for the offences under Sections 394, 302 and 449 IPC. By judgment, dated 20.10.2014, the trial Court convicted them under all the charges and sentenced them to undergo imprisonment for life and pay fine of Rs. 10,000/- each; in default, to undergo rigorous imprisonment for three years for the offence under Section 449 IPC; to undergo imprisonment for life and pay fine of Rs. 10,000/- each; in default, to undergo rigorous imprisonment for three years for the offence under Section 394 IPC; and to undergo imprisonment for life and pay fine of Rs. 25,000/- each; in default, to undergo rigorous imprisonment for three years for the offence under Section 302 IPC. The trial Court directed that the sentences imposed for the offences

under Sections 449 and 302 IPC shall run concurrently and the sentence imposed for the offence under Section 394 IPC shall run consecutively. Challenging the said conviction and sentence, the appellants are before this Court with these appeals.

2. The case of the prosecution, in brief, is as follows :

2.1. The deceased in this case was one Mrs. Rajammal, aged about 68 years. She was residing alone at her farm house at Velamarathur village in Erode District. She was wearing a gold chain and a pair of gold earstuds. It is the case of the prosecution that on 15.02.2013, around 07.45 p.m., when the deceased was alone at her farm house, these two accused came in a motorcycle bearing registration No. TN36W5268, parked the motorcycle in front of the house, went to the house of the deceased and knocked at the doors. When the deceased opened the doors, these two accused pretended as though they had come to purchase maize. By entering into the house, they attacked the deceased and killed her. The deceased died out of the injuries caused by the accused. Then, they removed the jewels, namely, a gold chain and a pair of gold earstuds and fled away from the scene of occurrence. The occurrence was not witnessed by anyone.

2.2. P.W.1 is the brother of the deceased. P.W.6 is the son of the deceased. On the date of occurrence, P.W.6 had gone to Chennai. P.W.1 was residing at Aappakudal village, which is situated at a distance of 4 kms. away from the house of the deceased. P.W.2 was working in the farm of the deceased under her as a coolie for about two years. As usual, on 16.02.2013, in the morning, he went to the farm house of the deceased to know from the deceased as to what was the work to be done on that day in the farm. One Ramakkal, who accompanied P.W.2, found the deceased lying dead in the house. P.W.3 also rushed there and found the deceased lying dead. The earstuds and the gold chain used to be worn by her were found missing. However, the motorcycle bearing registration No. TN36W5268 was parked in front of the house of the deceased. How the motorcycle came to the said place and who parked it were not known. P.W.2 informed about the same to P.W.6 immediately over phone. P.W.6, in turn, informed P.W.1 to go and visit the place of occurrence and to make a complaint. Accordingly, P.W.1 rushed to the place of occurrence and found the dead body of the deceased. Immediately, he went to Aappakudal Police Station and at 12.00 Noon on 16.02.2013, lodged a complaint vide Ex.P-1. P.W.23, the then Inspector of Police, on receipt of the said complaint, registered a case in Crime No.52 of 2013 for the offences under Sections 302 and 380 IPC. Since the assailants were not known, it was so mentioned in the F.I.R. Ex.P-36 is the F.I.R. He forwarded both the documents to the Court, which were received by the learned Magistrate at 04.30 p.m. on 16.02.2013. P.W.25, the then Inspector of Police, took up the case for investigation. He went to the place of occurrence and prepared an observation mahazar and a rough sketch, in the presence of the witnesses. He recovered certain material objects also from the place of occurrence. He examined many witnesses and recorded their statements.

2.3. According to P.W.25, on 23.02.2013, he arrested the second accused Palanisamy near a place, known as Atthanikaikatti, in the presence of P.W.11 and another witness. On such arrest, the second accused gave a voluntary confession and produced a sum of Rs. 16,150/-. P.W.25 recovered the same. In pursuance of the disclosure statement, the second accused took P.W.25 and the witnesses to the house of one Rekha at Srirangapattinam village. Then, he took them to the house of one Harsha. From Harsha, P.W.25 recovered a gold chain in the presence of the same witnesses under a mahazar. P.W.25 has further stated that P.W.24, the Inspector of Police, produced certain documents and cash of Rs. 4,200/- and he recovered the same.

2.4. P.W.24 has stated that while he was working as the Inspector of Police at Andhiyur on 23.02.2013, he was on special duty. At 02.30 p.m., on the same day, near Andhiyur Annamaduvu, he examined the second accused Palanisamy, out of suspicion. The second accused was in drunken state. P.W.24 took him to Andhiyur Government Hospital, for examination. The doctor certified that he was in drunken state. Then at 04.00 p.m., he brought the second accused to Andhiyur Police Station and arrested him, in the presence of one Govindaraj, P.W.12, and another witness. On such arrest, the second accused gave a voluntary confession. He produced a sum of Rs. 4,200/-. In pursuance of the said confession, he took the police, P.W.24, and the witnesses to Mettur village and to the house of one Sridhar. From Sridhar, P.W.24 recovered a Pawn Receipt issued by Muthoot Finance. Then, at 11.00 p.m., on the same day, he took the second accused to Aappakudal Police Station and produced him before P.W.25. P.W.25 received cash of Rs. 4,200/- and the Pawn Receipt issued by Muthoot Finance from P.W.24.

2.5. Continuing the investigation, P.W.25 arrested the second accused, as we have already pointed out, and he gave a voluntary confession, as we have already stated. Then, P.W.25 recovered the gold chain from Muthoot Finance. During the course of investigation, he recovered gold earstuds from one Malliga. The investigation was, thereafter, continued by P.W.26, who laid charge-sheet against the accused.

3. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgment and the accused denied the same. In order to prove the case, on the side of the prosecution, as many as 26 witnesses were examined, 51 documents and 11 material objects were marked. When the above incriminating materials were put to the accused, they denied the same as false. Having considered all the above, the trial Court convicted the accused as detailed in the first paragraph of this judgment. That is how, they are before this Court with these appeals. (The details of the evidences spoken by all the witnesses are not elaborately dealt with, in view of the nature of the direction that we are going to give in this judgment.)

4. As per the list of material objects appended to the judgment of the trial Court, M.O.6 series are the earstuds, numbering two, and M.O.7 is the gold chain. These are the very important pieces of materials to connect the accused with the crime.

5. It is the case of the prosecution that the deceased was wearing these two gold jewels lastly. Unfortunately, P.Ws.1 to 4, who have stated that the deceased used to wear a gold chain and gold earstuds and they were missing, were not called upon by the learned Additional Public Prosecutor and by the trial Court to identify as to whether M.Os.6 and 7 are the stolen gold jewels or not. P.W.6, the son of the deceased, has identified these jewels. He has stated that M.O.6 earstuds and M.O.7 gold chain belonged to the deceased. It was not elicited from him as to whether lastly these jewels were worn by the deceased or not. Let us assume from the evidence of these witnesses the prosecution has proved that M.Os.6 and 7 were worn by the deceased and they were found missing from the dead body, then, comes the evidence of P.W.8. According to him, on 16.02.2013, around 06.00 p.m., the first accused came to his house and the second accused, who was already known to him, also came to his house, accompanied by the first accused. He introduced the first accused as a coconut merchant. He further told him that the first accused had come to purchase coconut in the village. For that, the cash brought by him was not sufficient. Therefore, according to him, the first accused had decided to pledge his gold chain. Accordingly, M.O.6 was offered by the first accused to P.W.8, for pledging. He assured to give back money within four days and receive the chain. P.W.8 has further stated that he took both the accused to a jewellery shop at Chenampatti village. He has stated that the jewellery shop owner told him that he did not have sufficient money to receive the jewels on pledging. Then, he took back both the accused to his house. He informed his daughter Ms. Rekha about the same. Then, Ms. Rekha took P.W.8 to a jewellery shop. P.W.8 was working in a farm. His employer was one Mr. Theerthakumar (P.W.9). He spoke to P.W.9 over phone and wanted him to recommend to the jewellery shop owner to give money on pledging. Accordingly, Theerthakumar spoke. Thereafter, he pledged the jewels in the jewellery shop and received a sum of Rs. 58,000/-. He gave the entire amount of Rs. 58,000/- to the accused. The accused stayed overnight. On the next day, they went away. According to him, on 23.02.2013, the first accused brought the police to his house. Then, P.W.8 himself went to the jewellery shop, redeemed M.O.6 jewels and returned the same to the Inspector of Police. In his evidence, it has been recorded that what was redeemed by him was M.O.6. According to him, what was pledged by him was a gold chain. M.O.6 has been marked as earstuds and M.O.7 has been marked as gold chain. Thus, there is a discrepancy in the chief-examination itself to the effect that what was pledged was a gold chain, whereas what was redeemed was M.O.6 - a pair of earstuds.

6. It is argued before us that it was a clerical mistake committed by the Court while recording the evidence. If really it is a clerical mistake, then, we have to express our shock over the way in which the evidence has been recorded. Attention has not been shown by the trial Court while recording the evidence. It is argued by the learned counsel for the appellants that this discrepancy would give rise to a doubt in the case of the prosecution. We do not go into this issue at this stage.

7. As we have already stated, it was only Ms. Rekha, who took P.W.8 to the jewellery shop and pledged the jewels. But, Ms. Rekha has not been examined by the prosecution, for the reasons best known.

8. P.W.9 Theerthakumar has stated that on 16.02.2013, he spoke to Mr. Harsha, the jewellery shop owner, as requested by P.W.8, and requested him to receive the jewels from P.W.8, on pledging, and pay money. He has further stated that Mr. Harsha told him later that he paid Rs. 58,000/- to P.W.8. He has further stated that on 23.02.2013, the first accused brought the police to his house and at the shop, Harsha returned the jewels to the police. Unfortunately, this witness was not called upon to identify the jewels, which were returned by him.

9. It is argued by the learned counsel for the appellants that Mr. Harsha has not been examined by the prosecution to speak about the pledging of jewels at his shop and to speak about the recovery of the same. Had he been examined, he would have told whether what was pledged was a gold chain or a pair of earstuds.

The learned Additional Public Prosecutor would point out that though Harsha was cited as a witness by the Inspector of Police and the learned Additional Public

Prosecutor, who conducted the trial, has dispensed with the examination of the said witness, for no reason whatsoever.

10. We are not able to understand as to why it struck the mind of the learned Additional Public Prosecutor, who conducted the trial, to dispense with the examination of this vital witness, to whom the jewel was pledged and from whom it was redeemed by the police. P.W.9 has further stated that pawn receipt was issued for the said transaction. If that be so, the pawn receipt and the loan ledger are vital pieces of evidence. They are also not produced in evidence.

11. Now, turning to the earstuds, P.W.10 is the Manager of Muthoot Finance. According to him, one Sridhar had a permanent account in that establishment. Mr. Sridhar pledged a pair of earstuds in Muthoot Finance on 21.02.2013. The weight of the same is 3.100 grams. He received a sum of Rs. 5,100/- for the same. Ex.P-6 was the receipt issued for the same. He has further stated that later on 27.02.2013, Sridhar came with the police and retrieved the earstuds. But, he has stated that what was pledged was M.O.7 and what was retrieved was also M.O.7. But, as per the list of M.Os., M.O.7 is the gold chain. Therefore, the learned counsel for the appellants would argue that there is no consistent evidence as to what was pledged with P.W.10 was really a gold chain or a pair of earstuds. Here again, the learned Additional Public Prosecutor would submit that it was only a clerical mistake on the part of the trial Court.

12. It is pointed out that Ex.P-6 pawn receipt stands in the name of one Sridhar. According to the evidence of the Manager of Muthoot Finance, the jewel was pledged only by Mr. Sridhar and it was redeemed only by Mr. Sridhar. But,

unfortunately, Mr. Sridhar has not been examined by the prosecution. The learned Additional Public Prosecutor would submit that Mr. Sridhar was cited as a witness by the Investigating Officer, but the learned Additional Public Prosecutor, who conducted the trial before the trial Court, without assigning any reason, has dispensed with the examination of the said witness. Here again, we are unable to find any reason as to why the learned Additional Public Prosecutor dispensed with the examination of Sridhar, in whose name the pawn receipt stands.

13. P.W.16, Mrs. Malliga, has stated that, once, the second accused came to her with M.O.7, but, she mentioned M.O.7 as a gold earstud (singular), whereas, as per the prosecution case, M.O.6 is the gold earstud. According to her evidence, she took the second accused to Muthoot Finance, where M.O.7 earstuds were pledged for a sum of Rs. 5,300/-, for which, a receipt was also issued. It is not known whether the receipt was issued in the name of P.W.16 Malliga or in the name of the second accused. She has further stated that, later, police came with the second accused and she, in turn, took the police and the second accused to Muthoot Finance, from where the earstud was recovered. P.W.10 has stated that the earstuds were pledged only by Mr. Sridhar, whereas P.W.16 Mrs. Malliga claims that she only pledged the same. P.W.10 has stated that a sum of Rs. 5,100/- was paid for the said pledging of jewels, whereas P.W.16 has stated that Rs. 5,300/- was paid. P.W.10 has stated that Sridhar came along with the police and the accused Palanisamy and retrieved the earstuds, whereas, P.W.16 has stated that she went along with the police to Muthoot Finance and she only retrieved the earstuds from Muthoot Finance and handed over the same to the police. She has further stated that Sridhar also signed in the mahazar. These anomalies in the evidence let in by the prosecution also require further clarification.

14. We feel pained to say that the learned Additional Public Prosecutor, who conducted the case, had chosen to dispense with the vital witnesses and not shown any interest to elicit the important facts. Similarly, the trial Court was also not vigilant. It has remained a mute spectator, without active participation in the trial.

15. For these defects, the learned counsel for the appellants prays for acquittal of the accused. But, in our considered view, with the available materials on record, deciding the issues involved in these appeals would not amount to doing justice. It is evident that many of the materials collected during the investigation were not brought on record. Many vital witnesses have been simply dispensed with in a mechanical fashion by the learned Additional Public Prosecutor. If only these witnesses are examined and the omitted materials are brought on record, this Court would be in a better position to appreciate the evidence and to do justice to the parties. When this was pointed out, the learned counsel for the appellants submitted that allowing the prosecution to let in further evidence to rectify the defects would amount to filling up the lacunae in the case of the prosecution and the same should not be allowed. In our considered view, it is not so.

16. Fair trial, as guaranteed under Article 21 of the Constitution of India, is a concept known not only to the accused, but the prosecution as well. For the failure of the learned Additional Public Prosecutor, who conducted the case and for the failure of the trial Court in not showing proper attention during the recording of the evidence, this Court cannot allow justice to be killed at the very altar of the temple of justice. In our considered view, it is not as though these materials are introduced for the first time. The accused has already been put on notice about the availability of these evidences and witnesses, who are sought to be brought on record now. Therefore, there will be no question of prejudice to the accused. In such view of the matter, we deem it appropriate to set aside the conviction and sentence imposed on the accused/appellants by the trial Court and remand the matter back to the trial court for fresh disposal, in accordance with law.

17. The learned counsel for the appellants, at this juncture, submitted that remanding the case to the same Court, which is presided over by the same Judge, would not be conducive in the interest of justice. According to the learned counsel, since the learned Judge has already decided the case with the available materials, it may not be possible for him to take a different view, even after addition of some more materials. Therefore, the learned counsel for the appellants submitted that the case may be remanded back to some other Court, for trial. We find justification in the said argument. In view of the above, we are inclined to transfer the trial of the case to the Principal Sessions Judge, Erode.

18. In the result, these appeals are allowed and the conviction and sentence imposed on the appellants by the trial Court are set aside. The case in S.C.No.41 of 2014 is remanded back to the file of the trial Court and the same shall then stand transferred to the file of the Principal Sessions Judge, Erode. The Principal Sessions Judge, Erode, shall permit the prosecution to examine any witness afresh or to recall any witness already examined and to examine further. The prosecution shall be at liberty to let in any documentary evidence afresh to rectify the anomalies pointed out in this judgment. Similarly, the accused/appellants shall also be at liberty to recall any witness already examined, for the purpose of further cross-examination, and also to examine any defence witness. The accused shall be at liberty to cross-examine any witness, to be examined afresh by the prosecution or recalled by the prosecution. The learned Principal Sessions Judge shall, thereafter, dispose of the case strictly in accordance with law, by appreciating the evidence, both oral and documentary, without getting influenced by any of the observations made in this judgment. At any rate, this case shall be disposed of within a period of four months from the date of receipt of a copy of this judgment.