

**B.Ganesan Vs. State Through**

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**Court :** Chennai

**Decided On :** Aug-20-2015

**Judge :** S.Nagamuthu

**Appellant :** B.Ganesan

**Respondent :** State Through

**Judgement :**

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED :

20. 08.2015 CORAM THE HONOURABLE MR.JUSTICE S.NAGAMUTHU AND THE HONOURABLE MR.JUSTICE V.S.RAVI CRIMINAL APPEAL (MD).No.43 of 2012 and CRIMINAL APPEAL (MD).No.26 of 2013 B.Ganesan S/o.Backianadhan Nethaji Nagar Kallanai Alanganallur : Appellant in C.A.No.43/2012 1.Veerachamy 2.Pappathi @ Vijaya : Appellants in C.A.No.26/2013 Vs. State through Inspector of Police Alanganallur Police Station Madurai District. in Crime No.450 of 2007 :Respondent in both appeals PRAYER: Appeal is filed under Section 374 of the Code of Criminal Procedure against the judgment passed by the Additional District Judge, Fast Track Court No.III, Madurai, in S.C.No.108 of 2009 dated 17.11.2011. !For Appellant in C.A.No.43/2012 : Mr.C.M.Arumugam For Appellants in C.A.No.26/2013 : Mr.T.Thirumurugan Legal Aid Counsel ^For Respondent : Mr.A.Ramar Additional Public Prosecutor :

JUDGMENT

(Judgment of the Court was delivered by S.NAGAMUTHU, J.) The appellants are the accused 1 to 3 in S.C.No.108 of 2009 on the file of the learned Additional Sessions Judge, Fast Track Court No.III, Madurai. Including these appellants, there were four accused in the case. The 4th accused was one Mrs.Janaki.

2. The accused 1 and 2 stood charged for offences under Sections 302, 397 and 201 IPC. The accused 3 and 4 stood charged for offences under Sections 201 read with 34 IPC. By judgment dated 17.11.2011, the trial Court acquitted the fourth accused. However, the trial Court convicted the accused 1 and 2 under Sections 302, 397 and 201 IPC and sentenced them to undergo imprisonment for life and to pay a fine of Rs.10,000/- each, in default, to undergo rigorous imprisonment for two years for the offence under Section 302 IPC; to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/- in default, to undergo rigorous imprisonment for one year for the offence under Section 397 IPC and to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year for the offence under Section 201 IPC.

3. The trial Court convicted the third accused under Section 201 read with Section 34 IPC and sentenced him to undergo rigorous imprisonment for seven years and to pay fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year. Challenging the said conviction and sentence, the appellants/accused 1 and 2 have come up with the criminal appeal in C.A.No.26 of 2013 and the third accused has come up with C.A.No.43 of 2012.

4. The case of the prosecution in brief is as follows: The deceased in this case was one Mrs.Mahalakshmi. She was the wife of P.W.1 ? Mr.Senthilkumar. They were residing in Alanganallur. P.W.1 was doing cloth business. The accused are also residents of the same village. The 2nd accused is the wife of the first accused. The accused 3 and 4 are the relatives of the accused 1 and 2. It is alleged that on the eve of Diwali, prior to the occurrence, the first accused had purchased cloth from P.W.1 for a sum of Rs.6,500/-. But he paid only Rs.2,000/- and the balance was Rs.4,500/-. P.W.1 and the deceased were insisting upon the accused 1 and 2 to pay the said amount. But it was not paid. 4.1. While so, on

27.11.2007, P.W.1 and his wife (the deceased Mahalakshmi) went to the house of the accused to demand payment of the said amount. P.W.1 remained at a distance and asked the deceased alone to go and get the amount from the accused. Accordingly, at about 11.00 a.m., the deceased alone went to the house of the accused. But she did not return. P.W.1 was all along waiting for the return of the deceased. Since she did not return, P.W.1 went to the house of the accused No.1. The second accused was sitting at the entrance of the house. The first accused was not seen. On seeing P.W.1, the 2nd accused raised the volume of the radio, entered into the house and closed it. P.W.1 enquired with A2 as to what had happened to his wife. Immediately, the first accused came out of the house and warned him that it was not proper on his part to send his wife to demand money, as he had already told him not to send anybody asking for money. The first accused also told P.W.1 that the deceased would have gone elsewhere. Believing the said words, P.W.1 returned to his house. 4.2. He was waiting for his wife for some more time. Since till the evening the deceased did not return, he developed suspicion of foul play. Therefore, he informed his father-in-law and mother-in-law about the same. They also came. Then all of them went to the house of the accused No.1 at 5.00 p.m. At that time, the house was locked. Then, they went to the police station and informed a police constable about the same. He also came along with them and found the house locked. Then, P.W.1 and others returned to their house. Till 10.00 p.m., the deceased did not return. P.W.1 again went to the police station and informed P.W.11, the Head Constable was then available in the police station. P.W.12 is yet another Head Constable, who was also there in the police station at that time. Both of them accompanied P.W.1 and went to the house of the first accused. They noticed that the house was found locked. P.W.5 is the landlord of the house and he was residing in the adjacent house. When they enquired P.W.5, he expressed ignorance. Then, with his help, they got a torch light and through a hole, they peeped into the house. But nothing could be found there inside the house. But odour of blood emanated from inside the house. Therefore, after getting permission from P.W.5, the two police constables pushed the door, which was locked. The door opened. When they entered into the house, they found a gunny bag in the 2nd room of the house. When they opened it, they found the dead body of the deceased inside the same.

There were injuries on her body. The gold thali, gold balls and gold coins worn by the deceased were not seen. Similarly, two gold rings worn by the deceased and the ear rings (one pair) were also found missing. Then P.W.1 went to the police station and made a complaint regarding the same. 4.3. P.W.17, was the then Sub Inspector of Police attached to Alanganallur Police Station. At 1.30 p.m., on 28.11.2007, he received Ex.P1 complaint from P.W.1 and registered a case in Crime No.450 of 2007 under Sections 302 and 394 IPC. Ex.P12 is the FIR. He forwarded both the documents to Court and handed over the case diary to the Inspector of Police for investigation. 4.4. P.W.18 the then Inspector of Police attached to Alanganallur Police Station took up the case for investigation at 12.30 a.m. on 28.11.2007. He proceeded to the place of occurrence and prepared an observation mahazar in the presence of witnesses and he also prepared a rough sketch in the presence of witnesses. Then, he examined few witnesses on the spot. He recovered the bloodstained cement floor and sample cement floor from the place of occurrence. He also recovered the gunny bag, in which, the dead body was found and the rope, which was used to tie the same. Then, he conducted inquest on the body of the deceased between 2.15 a.m. and 4.45 a.m. and prepared Ex.P14 report. Thereafter, he forwarded the body for postmortem. 4.5. P.W.15 ?. Dr.Natarajan conducted autopsy on the body of the deceased on 28.11.2007 at 10.00 a.m. He noticed the following injuries:

1. An oblique stab injury 63 x 0.5 cm x tracheal deep noted on the front of middle of neck, 7 cms below the neck. On dissection, the wound passes obliquely downwards and backwards piercing the underlying muscles, vessels, nerves and entering into trachea.
2. An oblique stab injury 3 x .5 cm x 2 cm along the muscle plane, noted on the outer canthus of right eye.
3. An oblique stab injury 2 x 0.5 cm x bone deep noted over right cheek.
4. An oblique stab injury 2 x 0.5 cm x bone deep noted over left frontal region.
5. An oblique stab injury 1 x 0.5 cm x bone deep noted over outer aspect of left side of upper lip.
6. An oblique stab injury 1 x 0.5 cm x bone deep noted over right side of lower lip.
7. An oblique stab injury 3.5 x 0.5 cm x bone deep noted on the back of right ear.
8. Laceration 5 x 2 cms x bone deep noted over mid occipital region.
9. Laceration 4 x 2 cms x bone deep noted over lower occipital region.
10. Laceration 6 x 1 cms x bone deep noted over left occipital region.
11. Laceration 3 x 1 cms x bone deep noted over left lower

occipital region. 12. An oblique stab injury 1 x 0.5 cm x cartilage deep noted over right ear lobe. He gave opinion that the injuries on the body would have been caused by a weapon like a hammer. He further opined that the death was due to shock and hemorrhage due to the injuries caused, between 20 to 24 hours, prior to the autopsy. 4.6. Continuing the investigation, P.W.18 arrested the first accused on 30.11.2007 at 8.00 p.m. at Othakadai Bus stop in the presence of P.W.9 and another witness. On such arrest, he made a voluntary confession, in which, he disclosed the place, where he had hidden the knife and where he had hidden the dress materials. He also disclosed the place, where he had hidden the jewels. Based on the same, he took P.W.18 and the witnesses to his house, where from the toilet, he took out the gold jewels M.Os.1 and 3. P.W.18 recovered the same in the presence of witnesses. On the same day, similarly, he recovered the dress materials. He produced the dress materials and knife (M.O.15) also from the hide out. P.W.18 recovered the same. Then, he returned to the police station along with the seized articles and the accused No.1. He forwarded the accused to the Court for judicial remand and handed over the material objects to Court. 4.7. On 09.01.2008, at 5.00 a.m., near Alanganallur gate bus stop, he arrested the 2nd accused in the presence of P.W.10 and another witness. On such arrest, she made a voluntary confession, which was reduced to writing. In that, she disclosed that she had hidden two gold rings. Accordingly, the 2nd accused produced the TV model ring and flower model ring (M.O.2 series). On returning to the police station, he forwarded the 2nd accused to the Court for judicial remand and handed over the material objects. Then, he arrested the accused Ganesan (A3) and forwarded him to the Court for judicial remand. He collected the medical records, examined the Doctor. On completing the investigation, he laid the charge sheet against all the four accused. 4.8. Based on the above materials, the trial Court framed the charges as detailed in the first paragraph of the judgment. The accused denied the same. In order to prove the charges, on the side of the prosecution, as many as 19 witnesses were examined, 18 documents and 15 material objects were marked. 4.9. Out of the said witnesses, P.W.1 is the husband of the deceased. He has stated about the fact that the deceased lastly went to the house of the accused 1 and 2 and thereafter she was not seen. He has further stated that at 10.00 p.m., the dead body was found in a gunny bag inside the house of the accused 1 and 2.

He has also spoken about the complaint made by him to the police. P.W.2 is the brother-in-law of P.W.1, who had accompanied P.W.1 at 10.00 p.m. when the dead body was found inside the house. P.W.3 states that he saw P.W.1 and his wife at about 11.00 a.m. on 27.11.2007 going towards the house of the accused. P.W.4 has stated that around 12.30 p.m. on 27.11.2007, he found the accused 1 and 2 somewhere near their house with bloodstains on their hands. He has further stated that when he enquired them, they stated that when a chicken was cut, blood stained in their hands. P.W.5 is the landlord of the house, where the accused 1 and 2 were residing. He has stated about the fact that the house was found locked and that when it was opened, the dead body was found inside the house. P.W.6 has stated that on 27.11.2007, at about 1 p.m., he found the three accused behind the house of one Nallaiah washing their hands. P.W.7 has spoken about the observation mahazar, rough sketch prepared and the recoveries made from the place of occurrence. P.W.8 has stated that he found P.W.1 near the house of the accused at 11.00 a.m. on 27.11.2007 and when he enquired, P.W.1 told him that he was searching for his wife. He has also further stated about the finding of the body inside the house at night hours. 5.0. P.W.9 has spoken about the arrest of the first accused, the confession made and the recoveries of material objects from him. P.W.10 has spoken about the arrest of the accused 2 and 3 and the consequential recoveries. P.W.11 - the Head Constable and P.W.12 yet another constable, who has stated that at 10.00 p.m. on the date of occurrence, on the request made by P.W.1, when they went to the house of the accused No.1, the house was found locked, then, with the permission of P.W.5, they opened the house and they found the dead body inside the house of the accused 1 and 2. P.W.13 is the Constable, who has stated about the fact that he carried the FIR to the Court. P.W.14 has stated that he carried the material objects for chemical examination. P.W.15 ?. the Doctor has spoken about the autopsy conducted. P.W.16 is the Scientific Assistant, who has stated that when he examined the material objects, he found human blood on all the material objects except hammer. The knife was not sent for chemical examination. P.W.17 has spoken about the registration of the case. P.W.18 about the investigation done. P.W.19 about the filing of the charge sheet.

6. When the above incriminating evidences were put to the accused under Section 313 Cr.P.C, they denied the same as false. However, they did not choose to examine any witnesses on their side nor, they marked any documents. Having considered all the above, the trial Court convicted all the accused and that is how, they are before this Court with these appeals.

7. Since the learned counsel on record for the appellants in C.A.(MD) No.26 of 2013 had withdrawn his appearance and since the appellants had not engaged any other counsel, with a view to afford fair trial, this Court appointed Mr.T.Thirumurugan, as a legal aid counsel.

8. We have heard the the learned counsel for the appellant in Crl.A.(MD) No.43 of 2012, the learned legal aid counsel for the appellants in Crl.A.(MD) No.26 of 2013, the learned Additional Public Prosecutor for the respondent and we have also perused the records carefully.

9. The learned counsel for the appellants/accused 1 and 2 would submit that the FIR in this case cannot be considered as an earliest information and therefore, the same is hit by Section 162 Cr.P.C. He would further submit that there are contradictions as to the time, when the house was opened. He would further point out that P.W.1 has stated that the house of the accused was opened at 10.00 p.m. P.W.5 has stated that the house was opened at 6.00 p.m., whereas P.Ws.7 and 8 have stated that the house was opened at 2.15 a.m. The material contradiction regarding time, according to the learned counsel, creates doubt in the case of the prosecution. The learned counsel would further submit that the arrest of the accused 1 and 2 and the consequential recoveries made from them also cannot be believed. The learned counsel would further submit that there was no bloodstain on the hammer, which would indicate that the hammer has nothing to do with the crime.

10. The learned counsel for the 3rd accused would submit that except the evidence of P.W.6, there is no other evidence against the third accused. P.W.6 has stated that he saw the third accused in the company of the accused 1 and 2, when they were washing their hands. The learned counsel would submit that this witness has been examined after 42 days of the occurrence, for which, absolutely,

there is no explanation. Therefore, according to the learned counsel, this evidence is liable to be rejected.

11. But the learned Additional Public Prosecutor would vehemently oppose this appeal. According to him, there is no explanation by the accused as to how the dead body of the deceased would go into the house that too in the gunny bag with injuries. The learned counsel would further submit that they are absconding after the occurrence. This, according to the learned counsel, would go to prove the guilt of the accused 1 and 2. Apart from that, the recoveries of the stolen properties from A1 and A2 would also go to prove that the accused only committed the murder. The learned Additional Public Prosecutor would further submit that so far as A3 is concerned, the evidence of P.W.6 is cogent and convincing. Thus, he prays for dismissal of both the appeals.

12. We have considered the above submissions.

13. The evidence of P.W.1 clearly goes to show that at 11.00 a.m. on 27.11.2007, he sent his wife to the house of the accused 1 and 2 to demand payment of money. We do not find any reason to reject this part of the evidence of P.W.1. After that, it is his case that the deceased did not return. Therefore, he went to the house of the accused 1 and 2, at that time, the second accused was sitting at the entrance and on seeing P.W.1, she entered into the house and raised the volume of the Radio. When he enquired about his wife, the first accused came out and warned him that he should not send anybody for demanding money. He also stated that the deceased would have gone elsewhere. Thus, from the evidence of P.W.1, it has been clearly established that the accused 1 and 2 were very much available in the house at the crucial time.

14. P.W.1 had thereafter, informed the relatives and all of them had gone to the house of the accused 1 and 2 at 5.00 p.m. At that time, the house was found locked. Again on 10.00 p.m., when they went to the house of the accused along with P.Ws.3,11 and 12, the house was found locked. There was nobody inside the house. However, according to these witnesses, odour of blood emanated from inside the house. The owner of the house is P.W.5. He has also spoken about the fact that the accused 1 and 2 were residing in that house. He has further stated

that the house was found locked at 10.00 p.m. when P.Ws.11 and 12 had come, with his permission, the house was opened and at that time, they found to their shock that the dead body of the deceased was found in the gunny bag. The gunny bag was tied and was kept in the second room of the house. The accused have not denied this fact. There is no reason to reject this part of the case of the prosecution, as the same has been clearly established.

15. The learned counsel would submit that there is contradictions regarding the time of opening of the house. He would point out that P.W.1 has stated that the house was opened at 10.00 p.m. P.W.5 has stated that the house was opened at 6.00 p.m., whereas P.W.7 and 8 have stated that the house was opened at 2.15 a.m. Of course, there are some inconsistencies regarding the time of opening, that will not cause any harm to the case of the prosecution, because there is no denial of the fact that the dead body was found inside the house of the accused 1 and 2. Therefore, the time of opening of the house is immaterial.

16. After the dead body was found, a complaint was made by P.W.1 to the police. It is submitted by the learned counsel that the FIR cannot be the true information and the information passed earlier by P.W.1 must be the true information. Assuming that Ex.P1 had come into being very belatedly and even before the police had some information about the missing of the deceased, at the most, this Court can only hold that Ex.P1 is hit by Section 162 Cr.P.C. and therefore, the same cannot help the prosecution to corroborate the evidence of P.W.1. On that score, the defence does not stand to gain anything more. On this ground, the entire case of the prosecution cannot be disbelieved.

17. Next, it has to be stated that the accused 1 and 2 were not in the house at all. They were absconding. This conduct of the accused in not returning to the house also is a strong adverse circumstance against the accused 1 and 2. Then, comes the evidence of P.W.4. He has stated that on the same day, at about 12.30 p.m., he found the accused 1 and 2 behind their house with bloodstains on their hands. As rightly submitted by the learned counsel for the appellants, we are not able to believe this witness, because he did not disclose this fact to anybody immediately after the occurrence, though he was present at the place of occurrence when

inquest was held and further investigation was conducted. He was examined 42 days after the occurrence. He has not offered any explanation for his failure to disclose the above vital fact for 42 days. Thus, it is crystal clear that P.W.4 has been planted by the prosecution to strengthen the case of the prosecution and hence, the evidence of P.W.4 is rejected.

18. Then, comes the evidence of P.W.6, who has stated that he found all the three accused behind the house of one Nallaiah washing their hands. As rightly pointed out by the learned counsel, it is difficult to believe this witness also. He has admitted during cross examination that he was very much available with the police, when inquest was held and he accompanied the police. Even then, he did not disclose this fact to anybody. For the first time, when he was cross examined by the accused 1 and 2, he disclosed the said fact and therefore, we have got sufficient reason to believe P.W.6 that this witness has also been the planted to strengthen the case of the prosecution. Therefore, the evidence of P.W.6 also rejected.

19. Then, comes the arrest of the first accused. He was arrested on 30.11.2007. Thus, between 27.11.2007 and 30.11.2007, he was absconding. He did not return to his house. Absolutely, there is no explanation for his absconding. This also goes to prove the guilty mind of the accused. On 30.11.2007, he was arrested. He gave a voluntary confession, out of which, the gold jewels, namely, M.Os.1 and 3 series were recovered. The hammer and knife M.O.Nos.10 and 15 have also been recovered. These jewels have been identified by P.W.1, as that of the deceased. The missing of the jewels have been mentioned in the FIR. There is no reason to reject this part of the evidence of P.Ws.9 and 10. Similarly, the 2nd accused was arrested only on 09.01.2008. She was also absconding all along. There is no explanation for this, which would also establish her guilty mind. On her confession, M.O.2 series was recovered in the presence of P.W.11. We do not find any reason to reject the evidence of P.Ws.11 and 18 in this regard. These jewels have been identified by P.W.1 as that of the deceased.

20. From these evidences, in our considered view, the prosecution has clearly established the case. The possession of the stolen articles belonging to the

deceased by the accused 1 and 2 would give rise to a presumption under Section 114 of the Indian Evidence Act that they had only committed robbery. Again, as per Section 114 of the Indian Evidence Act, the presumption is that the person, who committed robbery had committed the murder of the deceased also. The Doctor, who conducted autopsy, has clearly stated that the death was due to shock and hemorrhage due to the injuries. These injuries would have been caused only by these two accused. Thus, the prosecution has proved the charges against the accused 1 and 2 beyond reasonable doubts. They had kept the dead body in the gunny bag, only with a view to cause disappearance. They had removed the properties from the dead body. Thus, the offences under Sections 201 as well as 397 have also been proved by the prosecution as against the accused 1 and 2.

21. So far as the third accused is concerned, as we have already stated that since the evidence of P.W.6 is rejected, since there is no other evidence against him, the third accused is entitled for acquittal.

22. Now, turning to the quantum of punishment. Having regard to the economic status of the parties, the fine of Rs.10,000/- imposed for each offences needs to be reduced. In our considered view, it would be in the interest of justice to reduce the fine amount for the offence under Section 302 IPC from Rs.10,000/- to Rs.1,000/-; to reduce the fine amount for the offence under Section 397 IPC from Rs.10,000/- to Rs.1,000/- and again for the offence under Section 201 IPC from Rs.10,000/- to Rs.1,000/- would meet the ends of justice.

23. So far as the substantive sentence is concerned, for the offence under Section 201 IPC, the substantive sentence may be reduced to two years. In other aspects, the sentences are to be confirmed as against the accused 1 and 2.

24. In the result, the criminal appeal No.26 of 2013 is partly allowed in the following terms: (1) The conviction of the accused 1 and 2 under Sections 302, 397 and 201 are hereby confirmed. For the offence under Section 302 IPC, the accused 1 and 2 are sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default, to undergo rigorous imprisonment for four weeks. (2) The accused 1 and 2 are sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,000/-, in default, to undergo rigorous imprisonment for

four weeks for the offence under Section 397 IPC. (3) The accused 1 and 2 are sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for four weeks for the offence under Section 201 IPC. (4) The sentences are to run concurrently. The period of sentence already undergone shall be set off under Section 428 Cr.P.C.

25. The criminal Appeal No.43 of 2012 is allowed and the third accused Mr.Ganesan is acquitted of all the charges. Fine amount, if any paid by him shall be refunded to him.

26. The services rendered by Mr.T.Thirumurugan, as legal aid counsel for the accused/appellants in Crl.A.(MD) No.26 of 2013 is appreciated and the Legal Services Authority is directed to pay his remuneration. To 1.The Principal Sessions Judge, Tirunelveli 2.The Inspector of Police Taluk Police Station Tirunelveli District. 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. .

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