

Palanisamy Vs. State

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Court : Chennai

Decided On : Mar-22-2013

Judge : T. Sudanthiram

Appellant : Palanisamy

Respondent : State

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :22.03.2013
CORAM THE HONOURABLE MR.JUSTICE T. SUDANTHIRAM CrI.A.No.541 of
2005 Palanisamy alias Kunjupaiyan .. Appellant/Accused Versus State
represented by Inspector of Police, Mecheri Police Station Salem District. ..
Respondent/Complainant Criminal Appeal filed under Section 374 of Cr.P.C.,
against the judgment passed by the learned Principal Sessions Judge, Salem, in
S.C.No.3 of 2005, dated 01.07.2005. For Appellant : Mr.B.Vasudevan For
Respondent : Mr.P.Govindarajan, Additional Public Prosecutor JUDGMENT The
appellant herein is the accused in S.C.No.3 of 2005 on the file of the learned
Principal Sessions Judge, Salem and stands convicted for an offence under
Section 304 (ii) I.P.C., and sentenced to undergo seven years rigorous
imprisonment and to pay a fine of Rs.1,000/- in default, to undergo six months
rigorous imprisonment. Challenging the said conviction and sentence, the accused
has preferred this Criminal Appeal.

2. The case of the prosecution, in brief, is as follows:- (i) PW.1 is the wife of
deceased Kunjan @ Muthusamy. PW.2 is their daughter. PW.3 is the brother of

the deceased. During February 2004, one Friday morning at about 10.00 a.m, the deceased left his home taking along with him two sheep in order to take them to hospital for giving them injection. As he did not return, PW.1 to 3 searched for him. They came to know that a body was found in Thimirikottai Kattuvalavu . They went there and identified the body, which was in decomposed state. On 08.02.2004, PW.1 went to police station and gave Ex.P1-complaint. (ii) PW.14 Inspector of Police, Mecheri Police station received the complaint and registered a case in Crime No.32 of 2004 of Mecheri Police Station under Section 174 Cr.P.C., and prepared Ex.P20-First Information Report and took up the case for investigation and rushed to the scene of occurrence and prepared Ex.P21-Rough Sketch and Ex.P8-Observation Mahazar and took photographs. He held inquest over the body of deceased and prepared Ex.P24-Inquest Report and recorded statement of witnesses and thereafter, he sent the body for postmortem examination. PW.12 Doctor held autopsy on the body of the deceased and issued Ex.P18-Postmortem certificate and opined that the death had occurred due to head injuries 3 to 5 days prior to the postmortem. PW.14 altered the case into Section 302 IPC and prepared alteration report - Ex.P25. (iii) During investigation as it was revealed that the accused had committed murder on 17.02.2004 at about 17.15 hours, he arrested the accused near Kaligoundanoor bus stop. The accused was produced before PW.13-Tahsildar and he recorded Ex.P19 - confession statement of the accused and obtained signature in Ex.P19 and the admissible portion of the confession statement is Ex.P10. M.Os.9 and 10 blood stained stones were recovered and thereafter, M.Os.11 and 12 blood stained shirt and lungi were also recovered. PW.14 gave requisition to the Judicial Magistrate to record the statement of witnesses P.Ws.4, 5, 6 and others under Section 164 Cr.P.C and PW.7 - Judicial Magistrate, Mettur, recorded their statements and on completion of investigation, PW.14 laid final report against the accused. (iv) PW.4 deposed before the Court that the accused and the deceased came together with sheep, which were sick, for treatment. PW.5 deposed before the Court that one Friday in the month of 'Thai (ij)', she had seen the deceased and at about 5.30 p.m, the accused and the deceased came together. They have brought the sheep and injection was given to them and thereafter, both of them left and subsequently, she had seen only the accused. PW.6 had deposed that he was R.I.M.P. Doctor and

both the accused and the deceased took two sheep to the hospital, and he was told by them that they were going to see PW.4 and PW.5. On the next day, he has seen only the accused returning back.

3. In order to prove the case, the prosecution examined P.Ws.1 to 14, marked Exs.P.1 to P.25 and produced M.Os.1 to 12. The accused was questioned under Section 313 Cr.P.C. with regard to the incriminating circumstances and he denied the complicity. On behalf of the accused, no witness was examined and no document was marked.

4. The Trial Court, after analyzing the oral and documentary evidence, convicted and sentenced the accused as already stated above.

5. The learned counsel Mr.B.Vasudevan, appearing for the appellant submitted that there was no eye witness to the occurrence. The prosecution case lies on feeble circumstances. The trial Court erroneously relied on Ex.P19 - confession statement of the accused recorded by PW.13 Tahsildar. Learned counsel further submitted that Ex.P19 is inadmissible and also relied on the decision of this Hon'ble High Court reported in (2009) 2 MLJ (Cri) 833 (Velu ..vs.. State) and (2011) 4 MLJ (Cri) 428 (Kalam @ Abdul Kalam ..vs.. Inspector of Police). Learned counsel further submitted that the evidence of P.Ws.4, 5 and 6 regarding last seeing the accused and deceased together are contrary and unacceptable. PW.4 did not refer to any day, time and month while deposing that he saw the accused and the deceased together. PW.5 also had not specifically given the date on which she saw the accused and the deceased together. The evidence of PW.6 also should not be accepted, since there was a ganja case pending against him and his statement was recorded by the police 12 days after the First Information Report being registered. Learned counsel further submitted that it is very unsafe to convict the accused based on the 'last seen theory' only without any other corroboration.

6. Per contra, the learned Additional Public Prosecutor submitted that it is the specific evidence of P.Ws.4, 5 and 6 that they have seen the accused and the deceased together and thereafter, only the body of the deceased could be seen, and P.Ws.4 to 6 did not have any animosity against the accused to depose falsely and the accused has also not given any explanation for the 'last seen theory' of the

prosecution case. The learned Additional Public Prosecutor further submitted that on the basis of the confession given by the accused, stones were recovered.

7. This Court considered the submissions made by the learned counsel on either side and perused the records.

8. The deceased, who left his house with sheep and went to the hospital along with the accused, was missing for two days. On 08.02.2004, the body of the deceased was found near the forest area of Thimirikottai. The body was sent for postmortem examination. The evidence of postmortem doctor and Ex.P18 - postmortem certificate established that the deceased died due to head injuries and the death of the deceased was due to homicidal violence. The head was disfigured and asymmetrical, a lacerated injury on right frontal region of scalp with a contusion surrounding it and comminuted fracture of vault and base of skull present.

9. The prosecution relied on the following circumstances to show that the accused was responsible for the death of the deceased. (i) Ex.P19 - confession statement said to have been given by the accused before the Tahsildar PW.13. (ii) Recovery of M.Os.9 and 10 stones. (iii) Recovery of M.Os.11 and 12 - blood stained clothes of the accused. (iv) The evidence of P.Ws.4, 5 and 6 that they have lastly seen the accused and the deceased together.

10. With regard to circumstance No.(i) i.e., confession statement said to have been given by the accused to the Tahsildar, Ex.P19, straight away it has to be held by this Court that Ex.P19 is inadmissible in view of Section 26 of the Indian Evidence Act. It is held by the Division Bench of this Court reported in (2009) 2 MLJ (Crl) 833 (Velu ..vs.. State) in paragraph 22 as follows:- "22. The confession statement of the accused has to be recorded only by a Metropolitan Magistrate or Judicial Magistrate as provided under Section 164 of the Code of Criminal Procedure and no confession can be recorded by any other Authority while the accused is in custody of police. Exhibit P11 Confession statement recorded by P.W.7 Tahsildar Thangavel while the accused was in police custody is inadmissible and no reliance is placed on it." 11. In yet another decision reported in (2011) 4 MLJ (Crl) 428 (Kalam @ Abdul Kalam ..vs.. Inspector of Police), this

Court has held as follows:- "11. At the outset, I have to state that the so-called confession said to have been given by the first accused to the police in the presence of P.W.13, the Tahsildar is not admissible in evidence in view of the clear bar contained in Section 25 of the Evidence Act. Admittedly, at the time when the confession was allegedly made in the Police Station, A1 was in the police custody. Therefore, under Section 26 of the Evidence Act, if the same has been recorded by a Judicial Magistrate, certainly, the same would be admissible. But the same was recorded by an Executive Magistrate. Here, the term "Magistrate" referred to in Section 26 of the Evidence Act does not refer to the Executive Magistrate in view of Section 3(3) of the Code of Criminal Procedure. Section 26 of the Evidence Act and Section 3(3) of the Code of Criminal Procedure read as follows:- Section 26 of the Evidence Act, 1872 :

26. Confession by accused while in custody of police not to be proved against him. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. [Explanation. In this section Magistrate does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the code of Criminal Procedure.] Section 3(3) of the Code of Criminal Procedure, 1973 "3. Construction of references.. (1) In this code, (a) (b) (c) (d) (2) (3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this code, - (a) To a magistrate of the first class, shall be construed as reference to a judicial Magistrate of the first class; (b) To a magistrate of the second class or of the third class, shall be construed as a reference to a judicial Magistrate of the second class; (c) To a presidency Magistrate or chief presidency magistrate, shall be construed as a reference respectively, to a metropolitan magistrate or the chief metropolitan magistrate; (d) To any area, which is included in a metropolitan area, as a reference to such metropolitan area, and any reference to a magistrate of the first class or of the second class in relation to such area, shall be construed as reference to the metropolitan magistrate-exercising jurisdiction in such area." 12. Admittedly, the Evidence Act was enacted before the commencement of the Code of Criminal

Procedure 1973, and, therefore, as per the above provision, the term "Magistrate" as referred to in Section 26 of the Evidence Act will mean only a Judicial Magistrate. Therefore, the confession either videographed or recorded by the police in the presence of PW.13, the Executive Magistrate will be hit by Sections 25 and 26 of the Evidence Act. Thus, the confessions said to have given by the accused to the police in the presence of PW.13, the Executive Magistrate is not admissible in evidence as the same does not fall under Section 27 of the Evidence Act as well. " 12. With regard to circumstance No.(ii) is concerned, on the basis of confession given by the accused, M.O.9 big stone and M.O.10 - two small stones were recovered 50 meters away from the scene of occurrence. Ex.P10 is the admissible portion of the confession statement given by the accused. As per the Analysis Report, M.O.10 small stones contained human blood stains with 'B' group. Circumstance No.(ii) shown by the prosecution is accepted by this Court.

13. With regard to circumstance No.(iii), though the clothes of the accused have been recovered, as per Serologist Report, blood was not detected. Hence, circumstance No.(iii) cannot be taken against the accused.

14. With regard to circumstance No.(iv), P.Ws.4,5 and 6 have deposed to the extent that they have seen the accused and the deceased together and thereafter, the deceased was not seen alive and only the accused was seen. None of these witnesses had any animosity against the accused and they had no reason to depose falsely. Of course, PW.4 had not given the details about the time, date on which he had seen the accused and the deceased together, but he had deposed in the cross examination that he had seen them during the month of 'Thai (ij)', which correlates with the time of occurrence. PW.5 had stated that he had seen the accused and the deceased together on one Friday during the month of 'Thai (ij)' and also seen them at 5.30 p.m. PW.6, who is a Homeopathy Doctor, had specifically stated that on 06.02.2004, he had seen the accused and the deceased together, but he had seen only the accused returning back at 8.00 p.m. and within two days, the body of the deceased was found. Though the evidence of P.Ws.4, 5 and 6 established the fact that the deceased was lastly in the company of the accused, the accused has totally denied the said fact but he has not come forward with any explanation. As such circumstance No.(iv) is taken as most crucial

circumstance and most incriminating factor against the accused.

15. Based on circumstance No.(iv), which had also been corroborated by circumstance No.(ii) that the blood stained stones were recovered at the instance of the accused, it is held by this Court that the prosecution had established the case that the accused is responsible for the death of the deceased.

16. Of course, while convicting the accused, the trial Court relying on the confession statement of the accused - Ex.P19, convicted the accused only under Section 304(ii) IPC. Even though Ex.P19 is not admissible, it could be used for the benefit of the accused. Hence, the conviction imposed by the trial Court on the accused under Section 304(ii) IPC is confirmed.

17. Considering the fact that more than 8 (eight) years had elapsed from the date of occurrence and the occurrence had taken place in a spur of moment, the sentence and imprisonment imposed on the accused / appellant by the trial court is modified and reduced for a period of four years rigorous imprisonment. The fine amount imposed by the trial Court is confirmed.

18. Except the above modification regarding the sentence, the Criminal Appeal is dismissed.

19. The trial Court is directed to take steps to secure the accused/appellant and send him to prison in order to undergo the remaining period of sentence of imprisonment. 22.03.2013 Index : Yes/No Internet : Yes/No mra To 1. The Principal Sessions Judge, Salem.

2. The Inspector of Police, Mecheri Police Station Salem District.

3. The Public Prosecutor, High Court, Madras. T. SUDANTHIRAM, J.

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