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Court : Delhi

Decided On : May-26-2011

Judge : S. Ravindra Bhat; G.P.Mittal, Jj.

Acts : Indian Penal Code (IPC) - Sections 120B, 380, 302, 34, 411; Evidence Act - Section 114 (a); Code of Criminal Procedure (CrPC) (CRPC) - Section 313

Appeal No. : CRIMINAL APPEAL NOS.16/1998, 107/1998 & 187/1998

Appellant : T. Murugan and ors.

Respondent : State

Advocate for Def. : Mr. Lovkesh Sawhney, Adv.

Advocate for Pet/Ap. : Mr. Shamikh, Adv.

Judgement :

1. In these three appeals, a common judgment and order of the learned Additional Sessions Judge dated 10.07.1997 passed in Sessions Case No.27/1996 has been challenged.

2. By the impugned judgment, all the appellants (hereafter referred to by their names, i.e., Murugan, Veeran and Karuppan) were sentenced to undergo 7 years imprisonment for conspiracy to commit theft with fine and also undergo life imprisonment for the offence punishable under Section-302, IPC. All the

appellants were originally charged with committing offences under Section-120B/380/302/34, IPC.

3. The prosecution's case was that one N.R. Nagaratanam, a widower was living alone in Janak Puri, in Flat No.B-38/91-C, on the second floor. He had two sons, PW-7 & PW-8 who were living outside Delhi. PW-7 was working in Bhopal and PW-8, in Bombay. Nagratnam (hereafter referred to as "the deceased") had a tenant Sri Niwasan (PW-10); he lived there with his brother. It is further alleged that on 27.07.1993, PW-10 went downstairs and pressed the deceased's door bell. On finding no response, he pushed the door; it opened. PW-10 saw the dead body of the deceased lying on the floor in a pool of blood. He immediately rushed to the flat of PW-5, a neighbour who informed Police Station, Janak Puri. This was recorded as DD No.47-B. Immediately, PW-27, SI K.P. Singh rushed to the spot. Apart from noticing the body, he observed sharp weapon wounds on the deceased's chest and a nylon rope tied around his neck. A lot of blood was found; some blood stained foot prints were also discovered. Some food was lying on the dining table and a chair had been overturned. PW-27 prepared a rukka - Ex.PW-27/B and sent it to Constable Desh Raj, PW- 13 for registration of FIR under Section-302 IPC; it was accordingly done. The FIR was exhibited as Ex.PW-23A.

4. It is alleged that Inspector O.P. Yadav, SHO of the Police Station reached the spot thereafter and lifted blood samples from the drawing room floor in the presence of PW-20. A Rudraksh Bead and Tabiz with black thread were found at the spot and were seized and sealed after they were taken into possession by memo Ex.PW-20/A. PW-16 was summoned; he took photographs which were later marked as PW-16/B-1 to B-5. It is also alleged that after other formalities were completed, the deceased's sons were informed. They arrived in Delhi the next morning. They found that two golden rings, a gold chain and two wrist watches - one of Rolex make and other of Omax make (which belonged to their mother) was missing. The police was informed of these missing articles. It is alleged that the blood stained foot prints were photographed by PW-22; they were produced during the trial as PW- 22/A-1 and PW-22/A-2.

5. The prosecution alleged that Marimma - one of the accused was engaged by the deceased as a maid w.e.f. 15.07.1993. She did not report for duty on 24th & 25th July, 1993.

The deceased was murdered in the night of 27.07.1993. After the case was registered, Inspector Yadav made enquiries and found that PW-9, who was running a hotel in a jhuggi cluster, in the vicinity of the deceased's flat had allegedly over heard the appellants when they were sitting in Murugan's jhuggi and planning to commit a theft in the deceased's flat. PW-9 also stated that appellants had disappeared from the jhuggi after the incident. The prosecution further alleged that PW-6, step father of Murugan was contacted. PW-6 allegedly informed the police that Murugan had confessed about the murder of the deceased. The police party left for Dindigul, Tamilnadu on 29.07.1993. They were accompanied by PW-6. On 02.08.1993, Karuppan was arrested in Malai Kottai. He was wearing an Omax wrist watch which was seized and sealed by Memo Ex.PW-24/C. Karuppan was later produced and transit remand was obtained from the concerned Court. It is alleged that on 04.08.1993 accused Marimma was arrested from her father's house at R. Puddu Kottai. Subsequently, Marimma and Karuppan were brought to Delhi.

6. The prosecution alleged that on 17.09.1993, a police team was again sent to Tamil Nadu under PW-26. On 21.09.1993, Murugan was arrested from the house of his father-in- law and the Rolex watch which he was wearing was seized and kept under seal by memo Ex.PW-2/B. Murugan made a disclosure statement Ex.PW-2/A and led the police to Ramnath Puram where Veeran used to live. Veeran was wearing a gold chain which was seized. He made a disclosure statement Ex.PW-2/C, further to which, two stolen gold rings, hidden in his house were seized and taken into possession. The prosecution alleged that specimen foot prints of all the three accused were taken after their arrest. The foot prints and negatives of the chance foot prints found at the spot were sent to the Finger Prints Bureau, Jaipur. PW-14 Iqbal Ahmed prepared an enlarged photograph of the chance footprint and compared it with the specimen footprint of the three accused. His opinion was that the chance footprints matched with that of the appellant Karuppan.

7. After considering the materials on record and the depositions of the witnesses, the Trial Court held the appellants guilty. Marimma, fourth accused was convicted with the charge of committing offence under Section-380 IPC; she had undergone five years detention as an under trial. The Court deemed it appropriate to confine the sentence to the period undergone. Feeling aggrieved, the appellants have challenged the findings of the Trial Court in these three appeals.

8. Learned counsel for the appellants submits that Sri Niwasan - PW-10 was the only witness who saw the deceased and that too after his murder. There was no eye witness to the attack or the alleged robbery. It is argued that PW-6 was an eye witness to the alleged extra judicial confession by Murugan. However, he did not support the prosecution's version at all and turned hostile. It is pointed out that even though, he is Murugan's step father, he could not identify him in the Court. Learned counsel submitted that similarly PW-9 had also turned hostile even though the prosecution had heavily relied upon his evidence.

9. Learned counsel submitted that Marimma was arrested on 04.08.1993 in Tamil Nadu and that Karuppan was arrested on 02.08.1993 when a wrist watch was allegedly recovered. It is submitted that even though the police witnesses mentioned about Marimma's arrest and also having seen Murugan, a fantastic theory that the latter (Murugan) escaped that day, was given. Arguing further it was stated that Murugan was later arrested on 21.09.1993 and a Rolex watch was allegedly recovered from him. Similarly, Veeran was arrested at the behest of Murugan on 21.09.1993. He was allegedly wearing a gold chain (seized by memo Ex.PW- 2/D). His disclosure allegedly led to the recovery of the two gold rings. Counsel submitted that it is unbelievable that if the motive for the attack and murder of the deceased was robbery, the culprits would be openly flaunting the stolen articles and that too, valuable ones such as a Rolex watch and wearing a gold chain which belonged to the deceased. This circumstance falsifies the prosecution's case about recovery and arrest of Murugan and Veeran. Learned counsel further submitted that the prosecution delayed identification of the stolen articles and got the Test Identification Parade (TIP) done only on 21.10.1993.

10. It was argued that the Trial Court found the appellants Veeran and Murugan guilty only on the basis of recovery of Articles stolen two months before their arrest. It was submitted that there was no material on the record to show that the said two appellants were living in Delhi and had absconded or gone missing as held by the Trial Court. Learned counsel submitted that even Marimma was arrested on 04.8.1993 in Tamil Nadu. Apart from proving that Marimma had been engaged by the deceased to work as a maid shortly before his death, none of the prosecution witnesses nor any materials established that Veeran and Murugan ever resided in Delhi or that they had run away; as was held. In these circumstances, the so called recovery of articles from their possession two months after the incident and also alleged identification in a TIP conducted on 21.10.1993, i.e., nearly three months after the incident, formed the sole basis for the conviction under Sections 302/120B/34 IPC. It was argued that recovery of articles by itself cannot be a circumstance justifying conviction and that by proceeding to do so, on an application of presumption under Section 114 (a) of the Evidence Act, the Trial Court fell into error.

11. Learned counsel for the appellant Karuppan, Mr. Manu Sharma argued that even though Karuppan was allegedly arrested on 02.08.1993, there was no reason why he ought to have been in possession of Omax wrist watch as was alleged and found against him. The sheer improbability of a criminal successfully stealing the valuables from the deceased person's premises and flaunting it openly itself undermines the prosecution's story. It was further argued that the other vital circumstance relied upon by the Trial Court to convict Karuppan was the alleged chance footprint found in the premises. In this regard, it was emphasized that the photograph of the said chance footprints though allegedly taken by PW- 22 was not deposited in the Malkhana till 07.09.1993 when the negatives were deposited. It was submitted that PW-22 as well as the police witnesses PW-24 & 26 had deposed that the photographs were taken on 28.07.1993. The prints and negatives therefore, were always in the possession of the police as also the specimen prints which were taken at the time of the arrest - Ex.PW-14/B1 to PW-14/B-4. In other words, submitted the learned counsel, the most damaging piece of evidence implicating Karuppan was in the form of the photograph of a chance footprint. The prints of the photographs and negatives continued to be in the

possession of the police even on the date when the alleged specimen footprints were taken after the arrest of Karuppan. In these circumstances, there was a strong possibility of manipulation and planting of evidence.

12. Elaborating on this aspect, it was argued next that there is no evidence on the point that the footprints of other accused/appellants were ever taken when they were arrested. The depositions of PW-3 & 4 are relied upon to say that they had arrested the accused but were silent on this aspect. As far as the appellant Karuppan's print is concerned, though PW-26 says that the prints were taken at P.S. Janak Puri by PW-24 O.P. Yadav, the latter does not corroborate this version. The other circumstance characterized suspicious by learned counsel was that PW-14's deposition that the forwarding letter - seeking opinion on the footprints - was signed by the DCP and dated 21.09.1993. This conflicted with the version of the SI K.P. Singh PW-27, who stated that all prints were taken on 29.9.1993. Learned counsel also relied upon the copy of the forwarding letter which referred to the DCP's letter enclosing the specimen footprints of all the three accused dated 21.09.1993. It was submitted that this was impossible because Murugan and Veeran were arrested in Tamil Nadu on 21.09.1993 and the letter enclosing their specimen footprints could never have been possibly referred for opinion the same day. It was argued that the witness PW-14 who mentioned that the specimen footprint tallied with that of the chance footprints could not be believed for more than one reason. In this regard, it was pointed out that the opinion PW-14/A merely lists out the physical features of the foot and fingers without detailing the distinctive and unique prints observed from the specimen forwarded for opinion. Learned counsel relied upon the judgment reported as *Mahmood v. State of Uttar Pradesh*, 1976 (1) SCC 542 and *Roop Singh v. State of Punjab*, 2008 (11) SCC 79, to say that the Courts cannot rely upon experts' opinion to convict an accused when other evidence does not support the prosecution version.

13. Mr. Sawhney, the learned APP, argued that the Trial Court's judgment does not call for any interference. It was submitted that the relatives of the deceased, i.e. his sons PW-7 and PW-8, were immediately informed about the tragedy, and reached Delhi on 28.07.1993. They were able to give information about the articles that were missing from the premises. On this basis, and the information the police

was able to garner during the investigation, a search was undertaken in Tamil Nadu; Karuppan was arrested on 02.08.1993; recovery of a Rolex watch was made. Later, Mairamma was arrested. Subsequently, on 21.09.1993, the other two accused were arrested, and the stolen articles were recovered either in their possession, or after they made disclosure statements. All these were integrally connected with the incident, whereby the deceased was looted and killed. The accused were under a duty to explain their role and more crucially how they came into possession of the stolen articles. Neither did they offer any explanation in the statements made under Section 313 Cr. PC, nor did they lead any evidence in this regard. In these circumstances, the findings of their complicity and their conviction for the offences they were charged with, was justified.

14. The learned APP next argued that the ratio of the decision reported as Earabhadrapa v. State of Karnataka, (1983) 2 SCC 330 supports the Trial Court's findings, inasmuch as the Appellants' inability to discharge the presumption arising under Section 114 Illustration (a), of the Evidence Act, justified their conviction. In that case, the Supreme Court held as follows:

"This is a case where murder and robbery are proved to have been integral parts of one and the same transaction and therefore the presumption arising under Illustration (a) to Section 114 of the Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her gold ornaments which form part of the same transaction. The prosecution has led sufficient evidence to connect the appellant with the commission of the crime. The sudden disappearance of the appellant from the house of PW 3 on the morning of March 22, 1979 when it was discovered that the deceased had been strangled to death and relieved of her gold ornaments, coupled with the circumstance that he was absconding for a period of over one year till he was apprehended by PW 26 at village Hosahally on March 29, 1980, taken with the circumstance that he made the statement Ex. P-35

immediately upon his arrest leading to the discovery of the stolen articles, must necessarily raise the inference that the appellant alone and no one else was guilty of having committed the murder of the deceased and robbery of her gold ornaments. The appellant had no satisfactory explanation to offer for his possession of the stolen property. On the contrary, he denied that the stolen property was recovered from him. The false denial by itself is an incriminating circumstance. The nature of presumption under Illustration (a) to Section 114 must depend upon the nature of the evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. There was no lapse of time between the date of his arrest and the recovery of the stolen property."

15. It was urged further that the possession of stolen property was proved by the prosecution, to have been with the accused. Therefore, by operation of Section 106, the burden of showing how they came by such possession, was upon them. The theft of stolen articles was also integrally connected with the homicidal assault on the deceased. In these circumstances, the Trial Court did not commit any error in holding that the Appellants were guilty.

16. The learned APP also submitted that Karuppan was arrested on 02.08.1993. His footprint specimen were obtained or secured the same day by PW-24, who deposed about that fact. PW-26 also signed on that paper. The other accused (Murugan and Veeran) were arrested later, on 21.09.1993. It was submitted that there was no improbability in the letter referring the prints for expert opinion, since

the forwarding letter appeared to have been prepared earlier. It was submitted that the exhibit relied on by the Appellants, to claim that the opinion was un-reliable, itself does not bear any date. Learned counsel stated that prints were taken to Jaipur on 29.09.1993. This question was also put to the accused, under Section 313, Cr. PC. He further emphasized that the witness was not in fact cross examined on behalf of the Appellant, when he deposed having taken the prints for opinion. The learned APP submitted that besides Karuppan being arrested the earliest in point of time, in the case, the opinion relied on cannot be discarded, because it showed that both the specimen print and the chance print (recovered from the site) bore the identical mark of scar of a healed wound. In these circumstances, the prosecution proved the complicity and role of Karuppan, in the offence punishable under Section 302, IPC.

17. The above discussion would show that the prosecution had primarily relied on the depositions of PW-6 and PW-9. One of them had allegedly been witness to a confession by Murugan. However, both the witnesses turned hostile. PW-6, the stepfather of Murugan, (who had heard the confessional statement) deposed that he could not recognize the said accused, in court. Both these witnesses, as indeed PW-10 could not say that the three Appellants were in Delhi, or that they had been seen by them. PW-10 deposed that the deceased had engaged Mariamma a few days before he was assaulted and killed. In these circumstances, the Appellant's argument about the Trial Court's finding regarding their having absconded from Delhi assumes significance. Beyond establishing that Mariamma was employed by the deceased shortly before his death, and that she vanished from the scene a couple of days previous to the incident, the prosecution has not led any evidence to show that the Appellants, particularly Veeran and Murugan were living in the jhuggi cluster (where Mariamma lived) and that they fled from there, around the time she did, or at the same time. The prosecution had no doubt relied on the testimonies of PW-6 and PW-9; however, they turned hostile. In the circumstances, the inference drawn by the Trial Court, was based purely on the assumption of the said accused having vanished from the scene.

18. Now, this court is conscious of the fact that Earabhadrapa (supra) is to the effect that Section 114 illustration (a) can be pressed home under certain

circumstances, and the time lag between the incident and the recovery from the accused is short or long, depending on the facts of the case. At the same time, what has to be remembered is that the said decision was also rendered in a case involving circumstantial evidence, where each link to the circumstances, as well as the link itself, has to be proved beyond reasonable doubt. In this case, beyond proving that the articles recovered from Murugan and Veeran belonged to the deceased (since PW-7 and PW-8, his sons had described it in their statements) the prosecution has not established even remotely the presence of those accused. In this state of facts, the other vital links in the chain pointing to the certainty of the accused's guilt, and ruling out every hypothesis of their innocence are missing. (That is the standard applicable for cases involving circumstantial evidence; Ref. Hanumant Govind Nargundkar & Anr. v. State of Madhya Pradesh, AIR 1952 SC 343; Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116; and Ashish Batham v. State of Madhya Pradesh, 2002 (7) SCC 317). Having regard to these facts this court is of the opinion that the conviction of the Appellants Murugan and Veeran, for the offence under Section 302/34 IPC, is not warranted. Equally, there is no proof that they were involved in commission of the offence punishable under Section 380. Their possession of the stolen property, however, was established during the trial. In the circumstances, their conviction has to be under Section 411, IPC, since they have offered no explanation whatsoever regarding the possession of such property.

19. So far as Karuppan is concerned, in addition to the recovery of an Omax wrist watch, the damaging circumstance is the footprint. The opinion of the expert PW-14 here becomes crucial. The witness, in his report, mentions the features and physical characteristics of the two specimens, given to him, on comparison (i.e. the specimen footprints of Karuppan and the magnified photograph of the bloodstained foot print, recovered from the spot). However, this expert curiously, does not mention the distinctive or unique print patterns discerned from the two footprints. He however, states, in the opinion that the specimen contains **"a scar or wound mark which is also visible in chance foot print photograph at the same relative position, the difference shown with green dotted line is due to photography as Camera was not placed at right angle while taking photograph."**

In this context, it would be relevant to notice the observations of the Supreme Court on expert evidence, in its judgment reported as *Mahmood v. State of U.P.*, (1976) 1 SCC 542, where it was said that:

"Lastly, it may be observed that Inspector Daryao Singh, PW 15, has not given any reasons in support of his opinion. Nor has it been shown that he has acquired special skill, knowledge and experience in the science of identification of fingerprints. It would be highly unsafe to convict one on a capital charge without any independent corroboration, solely on the bald and dogmatic opinion of such a person, even if such opinion is assumed to be admissible under Section 45 Evidence Act."

In a more recent decision, *Roop Singh v. State of Punjab*, (2008) 11 SCC 79, the Court, speaking about the value of expert evidence, held that:

"8. On completion of the investigation, charge-sheet was filed and since the accused persons abjured guilt, they faced trial. The trial court, as noted above, directed conviction and imposed sentence. According to the trial court the case rested on circumstantial evidence and four factors weighed with the trial court to record conviction. They were: (a) finding of the left footprint of the appellant on the spot of occurrence, (b) fingerprint on the bottle of liquor which was found near the place of occurrence matched with the right index finger of the appellant, (c) there was extra-judicial confession before PWs 2 and 4, and (d) evidence of Wazir Singh (PW 3) having seen all the three accused persons together.

9. The High Court did not accept the conclusions of the trial court relating to the relevance of the evidence of PWs 2 and 3. The High Court found that the same was not credible and cogent. However, relying on the other two circumstances, the

High Court upheld the conviction of the appellant while directing acquittal of the co-accused persons. The High Court noted that the chain of the circumstances was not complete so far as PWs 2 and 3 are concerned, but it is complete so far as the present appellant is concerned.

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13. As rightly contended by the learned counsel for the appellant that the two circumstances highlighted by the High Court while upholding the conviction of the appellant do not present a complete chain of circumstances which ruled out the possibility of any other person being the assailant and/or unerringly points to the appellant-accused as being guilty of the charged offences. There was no evidence led by the prosecution to show that the prints in question came into existence at the time the alleged incident took place."

20. It would therefore, be clear that expert opinion has to be unambiguous, and inspire confidence in the court. Apart from the lack of certain crucial details about the unique features in the two footprints, there is another significant aspect which the court has to carefully consider on this aspect. It is that concededly negatives of the photographs (of the footprints) were not deposited in the malkhana, till after the arrest of the Appellant Karuppan, and after specimen footprint samples were obtained from him. This, in this court's opinion is a serious infirmity in the prosecution case, because in a circumstantial evidence based case such as the present one, - where the incident was not witnessed by anyone, and where there is no "last seen" evidence, the court has to be doubly sure that there is no missing link in the chain (of circumstances) which has not been proved beyond reasonable doubt. The prosecution was unable to furnish any explanation why the negatives of the photographs of the footprints were deposited later, much after Karuppan's arrest, and admittedly after his specimen footprint had been taken.

21. The approach of the Trial Court, discernable in the last part of its judgment, was to draw inferences based on the disclosure statements made by various

accused, and the recoveries (of stolen articles) made by the police, pursuant to their search, or discovery statement. While that approach is unexceptionable in relation to the offence punishable under Section 414, there had to be something more to link the recoveries even of articles admittedly belonging to the deceased with the accused, especially since this is a circumstantial evidence based prosecution. It would be apt, at this stage, to remember that Section 106 of the Evidence Act comes into play after the necessary ingredients for the offence an accused is charged with, are proved beyond reasonable doubt. On this score, the Supreme Court had remarked, in P.N. Krishna Lal v. Govt. of Kerala, 1995 Supp (2) SCC 187 that:

"It is thus settled law even under general criminal jurisprudence that Sections 105 and 106 of the Evidence Act place a part of the burden of proof on the accused to prove facts which are within his knowledge. When the prosecution establishes the ingredients of the offence charged, the burden shifts on to the accused to prove certain facts within his knowledge or exceptions to which he is entitled to. Based upon the language in the statute the burden of proof varies. However, the test of proof of preponderance of probabilities is the extended criminal jurisprudence and the burden of proof is not as heavy as on the prosecution. Once the accused succeeds in showing, by preponderance of probabilities that there is reasonable doubt in his favour, the burden shifts again on to the prosecution to prove the case against the accused beyond reasonable doubt, if the accused has to be convicted. From this conceptual criminal jurisprudence, question emerges whether sub-section (5) placing the burden on the accused of the facts stated therein would offend Articles 20(3), 21 and 14 of the Constitution."

It is also an established proposition of law that mere recovery of stolen or other articles, alleged to be linked with the incident, without any evidence of their link with the accused, is not sufficient for the court to convict them (Ref Sanwat Khan

v. State of Rajasthan, AIR 1956 SC 54; Kagen Bera v State of WB AIR 1994 SC 1511; Mohd. Aman v State of Rajasthan 1997 (10) SCC 44). In Sanwat Khan, the Supreme Court held that:

"Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof."

22. In view of the above discussion this court is of the opinion that the only circumstance which could have distinguished the case of Karuppan from the other appellants was the footprint at the spot, or place where the incident occurred. In view of the unreliability of the expert evidence on that aspect, and other circumstances surrounding it, the court is of opinion that the Trial Court erred in accepting the expert opinion uncritically; it had to be discarded. Such being the case, the only incriminating piece of evidence against him (Karuppan) was the recovery of a stolen article. Here too, the conviction had to be under Section 411, IPC.

23. For the foregoing reasons, the Appeals have to succeed partly. All the appellants have undergone imprisonment for more than seven years. In view of the findings recorded in the previous portions of this judgment, their convictions are substituted to one under Section 411, IPC. They have already undergone more than the period of imprisonment prescribed. The surety and bail bonds furnished by them are accordingly discharged. These Appeals, are accordingly allowed.

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