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**Madras High Court**

**Case No:** Criminal Appeal No. 443 of 2007

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| Shivappa @ Sivanathan | APPELLANT |
| Vs | |
| State | RESPONDENT |

**Date of Decision:** April 9, 2009

**Hon'ble Judges:** Raja Elango, J; R. Banumathi, J

**Bench:** Division Bench

**Advocate:** V. Raghavachari, for the Appellant; P. Kumaresan, Assistant Public Prosecutor, for the Respondent

**Judgement**

R. Banumathi, J.
This appeal arises out of the judgment in S.C.197/2002 on the file of Prl. Sessions Judge, Dharmapuri at Krishnagiri convicting the appellant/accused U/s.302 IPC and sentencing him to undergo imprisonment for life and to pay fine of Rs. 2000/-.

2. Case of the prosecution in nutshell are as follows:-

(i) Accused is the husband of PW2-Suguna. Deceased Ramamoorthy is the son of PWl-Narasimmaiah and PW5-Mangammal. PW. ll-Radha is the daughter of PW1 and PW5 and younger sister of deceased and PW4-Chellappan is husband of PW11. Deceased Ramamoorthy was having illicit intimacy with PW2-Suguna. PW1 had warned his son - deceased Ramamoorthy for several times and despite his warnings, deceased continued his illicit intimacy with PW2. About two days prior to the occurrence i.e. on 06.1.2002, appellant beat his wife Suguna [PW2] and PW2 went to her mother''s house at Bairamangalam village.

(ii) On 08.1.2002 at about 3.00 P.M., deceased Ramamoorthy had gone to Bairamangalam accompanied by PW3-Anandhan. After reaching Bairamangalam, deceased told PW3 that he was going to see PW2 and asked PW3 to wait in the bus stop. After the deceased Ramamoorthy had left the place one Varadharajan of

Kunthumaranapalli village had come there and PW3 was talking to Varadharajan.

(iii) On the evening of 8.1.2002, PW7-Palaniammal who is the flower vendor went to the house of one Kavitha for giving flower and Kavitha asked her to sit for some time and PW7 had been talking with Kavitha, PW7 had seen Ramamoorthy was proceeding to the house of PW12-Mangathayammal who is none other than mother of PW2. About 10 minutes thereafter accused Shivappa also went to the house of PW2.

(iv) Since there was illicit intimacy between PW2 and deceased Ramamoorthy for quite some time, accused had been declaring in the village that he would not leave Ramamoorthy without killing. Since, accused Shivappa had gone to PW2"s mother"s house, fearing danger PW3 and his friend Varadharajan went to the house of PW2. PW3 and his friend Varadharajan saw Shivappa coming out of the house of mother of PW2 along with MOl-Rice ponder. PW3 and his friend Varadharajan went inside the house. They saw Ramamoorthy lying on Straw mat in pool of blood with blood injuries over his occipital region. Ramamoorthy sustained injuries on the right side mandible, interpretable region. His neck was found swollen and Ramamoorthy was found dead. PW3 asked Varadharajan to remain there and PW3 went to Kunthumaranapalli village and informed parents of the deceased Ramamoorthy.

(iv) PWs 1,3,4,10 and 11 went to the house of PW12 and saw the dead body of the deceased. PW1 accompanied by his son PW4 went to Kelamangalam police station and lodged Ex.Pl-Complaint. On the basis of which a case was registered in Cr.No.7/2002 U/s.302 IPC [Ex.P15].

(vi) PW21 - Inspector of Police had taken up investigation. He inspected the scene of occurrence and prepared Ex. PS-Observation Mahazar and also Ex.P16-Rough plan. He has collected blood stained earth and sample earth and also seized M05-Straw mat under Ex.P6 -Seizure Mahazar. PW21 held Inquest in the presence of panchayatdars and Ex.P17 is the Inquest report.

(vii) After Inquest, body was sent for post-mortem. PW19- Dr. D.V. Gandhi had conducted autopsy on the body of the deceased Ramamoorthy. PW19 had noticed (i) lacerated cut injury on the right side mandible near chin with bleeding and clots; (ii) lacerated wound with bleeding and clot near left angle of mouth; (iii) lacerated cut injury on the inter-parietal region with bleeding and clot and (iv) contused discoloration of skin on the left side of neck. Opining that death was due to shock and hemorrhage due to injury of head and base of skull, PW19 issued Ex.P14-Post-mortem certificate. After Post Mortem, Blood stained clothes were seized from the body of the deceased.

(viii) Accused was arrested on 19.1.2002. Based upon his confession statement, MOl-Rice pounder was seized under Ex.P4-Seizure Mahazar. Thereafter, accused was remanded to judicial custody. On completion of investigation and upon receipt of chemical analysis report, final report was filed against the accused U/s.449 and 302 IPC.

3. Before the trial court, prosecution examined PWs. l to 21 and Exs. Pl to P17 and Mos. l to 8 were marked. About the incriminating circumstances and evidence, accused was questioned U/s.313 Cr. P.C. Denying all of them by filing written statement U/s.313 Cr. P.C, accused had taken defence plea that deceased attempted to outrage modesty of his wife [PW2] and to protect herself and her chastity, PW2 attacked deceased and that accused is no way responsible for the death of the deceased. Version of PW2 and defence plea of the accused was rejected as an after thought, learned Sessions Judge held that accused inflicted fatal injuries to the deceased Ramamoorthy and guilt of the accused is proved beyond reasonable doubt and sentenced him as aforesaid in Para (1). Observing that PW2 had perjured, learned Sessions Judge ordered penal action to be initiated against PW2-Suguna U/s.193 IPC.

4. Mr. V. Raghavachari, learned counsel for the appellant submitted that it was quite improbable that appellant Shivappa would have gone to Bairamangalam village and the entire prosecution story is improbable whereas version of PW2 appears to be more than probable. It was further submitted that prosecution has not conclusively established all link evidence. Thus it was contended that prosecution has not proved the circumstances which would negate the innocence of the accused.

5. Supporting the judgment of the trial court, learned Addl. Public Prosecutor Mr. P. Kumaresan submitted that the circumstance viz., accused came to the house of PW2 and immediately thereafter deceased was seen dead and recovery of MOl-Rice pounder are very strong circumstances which would conclusively pin point the guilt of the accused and based upon the proved circumstances, trial court rightly held the accused guilty of the offence U/s.302 IPC.

6. Case of prosecution is based upon circumstantial evidence. In case of circumstantial evidence, it is settled law that circumstances from which conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature pointing to the guilt of the accused.

7. Contending that to base conviction on circumstantial evidence Prosecution must establish all pieces of incriminating circumstances, learned counsel for Appellant placed reliance upon Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, . Referring to various decisions on circumstantial evidence in para (20) Hon''ble Supreme Court has held as under:

20. It is now well-settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well-settled that suspicion, however, grave may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial

evidence.

8. It has been consistently laid by the Apex Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

9. In Bhagat Ram Vs. State of Punjab, , it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negate the innocence of the accused and bring the offences home beyond any reasonable doubt.

10. A reference may be made to decision in Sharad Birdhichand Sarda Vs. State of Maharashtra, . Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of Apex Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

11. These aspects were highlighted in State of Rajasthan Vs. Raja Ram, , State of Haryana Vs. Jagbir Singh and Another, and Kusuma Ankama Rao v. State of A.P. [Crl. Appeal No. 185/2005 disposed of on 07.7.2008].

12. In the light of the above well settled position, the point falling for consideration is whether trial court was right in concluding that incriminating facts and circumstances closely connect the accused and whether trial court was not right in rejecting defence

version as an after thought.

13. Circumstances relied upon by the prosecution and accepted by the trial court are:-

Motive;

Evidence of PW3 and PW7 that deceased proceeded to the house of PW2''s mother at Bairamangalam village.

Evidence of PW3 and PW7 that accused came out of the house with MOl rice ponder.

Immediately, deceased was found dead in a pool of blood with head injuries.

Recovery of MOl rice pounder at the instance of accused.

14. Deceased Ramamoorthy had illicit intimacy with PW2-Suguna for quite some time. PW1 and PW11 - father and sister of deceased had spoken about the illicit intimacy of deceased with PW2 and that deceased was warned. Inspite of warning, deceased persisted in his illicit intimacy with PW2. PW4 - husband of PW11 brother-in-law of deceased also heard about the illicit intimacy. Speaking about the illicit intimacy of the deceased with PW2, PW5 - mother of the deceased had spoken about the accused beating his wife and driving her away from matrimonial house and that PW2 went to her mother''s house [PW12] at Bairamangalam

15. On learning about illicit intimacy with the deceased and PW2 quite probably, appellant developed animosity towards deceased. In cases based upon circumstantial evidence, motive plays a significant role which led to the commission of offence. In this case by proving motive, prosecution case is rendered probable strengthening the prosecution version.

16. PW2 - Suguna has not supported the prosecution case and she has narrated different version saying that deceased Ramamoorthy misbehaved with her and that to protect herself, she has attacked him. For obvious reason, for saving her husband, PW2 has come forward with a different story which is not supported by any material.

17. On the fateful day 08.1.2002, PW3-Anandhan accompanied deceased to go to Bairamangalam. PW3 v/as waiting in the bus stop and talking to Varadharajan who is also native of Kunthumaranapalli village. Deceased went to PW2''s mother''s house [PW12] where PW2 was there. While PW3 and Varadharajan were talking with each other at the bus stop, they had seen appellant going towards the house of PW2. Fearing danger, PW3 and Varadharajan followed the accused and saw the accused coming out from PW2''s house with MOl-Rice pounder. PW3 and Varadharajan saw the deceased with injuries on M05-Srraw mat. Evidence of PW3 clearly pin points guilt of the accused and a strong circumstance connecting the accused to the offence.

18. PW3-Anandhan being a resident of Kunthumaranapalli, his presence in Bairamangalam and his evidence is sought to be assailed on various grounds viz:-

PW3 had not so accompanied the deceased to Bairamangalam and PW3 is resident of Kunthumaranapalli village and chance witness in Bairamangalam village.

PW3 being friend of deceased Ramamoorthy is an interested witness in securing conviction of the appellant.

If really, PW3 was the first person to see the deceased dead, PW3 would have been the best person to lodge the complaint whereas PW3 had gone to Kunthumaranapalli village only to inform about the occurrence to PW1 and other family members of deceased Ramamoorthy and therefore, PW3 was a concocted witness.

19. PW2 was chased away from her matrimonial house about two days prior to the occurrence. Probably, knowing the same, deceased Ramamoorthy went to Bairamangalam to see PW2 and PW3 being friend of the deceased had accompanied him to Bairamangalam. PW3 was waiting in the bus stop and on seeing the appellant proceeding to PW2''s house, PW3 and Varadharajan also followed him.

20. In fact, PW7-Muniammal who is yet another witness for prosecution who happened to be near the scene of occurrence had spoken about PW3 and Varadharajan. Evidence of PW3 cannot be doubted on the ground that he is a chance witness. The term of chance witness is of dubious coinage is of no precise import. Because of their presence, where they have no compelling reason to be present, their evidence does not warrant rejection. In Col.4 of Ex.P17 [Inquest Report], name of PW3 and Varadharajan is stated as per-sons last seen the deceased Ramamoorthy alive. Col.4 reads as under:-

There is no substance in the contention raising doubts about the presence of PW3 in Bairamangalam village.

21. Evidence of PW3 was also sought to be assailed on the ground that he is an interested witness. Whether a witness is interested witness is a matter of ascertainment from facts and circumstances by process of evaluation. There is no law which says that evidence of interested witnesses should be thrown out. We find no reason to discard the evidence of PW3.

22. PW7-Muniammal is a flower vendor. On the fateful day 08.1.2002 after giving flower to Kavitha neighbor to PW2''s house, PW7 was sitting in the house of Kavitha and talking to her. At that time, PW7 saw deceased Ramamoorthy proceeding towards Mangathayammal''s house [PW12 - mother of PW2]. PW7 also saw appellant Shivappa proceedings towards the house. Evidence of PW7 would clearly bring home presence of accused in the scene of occurrence.

23. During cross examination, PW7 has stated that Ramamoorthy went inside and within 5 minutes, PW2-Suguna came out and thereafter accused went inside.

24. The relevant portion of evidence of PW7-Muniammal reads as under :-

24. Much reliance was placed upon the evidence of PW7 to contend that evidence of PW7 probabilises defence plea. As pointed out earlier, version of PW2 and defence plea is that deceased Ramamoorthy entered into the house and attempted to outrage the modesty of PW2 and PW2 in order to protect herself and her chastity, she has attacked deceased and deceased sustained injuries and fell down. Much emphasis was laid upon the evidence of PW7 to contend that version of PW7 would substantiate the defence plea.

25. There is no substance in the defence plea that version of PW7 probabilises defence version. As pointed out earlier, PW7 has stated about PW3 and Varadharajan proceeding towards PW2''s house. PW3 has clearly stated that he saw the appellant coming out of the house and when they went inside they saw deceased lying in pool of blood on M05-Straw mat with head injuries.

26. In the chief examination, PW7 has stated that deceased had first gone inside the house and accused went thereafter. PW7 has further stated that in between, she saw PW2 coming out of the house. In our considered view, evidence of PW7 does not materially affect the core of prosecution case nor does it probabilises defence version. If really, there was any occurrence as alleged by PW2, PW2-Suguna being in her mother''s place would have raised hue and cry which would have drawn attention of several neighbors.

27. Here is a case that deceased had first gone inside the house in Bairamangalam village to see a woman with whom he was having illicit intimacy. It is significant to note that place of occurrence was inside the house of PW12 - mother of PW2. Presence of the deceased inside the house is not disputed. If deceased had tried to behave with PW2, why should deceased Ramamoorthy traveled from Kunthumaranapalli village to Bairamangalam which is stated to be at a distance about 5 km. Even if that be so, how Ramamoorthy would have gained entry into the house. We are of the considered view, evidence must be approached with a sense of reality from realistic angle with awareness of life realities. Defence version is unbelievable that Ramamoorthy traveled about 5 km to Bairamangalam village and gained forcible entry into the house of PW2 in the evening time at about 5.00 P.M. and attempted to outrage the modesty of PW2 and that PW2 attacked him to protect herself. It is pertinent to note that only during trial, appellant had taken such ingenious . If any such thing happened, PW2 would have rushed to the hospital and would have raised series of protest against registration of case against the appellant. Learned Sessions Judge rightly rejected the defence plea as an after thought

28. Prosecution case is assailed on the ground of delay in lodging the complaint and registration of FIR. Occurrence was on 01.1.2002 at 5.00 P.M. at Bairamangalam.

Ex.P15-FIR was registered at 10.00 P.M. nearly five hours after the occurrence. Placing reliance upon Dilawar Singh Vs. State of Delhi, , learned counsel for the Appellant therefore contended that when there is a delay in lodging complaint, delay affords opportunity to the complainant to make deliberation upon the complaint and to improve their version or even to make fabrications. It was therefore contended that delay in registration of FIR is to treated as fatal to the prosecution case.

29. No doubt delay in lodging a complaint is normally viewed by Courts with suspicion because there is possibility of concoction of evidence against accused so it becomes necessary for the prosecution to satisfactorily explain the delay. We have carefully examined the case, whether prosecution has satisfactorily explained the delay.

30. After seeing the occurrence, PW3 was grief-stricken, it might not have occurred to him to immediately go to Police Station. After all PW3 was only friend of deceased Ramamoorthy. Quite naturally, PW3 had gone to Kunthumaranapalli village and informed father of the deceased [PW1] who in turn informed his son-in-law PW4-Sellappan. Thereafter, PW1, PW3 and PW4 went to Bairamangalam village and after seeing deceased, PW1 and PW4 went to Kelamangalam Police station and lodged Ex.Pl complaint. In our considered view, delay in lodging the complaint has been satisfactorily explained by the prosecution. We are of the view, Ex.P15 FIR does not suffer from any embellishment or exaggeration to doubt the prosecution version.

31. On 19.1.2002, PW12 - Investigating Officer arrested the appellant and his confession statement led to the recovery of MOl- Rice pounder. From Ex.P13 -Chemical analysis report, it is seen that MOl-Rice pounder contain human blood. Presence of human blood in MOl-Rice pounder which was recovered at the instance of appellant is yet another strong circumstance pointing to the guilt of the accused.

32. The circumstances and the evidence adduced by the prosecution are very strong circumstances which inevitably connect appellant with the commission of the offence. It is not merely based on the sole circumstance of that deceased had gone inside the house of PW2. Undisputedly all the links in the chain point to the guilt of the accused.

33. Defence plea was that Ramamoorthy tried to outrage modesty of PW2 and to protect herself and her chastity, PW2 had caused injuries to Ramamoorthy. For the reasons indicated in Para (27), we have endorsed the views of the learned Sessions Judge rejecting the defence plea.

34. Crucial question is what is the appropriate provision under which the act of the accused would fall. Appellant-accused had not raised any plea whether his act would fall within Exceptions (I) to (V) to Sec. 300 IPC. Even if such a plea was not taken, analyzing the facts and circumstances, it is open to the Court to consider whether the act of appellant would fall within any of the Exceptions I to V to Sec. 300 IPC. We have carefully examined the facts and circumstances of the case and evidence.

35. A Couple of days prior to the occurrence, appellant/accused had beaten his wife and driven her away to her parents house. On the fateful day 08.1.2002, appellant-accused gone to Bairamangalam which is about 5 km. away from his place. Appellant had seen deceased Ramamoorthy in the house of his mother-in-law [PW12]. Perhaps he might not have foreseen the presence of Ramamoorthy. On seeing Ramamoorthy inside PW12"s house where his wife was alone, accused must have lost his control. Such act of the deceased and PW2 would have offered sudden provocation to the accused. It is not as if appellant made preparation to catch PW2 with her paramour and do away with Ramamoorthy. It is pertinent to note that while proceeding to Bairamangalam, appellant was not armed. MOl-Rice pounder, a tool for grinding and crushing is normally available in the houses in rural areas. Just on being provoked, appellant had taken the available weapon and gave blows on the right side of mandible and on the interpretable region. There was also contusion with discoloration of skin on the left side of neck. On opening of the skull, it was noticed that there is collection of blood and clot present on the right and left posterior cranial fossa.

36. Explanation to Exception 1 clarifies that whether provocation was grave and sudden is a question of fact. Considering the scope of Exception 1 to Sec .300 IPC, in K.M. Nanavati Vs. State of Maharashtra, , Supreme Court has held as follows:-

For the purposes of Exception 1 to Section 300, (1) the test of grave and sudden provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first exception to section 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time or otherwise giving room and scope for premeditation and calculation.

Having regard to the facts and circumstances of the case, in our considered view the act of the accused would fall within Exception No. 1 to Sec. 300 IPC.

37. Next question to be considered is whether the act of the accused would come U/s. 304 Part (I) or Part (II). The weapon used was MOl-Rice pounder which was length of about 84 cm. in length with iron ridge on one side having 5-6 Cms. diameter. Weapon used for the commission of offence is a dangerous weapon. Nature of weapon used and injuries caused manifests intention of the accused to cause fatal injuries. In such facts and circumstances, conviction of the appellant is modified as Sec. 304 Part (I) IPC. In our considered view imposing sentence of imprisonment of seven years would meet ends of justice.

38. In the result, conviction of the appellant/accused in S.C. No. 197/2002 dated 26.4.2007 U/s. 302 IPC is modified as Sec. 304 Part (I) IPC. Appellant/accused is sentenced to under RI for seven years. The fine amount imposed on the appellant shall hold good. Learned Prl. Sessions Judge, Dharmapuri is directed to take necessary steps to secure the accused and commit him to prison to undergo the remaining period of sentence.