

(2011) 10 MAD CK 0056**Madras High Court****Case No:** Criminal A. No. 714 of 2010

G. Neelamegam

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Oct. 29, 2011**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 106
- Penal Code, 1860 (IPC) - Section 201, 202, 302

Citation: (2012) 2 MLJ 23**Hon'ble Judges:** T. Sudanthiram, J; C. Nagappan, J**Bench:** Division Bench**Advocate:** S. Shanmugavelayudam, for A.V. Raja, for the Appellant; V.M.R. Rajendran, Additional Public Prosecutor, for the Respondent**Final Decision:** Dismissed**Judgement**

T. Sudanthiram, J.

The appellant herein, who is an accused in S.C. No. 41 of 2009, on the file of the Sessions Court (FTC), Ariyaiur, stands convicted for offence u/s 302 IPC and sentenced to undergo life imprisonment and to pay a fine of Rs. 2000/- in default to undergo rigorous imprisonment for one year. Further the appellant is convicted for the offence u/s 201 IPC and sentence to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1000/- in default to undergo rigorous imprisonment for three months and the sentences are ordered to run concurrently. The second accused in this case was acquitted by the trial Court. Aggrieved by the said conviction and sentence, the appellant/first accused has preferred this criminal appeal. The case of the prosecution, in brief, is that the first accused is the husband of the deceased and the second accused is the sister of the deceased. The first accused married the second accused with the consent of the deceased. Both the

accused and the deceased were living in a separate house and the first accused continued to live with his both wives. P.W.1 is the father of the deceased. P.W.2 is the mother of the deceased. The deceased had a practice of coming to her parents' house on the day time and return to the matrimonial home in the night hours. In the year 2008, on the day of "Audha Poojai", the deceased had come to the parents' house and returned to the matrimonial home in the night at 8.00 p.m. Thereafter, the deceased could not be seen and she was missing. When P.W.1 enquired the first accused, he had not given any proper reply. P.W.1 went and gave complaint to the Sub Inspector of Police, Venganur Police Station on 12.10.2008. The complaint is Exhibit P-1. The Head Constable Loganathan on receiving the complaint Exhibit P-1, registered the case in Crime No. 113 of 2008, under the caption "Woman missing" and he prepared Exhibit P-14, First Information Report. P.W.11, Inspector of Police who received the copy of the FIR went to the scene of occurrence and prepared the observation mahazar Exhibit P-15 and the rough sketch Exhibit P-16. He recorded the statement of witnesses. The accused was absconding and he has been searched.

2. P.W.1 came to know that the first accused had murdered the deceased Senthamilselvi and buried the body in the bamboo grove of one Sambasivam. P. W. 1 informed the police about the incident. In the mean time, on 13.10.2008 at 7.00 a.m., the first accused/appellant went to the office of P.W.4-Village Administrative Officer and gave a statement that he murdered his wife. The first accused stated that on 8.10.2008 at about 11.00 p.m. he demanded the jewels of the deceased in order to pledge them and get money to clear the dues on purchase of Tractor. As the deceased refused, the first accused slapped on her face and strangulated her neck and thereby caused her death. He had also stated that he had buried the body of the deceased and he would identify the spade. P. W.4 recorded the statement of the first accused in Exhibit P-2 - and obtained the signature. P.W.4 forwarded Exhibit P-2 along with Exhibit P-3 - letter, to the Sub Inspector of Police, Venganur police station.

3. P.W.11, Inspector of Police altered the case u/s 302 IPC and prepared FIR under Exhibit P-17. At about 9.30 a.m., he went to the office of P. W.4 - Village Administrative Officer and he arrested the accused. He also recorded the confession statement of the accused. In pursuance of the confession state-merit of the accused, the accused was taken and he pointed out the place where he buried the body of Senthamil Seivi. He also produced M.O.1- spade which was used to dig the pit. P.W.11 Inspector of Police gave a requisition to the Tahsildar - P.W.8 and came to the place at 2.00 p.m. and the body of the deceased was exhumed in his presence at 3.00 p.m. The body was in a decomposed stage. The body was identified by P.Ws.1 and 2. P.W.11, held inquest on the body of the deceased and prepared inquest report.

4. On receiving requisition, Dr. V. Senthilnathan, P.W.7 held autopsy on the body of the deceased at the spot and noted as follows:

Appearances found at the post mortem: A female body of about 27 years old was exhumed. The body was placed in prone position and the head was in east direction.

A highly decomposed body was found. Eyes closed. Abdomen distended. Hair on scalp easily peelable. Skin over both palm and soles coming out easily.

Internal Examination: (1) Skull: Bone intact; Brain parenchyma - liquidated.

(2) all visceral organs are found intact and decomposed.

The following viscerae are prescribed for chemical analysis:

(i) Hyoid, (ii) Stomach and its contents (iii) Portion of small intestine (iv) Piece of liver
(v) piece of kidney (vi) preservative

(3) Bone case No. 203/08/13.11.2008 O/o District Police Surgeon, Tiruchirappalli
Hyoid Bone. No ante mortem fracture detected.

(4) Forensic Science Department: RT No. 2885 of 2008 Divisional Forensic Science
Lab: Tox.H. No. 885 of 2008, 22.10.2008.

alcohol (or) other poison was not detected in viscerae.

Time of Death: 3 to 4 days prior to post mortem.

Opinion: No opinion could be given regarding nature of death of deceased person.

He sent the hyoid bone for chemical analysis and report was also received and no fracture was found. Doctor issued post mortem certificate Exhibit P-12. As the body was in a decomposed stage, doctor could not give any opinion on the body of the deceased about the cause of death.

5. On 13.10.2008, at about 6.00 p.m., P.W.11 arrested the second accused and the case was altered to Section 302 IPC read with 201 IPC. P.W.11 recorded the statement of witnesses. As P.W.11 was transferred, P.W.12 Inspector of Police took up the investigation and after completing the investigation, he laid the final report against both the accused 1 and 2 for the offences under Sections 302 and 201 IPC against the first accused and under Sections 201, 202 read with 302 IPC against the second accused.

6. In order to establish the charge against the accused, the prosecution examined 12 witnesses, marked 22 exhibits and produced 6 material objects. When the accused was questioned u/s 313 Cr.P.C., he had denied the complicity and no one was examined as defence witness.

7. The trial Court after analysing the evidence, convicted and sentenced the first accused alone as stated above and the second accused was acquitted.

8. Mr. S. Shanmugavelayudam, learned senior counsel appearing for the appellant submitted that there is no eye-witness to the occurrence and the whole case solely

rests on the weak piece of evidence, viz., the alleged extra judicial confession given by the accused to P.W.4, Village Administrative Officer.

9. The learned senior counsel relied on the decision of the Honourable Supreme Court in Sivakumar Vs. State by Inspector of Police, and submitted that though the extra judicial confession is admissible in evidence, it cannot be the basis for conviction unless it is reliable and credible. The Village Administrative Officer is only an obliging witness to the police and according to P.W. 1 even before the VAO could inform the police, P.W.1 had informed the police that he came to know from his brother-in-law one Nallathambi who had not been examined by the police that the deceased was murdered by the first accused.

10. The learned senior counsel further submitted that the evidence of P.W.4 loses its credibility when it is subjected to a rigorous test. He further submitted that absolutely there is no corroboration for the alleged extra judicial confession given by the accused, and the prosecution has not even established that the deceased died due to homicidal violence.

11. The learned senior counsel for the appellant also submitted that the circumstances let in by the prosecution remain unproved and do not lead to the guilt of the accused and the prosecution has miserably failed to prove its case against the accused/appellant.

12. Per contra, Mr. V.M.R. Rajendiran, learned Additional Public Prosecutor submitted that the deceased was residing only with the first accused and on the day of "Ayutha poojai", she went only to the house of the first accused from her parents' house, and therefore, she was missing. Though she was missing for the three days, complaint was given to the police only by P.W.1- father of the deceased and not by the first accused. The first accused had not come forward with any explanation as to why and how the deceased was missing. The conduct of the first accused itself was doubtful. Even at the time of giving the complaint Exhibit P-1 to the police, P.W. 1 had suspected the first accused, since the first accused was torturing his wife and he had demanded a sum of Rs. 50,000/-. As the police started inquiring the first accused, the first accused had approached the VAO and he had given confession statement. There is nothing to suspect Exhibit P-2, the extra judicial confession statement of the first accused given before P.W.4, Village Administrative Officer.

13. The Additional Public Prosecutor further submitted that Exhibit P-2 is well corroborated by other materials. Subsequent to his confessional statement, the first accused had pointed out the place where he had buried the body of the deceased and on the said information given by him to the VAO and police, the Tahsildar was summoned and the body was exhumed which stands as a strong piece of corroboration. Only the first accused was knowing about the place where the body of the deceased was buried and the spade which was used to bury the body was also recovered by the police. The learned Additional Public Prosecutor also

submitted that though there was no positive medical opinion from the doctor regarding the cause of death, as the body was in a decomposed stage, it could be inferred from the available circumstances that the deceased had not died due to natural cause. If the deceased died due to natural cause, then there was no necessity for the first accused to conceal the body of the deceased without informing anyone.

14. The learned Additional Public Prosecutor also relied on the decision of the Honourable Supreme Court in Ponusamy Vs. State of Tamil Nadu, wherein it is observed in paragraph-19 as follows:

19. The appellant is said to have thrown the dead body in the canal. The fact that there was sufficient water in the canal has also been established. In a situation of this nature, a presumption about the knowledge of the appellant in regard to location of the dead body of "Selvi" can be drawn. His confession led to a discovery of fact which had a nexus with commission of a crime.

15. We have considered the rival submissions made by both the parties and perused all the materials available on record carefully.

16. Admittedly there is no eye witness to the occurrence. The prosecution purely rests on circumstantial evidence. Of course the whole prosecution case rests mainly on the extra judicial confession given by the first accused to the Village Administrative Officer P.W.4. In view of the ratio laid down by the Honourable Supreme Court in Sivakumar v. State by the Inspector of Police (supra), an extra judicial confession given by an accused to a VAO is admissible in evidence and could be relied upon. It should be seen whether in this case, Exhibit P-2 is believable, acceptable and passes the test of credibility to be the basis for conviction.

17. The deceased was missing from 8.10.2009 in the night hours. It is not the case of the appellant/first accused that he made any attempt to search for the deceased or he gave complaint to the police. On the other hand, it was only P.W.1, father of the deceased who enquired about the deceased and after enquiring the appellant/first accused, he had given complaint to the police suspecting the first accused. According to P.W.1, the deceased was ill-treated by the first accused and there was a demand of money also. It appears from the evidence that on receipt of the complaint, the police also enquired the first accused and as there was no clue, he had been let off. Subsequently, the first accused on his own had appeared before the VAO and had given the extrajudicial confession Exhibit P-2 in which he had narrated about murdering the deceased. The contention of the defence counsel is that the evidence of P.W.4 should be rejected for the reason that the VAO is only an obliging witness to the police. It is not always possible to start with suspicion and to presume that Village Administrative Officer is an obliging witness to the police and thereby he is giving evidence falsely. The credibility of the evidence depends on the facts and circumstances of each case. The evidence of P.W.4 has not been shattered

in the cross examination by the defence. The evidence of P.W.4 regarding Exhibit P-2, extra judicial confession of the first accused had been strengthened very much by the fact that the place where the body of the deceased was buried was discovered only by the confession statement of the first accused/appellant. It was only at the instance of the appellant, the body of the deceased was recovered which is a strong piece of circumstance. It is the specific evidence of P.W.4, Village Administrative Officer and the investigating Officer - P. W. 11 that the place where the body was buried was pointed out by the accused. The body was exhumed in the presence of P.W.8 Tahsildar. The first accused/appellant has also not specifically denied about pointing out the place where the body was buried.

18. Of course, the post mortem doctor could not give any opinion regarding cause of death of the deceased as the body was in a decomposed stage. Just because the doctor had not given opinion regarding the cause of death, the Court cannot immediately jump to the conclusion that it is not a case of homicidal violence. Even if the medical opinion does not support the case of homicidal violence, if other materials are available as positive evidence that the deceased died due to homicidal violence, then Court can arrive at such conclusion wherein it is safe. The first accused himself had admitted in the extra judicial confession that he had committed the murder of the deceased and thereafter buried the body of the deceased. The fact that the body of the deceased was exhumed on the information furnished by the first accused, then it can be said that it was only the first accused who had knowledge about the death of the deceased and in the absence of any explanation from the accused, a reasonable inference can be drawn regarding the death of the deceased.

19. Section 106 of the Evidence Act is as follows:

106. Burden of proving fact especial within knowledge.--

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

20. The Honourable Supreme Court had observed in the decision in AIR 2001 2842 (SC) as follows:

24. Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudary was brutally assaulted and then a chhura-blow

was given on the chest. Thus chhura-blow was given after Bijoy Chaudhary had said "he is still alive and should be killed". The appellants then carried away the body. What happened thereafter to Krishnanand Chaudary is especially within the knowledge of the appellants. The appellants have given no explanation as to what they "did after they took away the body. Krishnanand Chaudary has not been seen since alive. In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the Court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt but the Section would apply to cases like a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr. Mishra.

21. This Honourable High Court also held in the decision in P. Ganesan v. State of Tamil Nadu (2008) 1 MLJ(Crl.) 1320 as follows:

13. The circumstances established by the prosecution, on cumulative effect, satisfies the test of proof of the guilt of the appellant on the basis of the circumstantial evidence for the commission of the offence. One another important aspect in this case is that the body of the deceased was recovered only at the instance of the information furnished by the accused. Once this aspect is established, it leads to proximity of the accused with the commission of the crime and the hypothesis of guilt. If at all the accused wants to show that he is not involved, it is for him to offer an acceptable explanation. Though the cause of death is not established by the medical evidence, as the body was decomposed, it is for the accused to explain under what circumstance the body was buried.....

22. The first accused having not come forward with any explanation for the availability of the body of the deceased at the place pointed out by him and from the confessional statement of the first accused before the Village Administrative Officer, the cumulative effect of the circumstances let in by the prosecution leads only to irresistible conclusion that the deceased died due to homicidal violence and the accused is involved in the commission of crime of murder. In the result, the appeal is dismissed, confirming the conviction and sentence imposed on the appellant/first accused by the learned Additional Sessions Judge (FTC), Ariyalur, in S.C. No. 41 of 2009 dated 17.9.2010.