



Citation : CDJ 2015 MHC 6767

Court : Before the Madurai Bench of Madras High Court

Case No : CrI.A(MD)No. 234 of 2011

Judges : THE HONOURABLE MR. JUSTICE S. NAGAMUTHU & THE HONOURABLE MR. JUSTICE V.S. RAVI

Parties : Selvam & Others Versus State through, the Inspector of Police, Sivagangai District

Appearing Advocates : For the Appellant: Ravichandran, Veerannasamy, Advocates. For the Respondent: C. Ramesh, Additional Public Prosecutor.

Date of Judgment : 18-08-2015

Head Note :

Constitution of India - Article 21 - Criminal Procedure Code - Section 374(2) – Indian Penal Code - Section 147, Section 201, Section 302, Section 404, Section 449 – Indian Evidence Act - Section 27 - Murder conviction – Court held that it is not every discovery of a fact which makes the statement of the accused admissible - Disclosure statement allegedly made by the 2nd Accused, marked as Ex.P8, itself is not admissible in evidence - Prosecution relies on the disclosure statement under Ex.P9 and the consequential recovery of a shirt and the evidence of PWs.12 & 13 - The connection between the shirt and the crime or the accused has not been established by the prosecution at all - Thus, Ex.P9 is not admissible in evidence – And convict the 1st Accused for two other murders, because in the absence of appeal, this Court cannot alter the conviction so as to convict the 1st Accused for the other two murders – 2nd and 3rd Accused acquitted – Criminal appeal partly allowed.

Paras: 36, 37, 41

Judgment :

(Prayer: Appeal is filed under Section 374(2) of the Code of Criminal Procedure against the conviction and sentence, dated 18.07.2011, made in S.C.No.4 of 2009 on the file of the learned Sessions Judge, Sivagangai.)

S. Nagamuthu, J.

1. The appellants are the accused 1 to 3 in S.C.No.4 of 2009 on the file of the learned Sessions Judge, Sivagangai. Totally there were five accused in this case. The trial Court framed as many as eight charges against them as detailed below;

Charge Nos.	Accused	Under the provision of Sections
1	A1 to A5	U/s.148 IPC against A1 to A3 U/s.147 IPC against A4 & A5
2	A1 to A5	U/s.449 IPC

3	A1 to A3	U/s.302 IPC
4	A2	U/s.302 r/w 34 IPC
5	A4 & A5	U/s.302 r/w 149 IPC
6	A1 to A3	U/s.404 IPC
7	A4 & A5	U/s.404 r/w 149 IPC
8	A1 to A3	U/s.201 IPC

By judgment dated 18.07.2011, the trial Court convicted the accused 1 to 3 under Sections 302 and 201 IPC and sentenced them to undergo imprisonment for life and to pay a fine of Rs.500/- each, in default to undergo rigorous imprisonment for two years, for the offence under Section 302 IPC and to undergo rigorous imprisonment for three years and to pay a fine of Rs.250/- each, in default to undergo rigorous imprisonment for one year for the offence under Section 201 IPC. The trial Court has also convicted the first accused under Section 404 IPC and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.250/-, in default to undergo rigorous imprisonment for nine months. However, the trial Court acquitted the accused 4 & 5 from all the charges. Challenging the said conviction and sentence, the appellants/accused 1 to 3 are before this Court with this appeal.

2. The case of the prosecution in brief is as follows;

(a) There are three deceased in this case viz., one Mr.Rajendran (hereinafter referred to as D1), Lakshmi (hereinafter referred to as D2) and the child, Yuvarani (hereinafter referred to as D3). D1 was the husband of D2 and D3 was their grandchild. D1 & D2 were residing at Pillupatti Village. PW2 – Mrs.Rajeswari is the daughter of D1 and D2 and the mother of D3. She was residing in the same village, but in a distant place, along with her husband. Her husband and brother were temporarily working in Tiruchirapalli in a tea shop. Thus, at her house, on the date of the occurrence, PW2 alone was there with the child (D3). By about 5.00 p.m. on 22.08.2007, D1 came to the house of DW2 and after some time, he expressed his intention to take D3 with him. PW2 agreed. Accordingly, D1 took the child D3 with him to his house. Around 8.30 p.m. on the same day, PW2 went to the house of D1. She noticed that D3 was then sleeping. Therefore, D1 told PW2 not to disturb the child and asked her to come on the next day to take the child with her. Therefore, PW3 did not take the child with her and she alone returned to her house.

(b) On the next day (23.08.2007), at about 5.00 a.m., PW2 went to the house of her father with a view to take the child. But, the house was found locked outside. PW2 believed that D1 and D2 would have gone elsewhere for any marriage taking the child also. Therefore, PW2 returned to her house. Since, till late evening D1 to D3 did not return, PW2 called her husband over phone and informed him about the same. The whole night PW2 had expected that D1 to D3 would return. The next day morning PW2's husband and her brother came from Tiruchirapalli.

(c) PW2, her husband and her brother went to the house of D1 and opened the door by force. On entering into the house, they found that D1 to D3 were not available. But, the bureau in the house was kept open, and the jewels and cash kept in the same were found missing. PW2 and others searched for the deceased. Since they could not succeed, on 26.08.2007, PW2 went to the Police Station and made a complaint to PW15.

(d) PW15, the then Sub Inspector of Police, Thuvaranguruchi Police Station, received the complaint of PW2 at 9.00 a.m. and registered a case in Crime No.218 of 2007 for man missing. Ex.P2 is the complaint and Ex.P27 is the FIR. Then, he handed over the Case Diary to the Inspector of Police for investigation.

(e) While so, on 26.08.2007, one Selvaraj, the Village Assistant of Musundhampatti Village, Tiruppathur Taluk, Sivagangai District, informed the Village Administrative Officer of Musundhampatti Village – Mr.Kanagasabapathi (PW1) that a gunny bag probably containing a human body with foul smell was floating in the well belonging to one Mr.Kunasekaran, comprised in Survey No.311/30 in the said village. PW1 – Kanagasabapathi, the Village Administrative Officer of that village, rushed to the said well at 11.00 a.m. and found a gunny bag with foul smell and through a hole in the same, one of the hands of a child was protruding out. At that time, some villagers came up and told him that two other gunny bags with foul smell were floating in the well belonging to one Shake Mohammed in Karisalpatti village. Immediately, PW1 rushed to the said place at 11.15 a.m. and found that there were two gunny bags floating in the well

with bloodstains and with foul smell. He suspected that these two gunny bags also would contain human bodies. Therefore, he rushed to Puzhuthipatti Police Station at 12.00 noon and preferred a complaint (Ex.P1).

(f) PW16 – the then Sub Inspector of Police, attached to Puzhuthipatti Police Station received the said complaint under Ex.P1 and registered a case in Crime No.61 of 2007 under Section 302 IPC (3 counts). Ex.P28 is the FIR. He forwarded both these documents to the Court and handed over the Case Diary to the Inspector of Police for investigation.

(g) PW17, the then Inspector of Police took up the case in Crime No.61 of 2007 on the file of the Puzhuthipatti Police Station for investigation. At 1.00 p.m., he proceeded to Karisalpatti Village and found that two gunny bags with contents were floating. He called a photographer for taking photographs. With the use of a JCP machine, two bags were brought out from the well. He prepared an observation mahazar under Ex.P3 and a rough sketch under Ex.P29 showing the place of occurrence. When he opened the first gunny bag, the dead body of D1 was found inside. When he opened the second gunny bag, he found the dead body of D2 in the same. The dead bodies were identified by PW2, PW5 and other relatives of the deceased. Then, he conducted inquest on the body of D1 and prepared Ex.P30 – inquest report, and he conducted inquest on the body of D2 and prepared Ex.P31 – inquest report.

(h) Thereafter, PW17 carried both the bodies in an ambulance and brought the same to Musundhampatti. From the well belonging to one Kunasekaran at Musundhampatti, he brought the gunny bag out from the well with the help of one Rajendran and PW5 - Mr.Kumar. When the said gunny bag was opened, he found the dead body of D3. Through photographer, he took photographs of the said dead body also. He prepared an observation mahazar in the presence of PW5 and another witness, and also a rough sketch under Ex.P32. The dead body of the child was identified by PW2. Then, he conducted inquest on the body of D3 and prepared Ex.P33 - Inquest report. Near the place of occurrence, he found bloodstained and two bloodstained mats (MO.13) and a gunny bag (MO.29). All these materials were recovered by him under Ex.P5 mahazar in the presence of witnesses. He took the dead body of the child (D3) also in the same ambulance and brought all the three, to the Government Hospital at Ponnamaravathi. He made a request to the Doctor to conduct autopsy on the body of the deceased.

(i) PW8 Dr.Senthilkumar conducted autopsy on the body of the D3 at 3.15 p.m on 27.08.2007. He found the following injuries;

“Appearances found at the post-mortem : A decomposed female body lies on back with dismantled all joints of all four limbs. Symmetry of body – Asymmetrical, colour of skin – purplished. Colour of Hair & Length – Head : Black. 7 cm, signs of Decomposition – Maggots present in the body. Scalp : partial skin detach from occipital area of skull with crushed left side of face. Eye lid : Left side no eye ball. Right side – engorged eyes. Mouth & Lips : engorged loss of both central, lateral incisor and canine teeth in lower jaw. External Genitalia : Macerated scattered skin peeling in both lower limbs present.

Internal examination : Abdomen : Loss of whole anterior abdominal wall, All abdominal Viscera's including liver, kidney, pancreas, stomach, intestine are not present in the abdominal cavity. Ribs : Ribs are visible in scattered areas in anterior & Posterior aspect of chest due to loss of skin and soft tissue. Thoracic organs including heart & lungs are not present in thoracic cavity. Bladder : empty and contracted. Uterus : present. Skull : partial circumferential loss of occipital bone with circumference of 5 c.m. Brain : matter in not found in cranial cavity. Lumbar vertebra visible due to loss of skin & soft tissue.

Time of death : 3 to 10 days prior to post-mortem.”

Ex.P20 is the postmortem certificate. He concluded that no opinion could be given regarding the cause of death as the body was highly decomposed.

(j) PW9 – Dr.Vivekanandan conducted autopsy on the body of D1 at 2.30 p.m. He noticed the following injuries:

“Appearances found at the post-mortem : A blotted male body lying on the back with both arms on the sides of the body and legs is extended position with degloving of both foot and hands. Skin of the colour – Bleached appearance. Colour of the hair – scalp – Hair got detached from scalp right parietal region. Length 4 cm, Maggots present in body.

External injuries- nil. Scalp – Hair detachment present parietal region. Mouth and lips – opened, tongue – blotted (N.C) present in the mouth. Ears : intact, full of maggots. Abdomen – Distended, eye lids, intact, blotted. Ext. genitals – blotted and intact, Extremities – Normal and degloving of foot and hands present. Ribs intact. Heart soft, floppy, lung flabby, hyoid bone – intact. Stomach – empty, liver, soft & flabby, intestine - empty. Bladder empty. Kidney – pulpy and soft. Skull – normal.”

Ex.P22 is the postmortem certificate. He concluded that the final opinion regarding the cause of death could not be given as the body was highly decomposed.

(k) Then, PW9 conducted autopsy on the body of D2 also. He noticed the following injuries:

“Appearances found at the post-mortem : A blotted female body lying on the back with both arms on the sides of the body and leg is extended position with degloving of both foot and hands. Skin colour – Bleached appearance. Colour of hair. Hair detached from scalp right parietal region. Length 50 cm, Axilla – 3 cm. Genitals – Hair lost.

External injuries: Stabbed injury over right breast, just below supra sternal notch 5 cm x 1 cm, stabbed injury in epigastric region 5 cm x 2 cm, stabbed wound just above left knee 3 cm x 1 cm, signs of decomposition – present, mouth & lips – opened & tongue – blotted maggots present over the body. Ear – intact, full of maggots. Abdomen distended, eyes lost on right side, eye lids left side intact. External genital – intact and blotted. Hyoid bone - fractured, Nose – compressed. Internal organs : Stomach opened empty – Internal organ distended with gas. Liver soft and decomposed flabby, kidney – soft & pulpy and decomposed. Heart, Lungs – soft and flabby. Bladder empty. Uterus – in anatomical position.”

Ex.P23 is the post-mortem certificate. He gave opinion that the deceased would appear to have died of shock due to stab injury to stomach.

(l) During the course of investigation, PW17, on 27.08.2007 at 12.00 noon, in the presence of PW6 and another witness, arrested the accused 1 to 3 in front of Singampunari Bus Stop, near Shanmuga Store and on such arrest, the first accused gave a voluntary confession, in which he disclosed the place where he had hidden a 'Koontharam' and the place where he had buried the cash and the place where he had hidden the TVS-50 Motorcycle. The first accused was in his possession a sum of Rs.22,000/-. PW17 recovered the said amount under Ex.P7 Mahazar. Then, the second accused gave a voluntary confession, in which he disclosed where he had hidden a Hero-Honda Motorcycle. He also produced a pant and shirt which he was in possession. PW17 recovered the same under mahazar. Then, the third accused gave a voluntary confession in which he disclosed the place, where he had hidden a shirt.

(m) In pursuance of the above disclosure statement, the first accused took PW17 and witnesses to the house of one Valliammal from where, he produced Rs.20,000/- (MO.14) and agricultural loan card dated 23.08.2007 (Ex.P.11). Then, at 8.30 p.m. on 29.08.2007, PW17 recovered a yellow colour ring from Vallampatti Vilakku at the instance of the first accused. Then, at 9.30 p.m. at the instance of the first accused, PW17 recovered the TVS Motorcycle (MO27) bearing Registration No.TN-45-K-7436. At about 10.30 p.m. on 29.08.2007, in pursuance of the disclosure statement made by the third accused, he produced a light yellow colour full hand shirt (MO.18). That was recovered under Ex.P15 mahazar. Then, at the same time, the second accused produced from his house the motorcycle bearing Registration No.TN-45-R-9823 (MO.19). All the three accused, took PW17 and witnesses to the common well belonging to the first accused and the deceased at Puzhuthipatti. From the said well, gold thali, gold annappottu, gold mattal (MO.9 series), gold studs (MO.10 series), ear joined gold chain (MO.12), gold dollars (MO.11 series) were recovered in the presence of witnesses under mahazar (Ex.P16).

(n) Then, the first accused took PW17 and witnesses to the IOB Bank at Puzhuthipatti. PW17 recovered 99.200 grams of jewels from the said bank which had been pledged by the first accused. MO.1 to MO.8 are the said jewels. He recovered the same under Ex.P34 mahazar. Then, he forwarded the accused to the Court for judicial remand and handed over the material objects to the Court. He made a request to the Court to forward the material objects for chemical examination. Ex.P54 is the analysis report. According to the same, human blood was found on the mat, stool, pillow and lungi.

(o) On 03.09.2007, PW17 handed over the Case Diary to his successor Mr.John George. (Mr.John George could not be examined before the Court as he was undergoing treatment in a serious condition in

a private hospital in Kerala and so PW17 has spoken about the investigation done by Mr. John George, based on the case diary.) Mr. John George finally laid charge against the accused on 31.07.2008.

(p) Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgment. In order to prove the case, on the side of the prosecution, as many as 17 witnesses were examined, 56 documents were exhibited and 32 material objects were marked.

(q) Out of the said witnesses, PW.1 – the Village Administrative Officer, who had seen the dead bodies in the Wells and preferred the complaint to the Police, has vividly spoken about the same. PW2 has spoken about the fact that she lastly saw all the three deceased at 8.30 p.m. on 22.08.2007. She has further stated that on the next day morning, when she went to the house, the house was found locked. She has also spoken about the search made by her and the complaint given by her finally. PW3 is a person belonging to Puzhuthipatti Village. He has stated that the accused 1 to 3 are brothers and their father was one Mani Pillai. D1 was the brother of Mr. Manipillai. PW3 has stated that in respect of a land, there was a long standing dispute between the family of the deceased and the accused 1 to 3. In this regard, according to PW3, there was a panchayat held two months before the occurrence. D1 wanted to lay pipe line across the land of the accused. According to PW3, on behalf of D1, he had spoken to the first accused, but the first accused declined. At that time itself, the first accused challenged that he would not allow D1 to lay pipes across his land. This is stated to be the motive for the occurrence.

(r) PW4 is the owner of the Well, where the dead body of D3 was found. He has stated about the same. PW5 has spoken about the observation mahazar prepared near both the Wells. PW6, the then Village Administrative Officer has spoken about the arrest of all the three accused, their disclosure statements and the consequential recoveries of material objects. PW7 – the Finger Print Expert has stated that he was summoned by the Inspector of Police to examine the house of the deceased on 30.08.2007 and to find any chance finger print of the culprits in the same. He has further stated that on 30.08.2007 at 8.15 p.m., he thoroughly examined the house of the deceased and found on the steel bureau a chance finger print. He noticed another chance finger print inside the steel bureau. He marked the same as S1 and S3. He developed the same and took photographs. He presented the same at his office viz., Finger Print Bureau at Sivagangai. According to him, subsequently, he received sample finger prints of three persons for the purpose of comparison. On comparison, he found that the chance finger print lifted from the place of occurrence tallied with the sample finger print of Selvam S/o. Manipillai viz., the first accused. Then, he submitted a report stating the said fact under Ex.P18.

(s) PW8 - Dr. Senthilkumar has spoken about the postmortem conducted on the body of D3 and his final conclusion that the cause of death could not be found out. PW9 has spoken about the postmortem conducted on D1 and D2 and his opinion that the cause of death of D1 could not be said, but D2 died due to shock and haemorrhage due to the injury. PW10 has spoken about the photographs taken. PW12 is an important witness for the prosecution. He has stated that on 22.08.2007 at about 8.00 p.m. cinema was exhibited for public view in Puzhuthipatti Village. When he was seeing cinema, around 1.00 a.m. he went to a nearby field for passing urine and at that time, he noticed the accused 1 to 3 behind the house of the deceased with two motorcycles. PW13 is yet another witness, who has stated that he was also witnessing the cinema and at about 2.30 a.m. to 3.00 a.m. when he went for passing urine, he noticed the third accused carrying a big gunny bag, containing something, in a motorcycle and followed by the accused 1 & 2 in another motorcycle, wherein the first accused was carrying a gunny bag with some contents.

(t) PW14 is the manager of the Indian Overseas Bank, who has spoken about the pledging of the jewels by the first accused and also recovery of the same. PW14 has further stated that MOs.1 to 8 were recovered from him by PW17. PW15 has spoken about the registration of the case under Ex.P2 on the file of Thuvarangurichi Police Station. PW16 has spoken about the registration of the case on the file of Puzhuthipatti Police Station on the basis of Ex.P1. PW17 has spoken about the entire investigation done.

3. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., they denied the same. On their side, three witnesses were examined as DWs.1 to 3 and ten documents were marked as Exs.D1 to D10. DW1 has stated that he is a resident of Nattarpatti Village and he had acquaintance only with the first accused. He has further stated that one Mr. Kandasamy had mortgaged his property to him. Then, Mr. Kandasamy redeemed the property in the presence of the first accused. Ex.D6 is the receipt for the discharge of the mortgage, which contained the signature of the first accused also. DW2 is the Branch Manager of the Indian Overseas Bank at Puzhuthipatti. According to him, on

27.03.2010 under Loan No.4314/2007, the first accused had pledged jewels for Rs.65,000/- under Ex.D7 receipt. Again, on 09.03.2010 he pledged few more jewels under loan No.952/2010 for a sum of Rs.55,000/- under Ex.D8 receipt. He has further stated that what had happened to the jewels pledged under Exs.D7 & D8 cannot be said by him as he had not brought records to the Court. During cross examination, he has submitted that as per Ex.P26, the loan Ledger on 23.08.2007, the first accused had pledged nine items of gold jewels for Rs.57,000/-. DW3 is a resident of Chinnamarungi Village, which is situated two kilometers away from Puzhuthipatti. He is the brother of Mr.Kandasamy, who had earlier mortgaged the land to DW1. He has stated that under Ex.D6, the mortgage was discharged. He has further stated that the house of the deceased was a lonely house in the midst of a field to which there was no approach road. Therefore, according to him, no one can go to the house of the deceased by motorcycle. He has further stated that on the night intervening 22.08.2007 and 23.08.2007, there was no cinema exhibited in the village, as it is claimed by PW12. PW12 is his own brother. He has stated that on 22.08.2007, on the whole night, PW12 was only at his house.

4. The defence taken by the first accused was that MOs.1 to 8 belong to him and they did not belong to the deceased at all. He has further stated that MOs.1 to 8 were pledged by him in the Bank for the purpose of raising funds for purchasing land from Mr.Kandasamy. These jewels (MOs.1 to 8) were recovered by the Police in connection with the case as if they were stolen articles. All the accused had denied that they committed the crime as charged.

5. Having considered all the above materials, the trial Court has acquitted the first accused from the charges under Sections 148 and 449 IPC; the second accused from the charges under Sections 148, 449, 302 r/w 34 and 404 IPC; and the third accused from the charges under Sections 148, 449 and 404 IPC. The trial Court has acquitted the accused 4 & 5 from all the charges. In fact, the trial Court convicted the first accused under Sections 302, 404 and 201 IPC and the accused 2 & 3 under Sections 302 and 201 IPC alone. That is how the appellants are before this Court with this appeal.

6. We have heard Mr.N.P.Ravichandran, the learned counsel appearing for the first appellant / A1 and Mr.Veeranasamy, the learned counsel appearing for the appellants 2 & 3/ A2 & A3 and the learned Additional Public Prosecutor appearing for the State. We have also perused the records carefully.

7. Before entering upon analysing the evidence let in and examining the correctness of the judgment of the trial Court, let us first go into the correctness of the charges framed and the related issues. In this case, five accused were put up for trial before the trial Court and as many as eight charges were framed.

8. The first charge framed was against the accused 1 to 3 under Section 148 IPC and the accused 4 & 5 under Section 147 IPC. To frame this charge, absolutely, there was no material collected by the investigation. It is not understandable as to how the trial Court framed the first charge against the accused as stated above. It is obvious that the trial Court has looked into the so called confession statements of the accused made to the Police and used the same to frame charge No.1. The trial Court has rightly acquitted all the accused from Charge No.1 for want of evidence.

9. The second charge framed was under Section 449 IPC against all the five accused. The Police report and the documents filed therewith do not disclose that the accused 4 & 5 had trespassed into the house of the deceased. So far as the accused 1 to 3 are concerned, since there were materials that they had entered into the house of the deceased to commit murder of all the three deceased, the trial Court was right in framing charge under Sections 449 IPC against them. But, without any material, the trial Court has framed this charge against the accused 4 & 5 also. But, unfortunately, the trial Court, having convicted the accused 1 to 3 for murder, has acquitted them from the charge for house trespass. When the lower Court had come to the conclusion that A1 to A3 had entered into the house to commit the murder of the deceased and A1 had stolen away gold jewels, it is disturbing to note that the trial Court has acquitted the accused 1 to 3 also from the charge under Section 449 IPC. The further unfortunate fact is that the State has not made any appeal against the said acquittal.

10. The third charge is against A1 to A3 under Section 302 IPC. This charge reads as though the first accused had caused the death of D1; the second accused had caused the death of D2 and the third accused had caused the death of D3. For this also, there was no direct evidence collected during the investigation. The prosecution is based only on the circumstantial evidences. The trial Court convicted all the three accused under Section 302 IPC for single count. Unfortunately, the trial Court had not framed charges against A1 to A3 for three counts i.e., a charge under Section 302 IPC in respect of each

deceased. As a result, in conclusion of the trial, the trial Court has convicted A1 to A3 under Section 302 IPC for single count as though there was only one murder committed by all the three. The judgment of the trial Court also does not indicate as to why there was no charge framed under Section 302 IPC for three counts, i.e., one count in respect of the death of each deceased and the judgment further does not indicate in respect of whose death the accused 1 to 3 have been convicted.

11. The fourth charge was so strange. It was made against the accused No.2 under Section 302 r/w 34 IPC. The charge states that he had common intention with the third accused to kill D2. It is as though there was no common intention between the accused 1 to 3 to commit the murder of all the three deceased. Thus, the second accused alone faced a charge under Section 302 r/w 34 IPC, that too only relating to the murder of D3. The second accused was acquitted from the charge under Section 302 r/w 34 IPC also. Thus, the second accused has been convicted for a single count under Section 302 IPC alone.

12. The fifth charge is against the accused Nos.4 & 5 under Section 302 r/w 149 IPC. It is nowhere available in the Police report or in the materials collected during the investigation that the accused 4 & 5 were in unlawful assembly with the accused 1 to 3 at the time when the murders were committed by the accused 1 to 3. It is really disturbing that the trial Court, without going through the records, has simply framed the charge under Section 302 r/w 149 IPC also, that too for a single count. Thus, the accused 4 & 5 faced charge which was baseless and they have been acquitted.

13. The sixth charge is under Section 404 IPC against A1 to A3, for having taken away the jewels from the house of D1. But, the trial Court has convicted the first accused alone under Section 404 IPC and not the accused 2 & 3. The accused 2 & 3 have been acquitted. It is because as though the jewels were taken away by the first accused alone to which the accused 2 & 3 had no part to play. It is obvious that the accused 1 to 3 had common intention and in furtherance of the said common intention only the first accused had taken away the goods. Therefore, the trial Court ought to have framed charge against all the three accused under Section 379 r/w 34 IPC and ought to have dealt with the same. Unfortunately, since the charge was defective, the accused 2 & 3 have been acquitted, against which also the State has not made any appeal.

14. The seventh charge was under Section 404 r/w 149 IPC against the accused No.4 & 5. To frame this Charge, there was no material at all in the Police report or in the documents filed therewith. It is not as if the accused 4 & 5 alone formed an unlawful assembly with the accused 1 to 3 when the offence was committed. This charge was baseless and the accused 4 & 5 were acquitted from this charge also.

15. The eighth charge was against A1 to A3 under Section 201 IPC. This is regarding causing of disappearance of the evidences by throwing the dead bodies into the Well, by putting the same in three gunny bags. This charge also had been framed as though there was only one offence committed making out a single count of offence under Section 201 IPC. When three bodies were thrown in two different places by putting the bodies in gunny bags so as to cause disappearance of three murders, it is strange that the trial Court has not framed charge under Section 201 r/w 34 IPC for three counts. Consequently, the trial Court has convicted the accused 1 to 3 under Section 201 IPC for single count as if there was a single murder. The State has not made any appeal against this also.

16. With pains, thus far, we have discussed about the irregularities in the charges framed and the consequential trial conducted by the trial Court. Time and again, the Hon'ble Supreme Court as well as this Court have been impressing upon the need for the trial Court to have thorough study of the entire Police report and all the documents filed therewith and to frame appropriate charges so as to avoid any failure of justice. The law makers have made it mandatory that under Section 218 Cr.P.C. for every distinct offence of which a person is accused, there shall be a separate charge. The law makers have also made a provision under Section 226 Cr.P.C. that in a trial before a Court of Sessions, the Public Prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. In practice, often we have come to know that this provision is followed only in breach. This case is a classic illustration of failure of justice as the accused have walked away with punishment for single murder, though there were three brutal murders.

17. We regret to say that in our experience, in many cases, which have come up before this Court in the recent past, we have noticed that because the cases were not properly opened by the prosecutors, because the prosecutors had not described the charges brought against the accused; and because the

trial Courts also had not bestowed their required attention, there were defective charges framed which, ultimately, in some cases, resulted in failure of justice as well. In some cases, because of the defects in the charges, the accused have cakewalk on account of the said loopholes in the charges. In some cases, this Court had to often remand the case after many years, for altering the charges properly and to pass fresh judgment. This sordid state of affairs has not vanished.

18. Judicial training has almost become a part of the service of the Judges, in this State. On the important subjects, often training is imparted to the Judges by the Tamil Nadu State Judicial Academy run by this Court and by the National Judicial Academy, through eminent jurists drawn from across the country. We are told that even the Public Prosecutors are also trained at the cost of the Government. Despite these efforts, it is really distressing that we have noticed a lot of defects in the matter of framing of charges as we have seen in the instant case which have, at times, paved the way for the real culprits to escape from the clutches of law. We would like to remind the Judicial Officers that gross failure to bestow attention and to frame appropriate charges resulting in failure of justice and paving the way for the accused to escape from the clutches of law may amount to a dereliction of official duty by the officers. In this scenario, we, once again, wish to reiterate that Judges and Magistrates, presiding over the Criminal Courts, shall bestow their best attention in the matter of framing of charges as framing of charges is not a ministerial job but a very serious judicial function.

19. As there were defects in the charges, equally in this case, there were defects in the trial also, as the trial was not conducted with best attention by the learned Public Prosecutor, who was in charge of the case. In many cases, this Court has pointed out that the trial had not been conducted with proper care and attention, resulting in acquittal of the accused, though during the investigation sufficient materials had been collected by the investigating officers. Very recently, one of us (Justice S.NAGAMUTHU) sitting single in CrI.A.No.67 of 2015 (Navaneethakrishnan and another Vs. Inspector of Police, Q Branch Police Station, Madurai), relating to a very sensational case involving the security of the nation, found such serious irregularities in the charges and the serious errors committed at the time of trial by failing to bring on record the evidences collected during the investigation. In that case, the conviction was set aside and the matter was remanded to the trial Court for fresh disposal (vide judgment dated dated 24.07.2015). This is only an illustration. The case on hand is the next illustration. We do not want to cite many more cases as, in our considered view, it would only add to the length of this judgment. We only wish to impress upon the Government to ensure the competence of the Public Prosecutors in conducting criminal trials, while making appointments and also impart them legal training on periodical basis. This will surely improve the quality of the Prosecutors in this State and consequently, improve the quality of the criminal judicial administration in the State.

20. Let us now go into the facts of the case. As we have already pointed out, the accused 4 & 5 have been acquitted, against which no appeal has been filed and therefore, we cannot deal with the case against them. Similarly, in respect of the accused 1 to 3, we cannot deal with those charges from which they have been acquitted, as no appeal has been filed by the State. In this appeal, we are concerned only with the charges under which the accused 1 to 3 have been convicted.

21. This is, admittedly, a case based on circumstantial evidence. Therefore, let us now examine as to what are all the circumstances pleaded by the prosecution and whether they have been proved beyond reasonable doubts. The following are the circumstances;

- (a) There was enmity between the accused 1 to 3 and the deceased in respect of a land dispute.
- (b) On 22.08.2007 at 8.30 p.m., all the three deceased were lastly seen alive at the house of D1 and D2.
- (c) At 5.00 a.m. on 23.08.2007, when PW2 went to the house of the deceased, she found the house of the deceased locked from outside.
- (d) On 24.08.2007, in the morning, PW2 and her husband (PW5) and her brother broke open the Door of the house of the deceased and found that all the three deceased were missing. At that time, they noticed that gold jewels viz., MOs.1 to 12 were found missing from the bureau.
- (e) A case was registered on the complaint of PW1 at 9.00 a.m. On 26.08.2007 on the file of Thuvankurichi Police Station. Until 26.08.2007, there was no information regarding the whereabouts of D1 to D3.

(f) The dead body of D3 in a gunny bag was found floating at 11.00 a.m. on 26.08.2007 in the well belonging to PW4 at Musunthampatti Village. The dead bodies of D1 & D2 were found by PW1 at 11.15 a.m. in two separate gunny bags in a well belonging to one Sheik Mohammed which is situated at a distance of three kilometres away from the well where the dead body of D3 found.

(g) A case is Crime No.61 of 2007 (present case) on the file of Puzhuthippatti Police Station under Section 302 IPC (three counts) was registered on the complaint of PW1 by PW14 at 12.00 noon on 26.08.2007.

(h) PW7 – the Finger Print Expert on examining the house of the deceased lifted two chance finger prints from the steel bureau kept in the house of deceased from where the jewels were stolen away. The finger print taken from the first accused tallied with the chance finger print taken from the house of the deceased, which proves the involvement of the first accused in the commission of the Crime.

(i) The accused 1 to 3 were arrested on 29.08.2007 and on such arrest, they independently gave voluntary confessions, containing disclosure statements regarding certain relevant facts.

(j) Out of the said disclosure statement, the first accused produced a sum of Rs.22,000/- which was in his possession at 1.30 p.m. on 29.08.2007. Then, the first accused identified the place where he had borrowed Rs.20,000/- and agricultural jewel loan card dated 23.08.2007 bearing Loan No.4316.

(k) On the disclosure statement of the first accused, the T.V.S.-50 Motorcycle bearing Registration No.TN-45-K-7436 was recovered on 29.08.2007 at 9.30 p.m. On the confession of the third accused, a light yellow colour shirt was recovered on 29.08.2007 at 10.30 p.m.

(l) On the confession of the second accused, a Hero Honda Motorcycle bearing Registration No.45– R-9823, a cement colour pant and a shirt were recovered.

(m) On the confession of the first accused, Koontharam numbering 2, spade handle, gold thali, gold ear studs one pair, gold Annapathagai weighing one gram, gold mattal weighing one gram, a gunny bag and a plastic bag were recovered on 29.08.2007 at 7.30 a.m. near a well.

(n) The recovered jewels were identified by PW2 that they belong to the deceased.

22. Now, let us examine whether these circumstances have been proved beyond reasonable doubts. So far as the first circumstance is concerned, viz., motive, PWs.2 & 3 have vividly spoken about the same. There is no much of a dispute about the same also. Thus, the motive has been clearly established by the prosecution.

23. From the evidence of PW2, it has been clearly established that all the three deceased were lastly seen alive at 8.30 p.m. on 22.08.2007 at the house of D1 & D2. There is no reason to disbelieve the evidence of PW2 in this regard. Thus, this fact has been clearly proved. The next one is that on 23.08.2007 at 5.00 a.m. the house of the deceased was found locked from outside. This has been spoken to by PW2. From this, it has been clearly established by the prosecution that all the three deceased disappeared between 8.30 p.m. on 22.08.2007 and 5.00 a.m. on 23.08.2007. It has also been established that the deceased would have been done to death during the interregnum period.

24. PW2 had promptly lodged a complaint, but there was no break through made in that till 26.08.2007. The fact that the dead bodies were found in two different wells, has been clearly spoken by PW1 and other witnesses. There is no reason to reject the said evidence. Thus, the prosecution has proved that the dead bodies were found floating in two different Wells on 26.08.2007 at 11.00 a.m.

25. PW8 Dr.Senthil Kumar, who conducted autopsy on D3, has stated that since the dead body was highly decomposed, he was not in a position to give any definite opinion regarding the cause of death. We accept the said opinion offered by PW8. But, on that score, we cannot hold that the death of D3 was not a homicide. The very fact that the body was kept in a gunny bag and it was floating in a Well and the very fact that the house, where D3 was staying with D1 & D2, was found locked and the jewels were taken away, would all go to clearly establish that the death of D3 was only a homicide. PW9, who conducted autopsy of D2, has given clear opinion that D2 would appear to have died of shock and

haemorrhage due to stab injury to stomach. Thus, the prosecution has clearly established that D2 died of homicide. So far as D1 is concerned, the Doctor has stated that no definite opinion could be given regarding the cause of death since the body was highly decomposed. As we have already pointed out, on that score, it cannot be held that the death of D1 is not a homicide. From the fact that the body of D1 & D2 were found floating in the same well in different gunny bags and the fact that there was stab injury on the body of D2 and the other facts dealt with already, would all go clearly establish that D1 also died of homicide. Thus, the prosecution has proved beyond any shadow of doubt that all the three were murdered.

26. Now, the question is, "who committed the murder of all the three deceased?". As we have already concluded, the motive has been clearly established. But, the motive is always a double-edged weapon and therefore, only on the basis of motive, we cannot rush to the conclusion that the deceased would have been done to death only by these three appellants. The motive is only an adverse circumstance against these three accused.

27. PW2 in her evidence has clearly deposed that MOs.1 to 8, 10 to 12 were found missing from the house. From this, it is to be presumed that the murders and removal of jewels had taken place simultaneously in one and the same occurrence. In other words, the persons, who committed the theft of the jewels, have committed the murders also. The accused 1 to 3 were arrested on 29.08.2007. This has been spoken to by PW17 and PW6. On such arrest, the first accused gave a voluntary confession and out of the said confession, a loan card was seized. The loan card indicated that the jewels viz., MOs.1 to 8 had been pledged by him in the bank. A1 disclosed in his statement itself about the said fact. These jewels were later on recovered from the Indian Overseas Bank. PW14 has clearly stated about the same. PW14 has deposed that these jewels were pledged by the first accused on 23.08.2007. The occurrence in this case was on 22.08.2007. Thus, on the next day, i.e., on 23.08.2007 the stolen properties were in possession of the first accused and he had pledged the same on 23.08.2007.

28. The learned counsel for the appellants would submit that these jewels belong to the first accused. He has stated that for the purpose of purchasing a land from one Kandasamy, he pledged his own jewels, which are MOs.1 to 8 and raised loan from the bank. This kind of defence has been taken by the first accused only during trial. Never before he made a claim for the jewels. This only indicates that the accused has taken such a plea only to escape from the clutches of law. Thus, we do not find any jurisdiction to accept the said claim made by the accused. We hold that from the evidence of PW2, it has been clearly established that MOs.1 to 8 belongs to the deceased only. Apart from such claim made by the first accused, he has not made any other explanation for his possession of MOs.1 to 8 in his hands on 23.08.2007. Similarly, he had pledged MOs.10 to 12 to one Mrs.Valliammal. They were all recovered by the investigating officer based on the disclosure statement made by the first accused and on his identifying Mrs.Valliammal. But, the learned counsel for the appellants would submit that Mrs.Valliammal has not been examined in this case and therefore, the recovery of jewels from Mrs.Valliammal is to be rejected. In our considered view, the non examination of Mrs.Valliammal may be a loss to prove the date on which the jewels were pledged to her. But, even in the absence of examination of Mrs.Valliammal, by recovering the jewels from Mrs.Valliammal, the prosecution has clearly proved through other evidences that Mrs.Valliammal was in possession of those jewels on 29.08.2007. The possession of these jewels by Mrs.Valliammal was disclosed only by the first accused. To that extent, the disclosure statement is also admissible under Section 27 of the Indian Evidence Act. He disclosed that he handed over the jewels (MOs.10 to 12) to Mrs.Valliammal. In our considered view, from the disclosure statement made by the first accused and the discovery of MOs.10 to 12 the prosecution has established that the first accused was in possession of these stolen goods also as soon as the occurrence.

29. At this juncture, we have to state that the above possession of the stolen goods in the hands of the first accused gives rise to the presumption that it was this accused who removed the jewels from the bureau of the first deceased. As we have already pointed out, the accused has not offered any explanation for his possession. The said presumption drawn under Section 114 of the Indian Evidence Act has not been rebutted by the accused in any manner. Therefore, we hold that the prosecution has established that the first accused removed the jewels and as we have already pointed out, since the murder and removal of these jewels had happened in one and the same occurrence, it is to be presumed again under Section 114 of the Indian Evidence Act that the murders were also committed by the first accused.

30. Yet another circumstance pleaded by the prosecution is that in the steel bureau, where the jewels

were kept at the house of the deceased, chance finger prints numbering two were lifted by PW7 on 30.08.2007. PW7 has stated that he received the sample finger prints of the three persons and on comparison, he found that the chance finger prints tallied with the finger print of one Mr.Selvam S/o.Mani Pillai (the first accused). But, unfortunately, in this case, the finger prints sent for comparison have not been proved to have been that of the first accused. Shockingly the person, who took the finger prints allegedly from the first accused, has not been examined to prove the same. The finger prints of the first accused were also not taken on the orders of a learned Magistrate. While the first accused was questioned under Section 313 of Cr.P.C., it was not brought to his notice that the finger prints used for the purpose of comparison were taken from him. Thus, there was no occasion for him also to state his case. Thus, an important piece of evidence which would have otherwise scientifically proved the involvement of the first accused in the crime has been lost by the prosecution because of the careless manner in which the trial had been conducted. Neither the investigating officer nor the Public Prosecutor, who conducted the case, had taken adequate care to see that sufficient evidence was let in to prove that the finger prints sent to PW7 were the finger prints of the first accused. Thus, we hold that this circumstance has not been proved by the prosecution.

31. Then comes the evidences of PWs.12 & 13. PW12 has stated that on 23.08.2007, a cinema was shown for public view, in which he participated. According to him, around 01.00 a.m. on 23.08.2007, when he went, from the place where he was witnessing the cinema, for passing urine, just behind the house of the deceased, he found all the three accused standing with two motorcycles. But, the learned counsel for the appellants would submit that this witness cannot be believed in view of the evidence of DW3. DW3 is the brother of PW12. He has stated that on the night intervening 22.08.2007 and 23.08.2007, there was no cinema shown in the village and PW12 was only at his house. In our considered view, the evidence of PW12 deserves to be rejected for more than one reason. Had it been true that he saw these accused standing in suspicious circumstances just behind the house of the deceased, by all means, his natural conduct would have been to inform the same to any of the relatives of the deceased, after coming to know that all the three deceased were found missing. The very fact that he did not disclose about the above fact until the dead bodies were found would clearly go to show that he has been planted as a witness only to strengthen the case of the prosecution.

32. Similarly, it is the case of PW13 also. According to him, he was also witnessing the cinema on the night intervening 22.08.2007 and 23.08.2007. He has also stated that he went for passing urine and at that time, he found the accused carrying gunny bags in two motorcycles. The learned counsel for the appellants would submit that the evidence of DW3 would go to show that the house of the deceased was in the midst of a field and there is no possibility for any motorcycle to go to the said house as there is neither a road nor a pathway. Though we find it difficult to accept the evidence of DW3, we are not prepared to believe the evidence of PW13 for different reasons. As we have already pointed out, PW13 also did not disclose anything about this fact to anybody, including the relatives of the deceased, even after coming to know that the deceased were found missing. This would only go to indicate that this witness has also been planted by the prosecution only to improve the case. Therefore, we reject the evidence of PW13 also.

33. The learned counsel for the appellants would next contend that the motorcycles allegedly recovered from the accused have got no relevance to the case, since they have not been identified by any of the witnesses that they were used for the purpose of the commission of crime. We agree with the said submission. Therefore, we do not attach any importance for the recovery of the motorcycles.

34. Thus for we have deeply analysed the entire evidence let in by the prosecution and we have found that some of the vital circumstances have been proved and the others have not been proved. From the above proved circumstances, which we have dealt with above, it is crystal clear that the prosecution has succeeded in proving that the first accused had committed murder of all the three accused and also removed the jewels from the house of the deceased.

35. Now, turning to the accused 2 & 3, we find that there is no convincing evidence to prove the charges against them. So far as the second accused is concerned, the only piece of evidence available against him is that on his arrest, he made a confession, in which he disclosed that he would identify a spade handle, motorcycle, a pant and a shirt. They were all recovered, subsequently, by the investigating officer. But, there is no evidence linking any of the material objects with the alleged crime. The spade handle has not been proved to have been used for the commission of the offence in any manner. The motorcycle recovered at his instance has not been identified by any one that the same was used for the commission

of the crime. So far as the pant and shirt are concerned, there is no evidence that they were worn by the second accused at the time of occurrence. Further, there was no bloodstain also on these two material objects. Thus, there is no link between these facts discovered and the crime.

36. In this regard, we need to say that it is not every discovery of a fact which makes the statement of the accused admissible, but it is only a discovery of a relevant fact which makes the statement admissible under Section 27 of the Indian Evidence Act. The said relevancy is to be proved by establishing a link between the fact discovered and the crime or the accused. In this case, the prosecution has not proved that these material objects had any connection with either the accused or the crime. Therefore, the disclosure statement allegedly made by the second accused, marked as Ex.P8, itself is not admissible in evidence. We have to point out that the only other evidence available against second accused is the evidence of PWs.12 & 13. We have already rejected their evidences. Therefore, we hold that the prosecution has failed to prove the case against the second accused.

37. Now, turning to the case against the third accused, the prosecution relies on the disclosure statement under Ex.P9 and the consequential recovery of a shirt and the evidence of PWs.12 & 13. The connection between the shirt and the crime or the accused has not been established by the prosecution at all. Thus, Ex.P9 is not admissible in evidence. We have already rejected the evidence of PWs.12 & 13. Thus, absolutely, there is no evidence against the third accused. Therefore, he is also entitled for acquittal.

38. At this juncture, the learned counsel appearing for the appellants would submit that since the accused 2 & 3 are entitled for acquittal, the accused No.1 is also entitled for acquittal, because the crime, as a whole, would not have been committed by him single handedly. Though attractive this argument is, we do not find any reason to acquit the first accused in this case on this assumption. It cannot be ruled out that A1 alone would have committed the murders of all the three accused, committed theft and disposed of the bodies. It may even be true that the first accused would have had the company of others in committing the crime. But, there is no evidence to that effect. Therefore, this argument is rejected.

39. Now, turning to the quantum of punishment for the first accused, we do not find any reason to interfere with, because the trial Court, after having taken into account all the mitigating circumstances as well as aggravating circumstances, has imposed appropriate punishment. Therefore, we do not find any reason to interfere with the same also.

40. Now, we would like to highlight an yet another disturbing feature of the prosecution case i.e., as to the manner in which it was prosecuted and conducted before the trial Court. There were three murders, but the first accused has been convicted under Section 302 IPC only for single count for the murder of D1 and he has not been punished for two other murders committed by him. The trial Court did not even frame charge under Section 302 IPC for three counts against the first accused. While advancing arguments as per Section 234 of Cr.P.C., it is not understandable as to how the learned Public Prosecutor, who argued before the trial Court, failed to note the error in this charge. We are surprised as to how the trial Court also had failed to note this grave error in the charge while hearing the argument or at least while preparing the judgment. As a result, the trial Court has convicted the first accused only for one murder i.e., for the murder of D1 alone. It is again shocking to note that the State also has not filed any appeal on this. As a result, now the first accused goes unpunished for two murders and carries punishment for only one single murder.

41. This Court, being the appellate Court, finds that its hands are tied to convict the first accused for two other murders, because in the absence of appeal, this Court cannot alter the conviction so as to convict the first accused for the other two murders. Above all, in the absence of appropriate charges for the others two murders, it is not possible in law to convict the first accused for the said murders. This Court could only sustain the conviction for one murder. Since the accused 4 & 5 have already been acquitted and since they are not before us, it is not possible for this court to interfere with their acquittal also. Similarly, since the appellants have been acquitted under many other charges, it is not possible for us to interfere with that also. We even thought of taking suo motu revision against the judgment of the trial Court to rectify all the above errors. At this length of time, taking up a revision suo motu, at this stage, issuing notice to the accused and then, remanding the case to the trial Court for altering the charges and for delivering a fresh judgment, in our considered opinion, will not amount to fair trial in terms of Article 21 of the Constitution of India. In other words, at this length of time, allowing the accused again to face trial will not be fair under Article 21 of the Constitution of India. Therefore, we desist from making any innovation, except sustaining the conviction of the first accused as it has been done by the trial Court.

42. In the result, this Criminal Appeal is partly allowed in the following terms;

(a) The conviction and sentence imposed on the first appellant / first accused in S.C.No.4 of 2009 is confirmed.

(b) The conviction and sentence imposed on the appellants 2 & 3/Accused 2 & 3 in S.C.No.4 of 2009 is set aside and they are acquitted. The bail bond, if any, executed by them shall stand terminated. The fine amount, if any, paid by them shall be refunded.

Note: (i)The Registry is directed to forward a copy of this judgment to the Government for necessary follow up action.

(ii) The Registry is directed to place this judgment for the consideration of the Hon'ble Chief Justice to circulate the same to all the criminal Courts considering the important issues dealt with in paragraph Nos.7 to 18 and 40.

CDJLawJournal