

Bail Slip

The Appellants/Accused 1 & 2 viz., 1) Harikesavan & 2) Magesh @ Umamageswaran were already been released on bail in and by the order of this case dated 10.02.2009 & 16.02.2009 made in Crl.M.P.No.1/2009 in Crl.A.No.712 of 2008 on the file this High Court, Madras.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30-6-2009

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM
AND
THE HONOURABLE MR.JUSTICE C.S.KARNAN

CRL.A.No.712 of 2008

1.Harikesavan
2.Magesh @ Umamageswaran

.. Appellants/
A-1 & A-2

vs

The State Rep. By
Inspector of Police
Ambathur Estate Police Station
Ambathur, Chennai.

.. Respondent/Complainant

Criminal appeal preferred under Sec.374(2) of the Code of Criminal Procedure against the judgment of the Principal Sessions Judge, Thiruvallur, made in S.C.No.36/2008 dated 16.9.2008.

For Appellants : Mr.R.Margabandhu
For Respondent : Mr.N.R.Elango
Additional Public Prosecutor

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JUDGMENT

(Judgment of the Court was delivered by M.CHOCKALINGAM, J.)

Challenge is made to a judgment of the Principal Sessions Division, Thiruvallur, made in S.C.No.36 of 2008 whereby the appellants/A-1 and A-2 stood charged, tried, found guilty under Sections 302 r/w 34 and 392 r/w 397 of IPC and awarded life imprisonment along with a fine of Rs.1000/- and default sentence and 7 years Rigorous Imprisonment respectively.

2. The short facts necessary for the disposal of this appeal can be stated as follows:

(a) P.W.2 is the wife of the deceased Balasubramaniam. He used to go to his business and come for lunch everyday. Likewise on 1.11.2007, when he went over for his business, he did not come for lunch. She tried to telephone to his cellphone; but she could not. On the other hand, she received a reply that the cell phone was switched off. He did not come in the night hours also. In the next morning P.W.1 informed to one Selvaraj, and both of them went to Ambattur Estate where he was carrying on his business. There also he was not found. Thereafter, they went to the newly purchased house where they found the dead body of the deceased. A gold chain and a gold ring worn by him, and also two cell phones belonging to him were also found missing. Then P.W.1 proceeded to the respondent police station and gave Ex.P1, the report, to P.W.14, the Inspector of Police, who registered a case in Crime No.628 of 2007 under Sec.302 of IPC. The printed FIR, Ex.P21, was sent to the Court.

(b) The investigation was taken up by P.W.14. Then he went to the place of occurrence, made an inspection and prepared an observation mahazar, Exs.P2 and P3, and a rough sketch, Ex.P22. Further, finger print expert was also brought. He took the finger prints available. Then, the place of occurrence and also the dead body were photographed through a photographer. The Investigator conducted inquest on the dead body in the presence of witnesses and panchayatdars and prepared an inquest report, Ex.P23. Then the dead body was sent to the Government Hospital along with a requisition for the purpose of autopsy.

(c) P.W.12, the Tutor in Department of Forensic Medicine, Government Kilpauk Medical College, Chennai, on receipt of the said requisition, conducted postmortem on the dead body of Balasubramaniam and has issued a postmortem certificate, Ex.P19, with his opinion that the deceased would appear to have died of complications of cranial cerebral injury haemorrhage and shock.

(d) Pending investigation, the Investigator arrested both the accused. They came forward to give confessional statements voluntarily, which were recorded in the presence of witnesses. The admissible parts are Exs.P6 and P7 respectively. Pursuant to the same, he recovered M.O.9, knife, M.O.10, gold chain, M.O.11, gold ring, and other material objects under separate mahazars. Pursuant to the confession made by A-2, M.O.12, cell phone, was recovered under a cover of mahazar. The accused were sent for judicial remand. All the material objects were subjected to chemical analysis. The reports are marked as Exs.P20 and P29 to P33. On completion of investigation, the Investigator filed the final report.

3.The case was committed to Court of Session, and necessary charges were framed. In order to substantiate the charges, the prosecution marched 14 witnesses and also relied on 35 exhibits and 32 material objects. On completion of the evidence on the side of the prosecution, the accused were questioned under Sec.313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses, which they flatly denied as false. No defence witness was examined. The trial Court heard the arguments advanced and took the view that the prosecution has proved the case beyond reasonable doubt and hence found the appellants guilty and awarded

punishment as referred to above which is the subject matter of challenge before this Court.

4. Advancing arguments on behalf of the appellants, the learned Counsel Mr. R. Margabandhu would submit that in the instant case, the prosecution had no direct evidence to offer; that it rested its case entirely on the circumstantial evidence; that there was a cell phone recovered from A-2 which, according to the prosecution, belonged to the deceased, and there were phone calls, and Ex.P14 was the cell details of the deceased; that the same also stood corroborated from the details of the cell phone of A-1 as found in Ex.P18; that the occurrence, according to the prosecution, has actually taken place on 1.11.2007; that from the evidence of the Investigator, it is clear that the occurrence has taken place between 1.15 P.M. and 2.00 P.M.; but, contrarily the Doctor has given his opinion that death could have occurred only during night hours on 2.11.2007 i.e., between 1.15 A.M. and 2.00 A.M., and thus the time of occurrence would also differ.

5. Added further the learned Counsel that in the instant case, the cell phone was actually recovered from A-2; that according to P.W.2, he has two cellphone numbers namely one Nokia type No.9940659447 and the other Reliance type No.9380669447; that the recovery mahazar was Ex.P10 wherein the number is found as 9944565820; that the evidence would indicate that the said cellphone belonged to P.W.7; that it would clearly indicate that what was recovered was not the cellphone which was owned or retained by the deceased at the time of occurrence, and thus the so-called recovery would be of no significance at all; that the prosecution could not establish that what was recovered from A-2 was that of the deceased; and that even the time factor as stated above would be of no avail.

6. Added further the learned Counsel that the Investigator would claim that pursuant to the confessional statement, three items of properties were recovered namely M.O.9, knife, M.O.10, gold dollar chain, and M.O.11, gold ring, from the accused; that as far as the knife was concerned, no bloodstain was found and the blood group did not tally; that as far as the gold ring was concerned, P.W.1 was very particular that what was worn by the deceased contained the initials of her husband; but, M.O.11 did not contain the initials; that as regards M.O.10, gold chain, she claimed that there were photos of two deities in the same; but, what was recovered did not contain so; and that under the circumstances, the recovery pursuant to the confessional statement did not support the prosecution case.

7. The learned Counsel would further add that in the instant case, except the above two pieces of evidence, the prosecution had no evidence to offer; that the above circumstantial evidence never pointed the nexus of the accused with the crime; that the trial Court has committed an error in finding them guilty, and hence they are entitled for acquittal in the hands of this Court.

8.The Court heard the learned Additional Public Prosecutor on the above contentions and paid its anxious consideration on the submissions made.

9.It is not in controversy that the dead body of one Balasubramaniam, P.W.2's husband, was found at the place of occurrence. Following the inquest made by the Investigator, the dead body was subjected to postmortem by P.W.12, the Doctor, who has given opinion that the deceased died of complication of cranial injury and shock and haemorrhage. The fact that he died out of homicidal violence was never disputed by the appellants before the trial Court, and hence, it has got to be recorded so.

10.In order to substantiate the charges levelled against the appellants/accused that they have committed the murder and also robbed the jewels and also cell phones of the deceased, the prosecution had no direct evidence to offer. It relied upon the circumstantial evidence. Needless to say in a given case like this, where the prosecution rested its case on the circumstantial evidence, they must place and prove all the necessary circumstances pointing to the guilt of the accused, apart from the hypothesis that except the accused no one could have committed the crime. If this test is applied, this Court is afraid whether it can sustain the conviction recorded in the judgment made by the trial Court. The prosecution to start with came with the specific charge that the occurrence of murder and robbery has taken place between 1.15 A.M. and 2.00 A.M. on 1.11.2007. But, the Investigator has candidly admitted that the occurrence has taken place between 1.15 and 2.00 on 1.11.2007 during day hours. When the postmortem Doctor was examined, he has categorically given evidence that death should have occurred during night hours on 1.11.2007 i.e., between 1.00 A.M. And 2.00 A.M. The prosecution had no explanation to offer how this has happened. This time factor as to the time of death would differ.

11.Added further, the prosecution placed much reliance on the recovery of the cell phone pursuant to the confession alleged to have been made by A-2. As could be seen from the evidence and the materials available, the deceased had two cellphones, one Reliance type and the other Nokia type. What was actually recovered from A-2 under Ex.P10, mahazar, was Nokia model. It could be seen that what is found in the recovery mahazar is the cellphone pertaining to No.9944565820 which belonged to P.W.7. But, the number of Nokia cellphone of the deceased was 9940659447. Thus the cellphone number would differ. The prosecution relied on the particulars available in the cell details of the deceased under Ex.P14 and of A-1 under Ex.P18. But it would be quite clear that the cellphone number as found in Ex.P14 was pertaining to No.9940659447. Ex.P10 mahazar would indicate that the cellphone was actually a different one. That apart, it is not the case of the prosecution that the deceased was having the cellphone which is found under Ex.P10 mahazar. So long as the prosecution is unable to show what was recovered from A-2 under Ex.P10 was the cellphone of the deceased which was held by him at that time, that part of the evidence cannot be relied.

12.The learned Counsel brought to the notice of the Court that as far as the recovery made from A-1 pursuant to the confessional statement regarding gold chain and gold ring was concerned, discrepancies are found. The defects as spoken to by P.W.2 and as found in the recovery mahazar, would also differ. Merely because such defects are found, it cannot be stated that those items namely gold chain and gold ring, were not worn by the deceased. P.Ws.2's evidence need not be suspected since these items are identified by her, and it is well within the provision of law. Mere recovery of the items by itself would not suffice to sustain a conviction as one rendered by the trial Court. These items were identified by her that they were worn by the deceased, and hence there cannot be any impediment in ordering for the return of those properties to P.W.2. But, recovery by itself would not suffice to sustain a conviction. It can be well stated that the prosecution has miserably failed to bring home the guilt of the accused since all these doubts raised by the appellants remained unclarified before this Court. The trial Court has taken an erroneous view and found the appellants guilty. Hence they are entitled for acquittal.

13.In the result, this criminal appeal is allowed setting aside the judgment of the trial Court. The appellants are acquitted of the charges levelled against them. The fine amount if any paid by them, will be refunded to them. The bail bonds executed by them shall stand terminated.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

nsv/

To:

1. The Principal Sessions Judge
Thiruvallur.
2. The Judicial Magistrate,
Ambathur.
3. -do- Through The Chief Judicial Magistrate,
Thiruvallur.
4. The Director General of Police,
Chennai.
5. The District Collector,
Thiruvallur.

6.The Inspector of Police
Ambathur Estate Police Station
Ambathur, Chennai.

7. The Public Prosecutor
High Court, Madras.

8. The Superintendent,
Central Prison,
Puzhal, Chennai - 66.

9. The Section Officer,
Criminal Section,
High Court, Madras.

1 cc To Mr.R.Margabandhu, Advocate, SR.27324.

CRL.A.No.712 of 2008

CKN(CO)
RVL 16.07.2009



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