Citation : CDJ 2008 MHC 2423

Court : Before the Madurai Bench of Madras High Court

Case No : Criminal Appeal (MD)Nos.269 and 327 of 2006

Judges : THE HONOURABLE MRS. JUSTICE PRABHA SRIDEVAN & THE HONOURABLE MR. JUSTICE S. NAGAMUTHU

Parties : Pandi @ Erumai Pandi Versus State represented by Inspector of Police

Appearing Advocates : For the Appellant : R. Shanmugasundaram Senior Counsel for S. Ravi, A2, S.K. Mahendran Advocates. For the Respondent : V. Kasinathan, Additional Public Prosecutor.

Date of Judgment : 15-04-2008

Head Note :

Criminal Procedure Code - Section 374 - Appeal against conviction - Appreciation of evidence - Offences punishable under Sections 120(B), 341, 302 read with 34, 114, 396 and 402 I.P.C - The only material evidence available on record is the evidence of P.W.2, the daughter of the deceased, who has stated that when the deceased accompanied her towards Mattuthavani Bus Stand, she noticed the accused standing by the side of the road and they were murmuring among themselves pointing to the deceased. But, this part of the evidence of P.W.2 cannot be believed for the simple reason that the accused, admittedly, were not known to P.W.2 prior to the occurrence - Since she did not choose to identify the accused in the identification parade and further she did not give the identifying features of the assailants when she was examined by the police, the evidence of P.W.2 identifying the accused in Court for the first time is only liable to be rejected - The evidence of the Investigating Officer to the extent that the jewel was recovered from P.W.15, even if believed, in the absence of believable evidence that it was only at the instance of A-3 that P.W.15 was identified, much importance cannot be attached to the said recovery. To invoke the presumption under Section 114(a) of the Indian Evidence Act, it is necessary that the accused should have been found in possession of the stolen property as soon as the theft was committed. In this case, M.O.1 was not found in possession of A-3 nor there is evidence that the same was recovered at the instance of A-3 from the hide out. Thus, the prosecution has failed to prove that M.O.1 was seized from P.W.15 at the instance of A-3 beyond reasonable doubt - Though it is true that the knife recovered from the alleged possession of A-2 tallies with the blood group of A-1, that itself cannot be the foundation for recording conviction. It is quite common that many have the same blood group. Above all, the alleged occurrence was on 29.01.2004 and the accused were arrested on 15.02.2005 i.e., after about one year. It is highly unbelievable that the accused would have kept the knife with blood stains for such long period of time in safe custody - Yet another improbability is that initially investigation was done by P.W.18. During his investigation, no clue whatsoever was obtained in respect of the assailants. After a long time, the investigation was transferred to P.W.19. According to P.W.19, he arrested the accused on 15.02.2005. But, he has not stated as to what are the material evidences collected by him, which pointed to the guilt of the accused so as to impel him to arrest these accused. It is not known how P.W.19 came to the conclusion that the accused Nos.1 to 3 and 5 had involved in the crime. Thus, the evidence of P.W.19 deserves to be rejected as the above doubt has not been cleared by the Prosecution

- There is no evidence connecting the accused with the heinous crime of murder, have no option before us except to acquit all the accused - Criminal Appeals are allowed and the conviction and sentence imposed on the appellants by Judgment dated 18.04.2006 of the learned Additional District and Sessions Judge, (Fast Track Court No.II), Madurai in S.C.No.9 of 2006 are set aside and the appellants are acquitted of all the charges.

Para 14 to 20 (DB)

Criminal Procedure Code – Section 313 - Recording of Section 313 statement - The judges are bound to apply their mind while asking the questions. It is perhaps the only opportunity when the accused can give his explanation. The accused shall not suffer because the Court failed in its duty under Section 313 Cr.P.C. We also note that generally the evidence of hostile witnesses is not put to the accused during Section 313 questioning. If the hostile witnesses' evidence is to be rejected in toto then that evidence need not be put to the accused. But if the prosecution has elicited something from the hostile witness to support its case e.g. presence of the accused at the scene of occurrence after which the witness turn hostile, then that portion which is in favour of the prosecution must be put to the accused, so that the accused has an opportunity to explain his case. Questioning under Section 313 Cr.P.C. is not an empty formality, it is an important part of the trial and the Trial Judges would do well to remember this. Therefore all the incriminating evidence elicited from witnesses including the hostile witnesses should be put to the accused during the 313 questioning.

Para 21(DB)

Cases Referred:
1. State of Punjab V. Swaran Singh 2005 (6) SCC 101
2. Shivaji Sahabrao Bobade vs. State of Maharashtra 1973 (2) SCC 793
3. In re Shekur AIR (31) 1944 Madras 42

Judgment :

(Criminal Appeals filed under Section 374 (2) Cr.P.C against the Judgment dated 18.04.2006 passed by the learned Additional District and Sessions Judge, (Fast Track Court No.II), Madurai in S.C.No.9 of 2006).

Prabha Sridevan, J.

The appellants / accused Nos.1 to 7 have preferred these Criminal Appeals against the Judgment dated 18.04.2006 passed by the learned Additional District and Sessions Judge, (Fast Track Court No.II), Madurai in S.C.No.9 of 2006, convicting the appellants for the offences punishable under Sections 120(B), 341, 302 read with 34, 114, 396 and 402 I.P.C and sentencing them to undergo one month rigorous imprisonment for the offence under Section 341 I.P.C, five years rigorous imprisonment for the offence under Section 120(B) I.P.C., imprisonment for life and fine of Rs.10,000/- in default of fine amount to undergo three years simple imprisonment for the offence under Section 302 I.P.C and imprisonment for life for the offence under Section 396 I.P.C, seven years rigorous imprisonment for the offence under Section 402 I.P.C and five years rigorous imprisonment for the offence under Section 114 I.P.C.

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

P.W.1 - Raghavan is the husband of the deceased - Komalavalli. P.W.2 - Anusha is the daughter of the deceased. During the year 2004, P.W.2 was studying in a local college at Madurai. Usually, P.W.2 would go to the nearby Mattuthavani Bus Stand at Madurai in the morning accompanied by her mother to go to the college by bus from the said bus stand. The deceased used to accompany her upto

the bus stand and after seeing her off in the bus stand, she used to return home on walk. On 29.01.2004, as usual, P.W.2 accompanied by the deceased proceeded to the said bus stand. After leaving P.W.1 in the bus stand, while she was returning to her house at about 07.45 a.m., these seven accused way laid her, in which one of the accused stabbed her on her neck and snatched away the gold chain worn by her. The deceased managed to move to some distance, but fell in front of the house of P.W.4 - Sivasankar Kuthalam at about 08.15 a.m., and died. On hearing the information, P.W.1 rushed to the place of occurrence and found the deceased dead. He also noticed the injuries over her throat and on her right hand. He also found that the gold chain weighing 5 sovereigns worn by the deceased was found stolen. Then, he proceeded to the police station and preferred the Complaint - Ex.P.1 at 09.30 a.m.

3. P.W.18, who was the then Inspector of Police at Othakadai Police Station, on receiving the Complaint - Ex.P.1, registered a case in Crime No.49 of 2004 for the offence punishable under Sections 397 and 302 I.P.C. Ex.P.29 is the F.I.R. Then, he forwarded Exs.P.1 and P.29 to the Jurisdictional Magistrate. Thereafter, taking up the investigation, he proceeded to the place of occurrence at 10.15 a.m.

4. In the meantime, P.W.2, the daughter of the deceased was also informed of the occurrence. She rushed to the place of occurrence and found her mother dead with injuries on her body. She also noticed the missing of 5 sovereigns of gold chain.

5. P.W.18, the Inspector of Police prepared an Observation Mahazar under Ex.P.2 in the presence of P.W.5 and another witness at the place where the dead body was lying. Then, he prepared a Rough Sketch under Ex.P.30. Then, he recovered blood stained earth and sample earth from that place (M.Os.2 and 3) under a Mahazar - Ex.P.3. He also recovered a purse containing a ten rupee note with blood stains, one rupee coins five in numbers. P.W.18 also recovered the wearing apparels of the deceased under Ex.P.4 mahazar in the presence of P.W.5 and another witness. P.W.18 then recovered blood stained earth (M.O.4) and sample earth (M.O.5) from the place where the deceased was stabbed.

6. P.W.18 held the Inquest between 11.30 a.m., and 01.00 p.m., on the dead body of the deceased in the presence of the Panchayatars and he prepared Inquest Report - Ex.P.31. During the Inquest, P.W.18 examined P.Ws.1 and 2 and few more witnesses. Then, he forwarded the dead body through P.W.16 to the Government Madurai Medical College for autopsy.

7. P.W.13 - Dr.M.Alavudin, who was the then Tutor in Forensic Medicine, Madurai Medical College, Madurai received the dead body of the deceased on 29.01.2004 along with the requisition given by P.W.18. He conducted the autopsy on the body of the deceased at 02.15 p.m., on 29.01.2004. During the autopsy, he found the following injuries:-

"1. An oblique stab wound 4 cm x 1.5 cm cavity deep noted on left side of the neck, 5 cm below the left ear pinna. The margins of the above wound is regular with one end is pointed and other end is curved. On dissection, the wound possess obliquely downward, backward and medially piercing the underlying muscles, vessels (carotid artery) and enter the trachea with surrounding contusion.

2. Two oblique cut injuries on the right side of wrist 2 cm apart each measuring 4 cm x 1 cm muscle deep, on dissection, the wounds are directed downwards and outwards cutting the underlying muscles with surrounding contusion. The margins of the above wounds are regular."

Ex.P.12 is the Post Mortem Certificate and Ex.P.13 is the opinion of the Doctor regarding the cause of death. According to him, the death was due to shock and hemorrhage due to the stab injuries and the death would have occurred 7 to 9 hours prior to the post mortem.

8. During February 2005, on the orders of the Superintendent of Police, the investigation was transferred to P.W.19, who was then the Inspector of Police attached to Omachikulam Police Station in Madurai City. Taking up the Investigation, on 15.02.2005 at about 02.00 p.m., P.W.19 arrested A-1, A-2, A-3 and A-5 in the presence of Kalimuthu - P.W.10 and Manoharan - P.W.14 at Kalikappan Vilakku at Sivagangai Main Road at Madurai. On such arrest, A-1 volunteered a confession and the same was duly recorded by P.W.19 in the presence of P.Ws.10 and 14. In the said confession, A-1 disclosed that he would identify the place where the knife had been concealed by him and produce the same. The admissible portion of the said disclosure statement is Ex.P.32. Pursuant to the same, A-1 took P.W.19 and other witnesses to the place where the knife was hidden and identified the place and also produced M.O.16 - Knife. P.W.19 recovered the same under the Mahazar - Ex.P.33. Thereafter, the second accused gave a voluntary confession statement and the same was recorded at about 04.00 p.m. In the said disclosure statement, A-2 disclosed that he would identify the place where he had hidden a knife and produce the same. In pursuant to the said disclosure statement, he took P.W.19 and the witnesses to the place where the knife was hidden and produced the same. P.W.19 recovered the same at about 05.30 p.m., in the presence of witnesses. Ex.P.34 is the admissible portion of the said statement and M.O.7 is the knife recovered. Ex.P.35 is the mahazar for the said recovery. Then, A-3 gave a voluntary confession and the same was duly recorded by P.W.19. In the said statement, he disclosed that he had sold away the gold chain to P.W.15 - Sivaji. Pursuant to the same, he took P.W.19 and the witnesses to the place of P.W.15 and identified him. Then, P.W.15 produced the gold chain (M.O.1). The said gold chain was recovered under Ex.P.37 - Mahazar. Ex.P.36 is the admissible portion of confession statement of A-3. Thereafter, P.W.19 forwarded the accused to the learned Judicial Magistrate for judicial remand. The recovered articles were also sent to the Court. P.W.19 then examined P.Ws.10 and 14 and recorded their statements. Then, again on the orders of the Superintendent of Police, the investigation was handed over to the Inspector of Police, Othakadai Police Station.

9. P.W.20, who was the then Inspector of Police at Othakadai Police Station took up the investigation from P.W.19. He examined few more witnesses. He came to know that A-4, A-6 and A-7 had surrendered before the learned Judicial Magistrate, Melur. He took custody of A-4, A-6 and A-7 on 15.03.2005 on the orders of the Judicial Magistrate, Melur at his request for two days. On 15.03.2005, at the police station when P.W.20 interrogated A-4 in the presence of P.W.11 and P.W.12, he volunteered a confession and the same was recorded. However, no discovery of any new fact was made out of the same. Similarly, A-6 and A-7 also gave separate confessional statements, which were also duly recorded. But, no discovery of any new fact was made out of the same. On 16.03.2005, he gave requisition to the learned Judicial Magistrate for forwarding the material objects for chemical examination. Since he was transferred, he handed over the investigation to P.W.21 on 07.05.2005.

10. P.W.21 took up the investigation, during which he received the Chemical Analysis Report. Finally charge sheet was laid against the appellants.

11. The Trial Court framed charges under Sections 120(B), 341, 302 read with 34, 114, 396 and 402 I.P.C against all the accused. Since the accused denied the charges, they were put on trial. During trial, on the side of the prosecution, 21 witnesses were examined, 41 documents were exhibited and 7 material objects were marked. When the accused were questioned under Section 313 Cr.P.C., in respect of the incriminating evidences available against them, they denied the same. But, they did not examine any witness on their side and they did not mark any document.

12. Having considered the materials available on record and after having considered the submissions of the learned counsel for both sides, the Trial Court found the accused guilty under various penal provisions as enumerated in the beginning of the judgment and punished them accordingly.

13. Challenging the said conviction and sentence, the Accused Nos.1, 3 to 7 have preferred Criminal Appeal No.269 of 2006 and the Accused No.2 has preferred Criminal Appeal No.327 of 2006.

14. The case of the prosecution is based on circumstantial evidence. The first circumstance is that the deceased was lastly seen alive on 29.01.2004 at about 07.45 a.m., by P.Ws.1,2 and 4. The next circumstance is that the deceased was done to death and the gold chain weighing 5 sovereigns worn by the deceased was stolen away in the same occurrence by the miscreants between 07.45 a.m., and 08.15 a.m. To speak about the same, the Prosecution has examined P.Ws.1 and 2 who would say that when the deceased was lastly seen alive, she was wearing M.O.1 - gold chain and when she was found dead at 08.15 a.m., the said chain was found missing. The said fact has not been disputed by the defence by challenging the evidence of P.Ws.1 and 2. Thus, it has been established by the Prosecution that murder and robbery took place in one and the same transaction on 29.01.2004 between 07.45 a.m., and 08.15 a.m.

15. The next question is as to who are responsible for the murder and robbery. The prosecution, though has examined number of witnesses to speak about the circumstances against the accused, none has supported the case of the prosecution. The only material evidence available on record is the evidence of P.W.2, the daughter of the deceased, who has stated that when the deceased accompanied her towards Mattuthavani Bus Stand, she noticed the accused standing by the side of the road and they were murmuring among themselves pointing to the deceased. But, this part of the evidence of P.W.2 cannot be believed for the simple reason that the accused, admittedly, were not known to P.W.2 prior to the occurrence. In chief examination itself, she has admitted that during the course of Test Identification Parade, she did not identify any of the accused. Since she did not choose to identify the accused in the identification parade and further she did not give the identifying features of the assailants when she was examined by the police, the evidence of P.W.2 identifying the accused in Court for the first time is only liable to be rejected.

16. The prosecution nextly relies on the recovery of M.O.1 - gold chain from the possession of P.W.15 in the presence of P.Ws.10 and 14. According to the case of the prosecution, A-3 made a disclosure statement and out of the said disclosure statement, P.W.15 was identified by A-3 as the one to whom M.O.1 had been sold away by A-3 and thereafter, M.O.1 was recovered from P.W.15 in the presence of P.Ws.10 and 14. But, P.Ws.10 and 14 have turned hostile. The evidence of the Investigating Officer to the extent that the jewel was recovered from P.W.15, even if believed, in the absence of believable evidence that it was only at the instance of A-3 that P.W.15 was identified, much importance cannot be attached to the said recovery. To invoke the presumption under Section 114(a) of the Indian Evidence Act, it is necessary that the accused should have been found in possession of the stolen property as soon as the theft was committed. In this case, M.O.1 was not found in possession of A-3 nor there is evidence that the same was recovered at the instance of A-3 from the hide out. Thus, in our considered opinion, the prosecution has failed to prove that M.O.1 was seized from P.W.15 at the instance of A-3 beyond reasonable doubt.

17. Yet another circumstance projected by the Prosecution is the recovery of knife at the instance of A-2. Though it is true that the knife recovered from the alleged possession of A-2 tallies with the blood group of A-1, that itself cannot be the foundation for recording conviction. It is quite common that many have the same blood group. Above all, the alleged occurrence was on 29.01.2004 and the accused were arrested on 15.02.2005 i.e., after about one year. It is highly unbelievable that the accused would have kept the knife with blood stains for such long period of time in safe custody.

18. Yet another improbability is that initially investigation was done by P.W.18. During his investigation, no clue whatsoever was obtained in respect of the assailants. After a long time, the investigation was transferred to P.W.19. According to P.W.19, he arrested the accused on 15.02.2005. But, he has not stated as to what are the material evidences collected by him, which pointed to the guilt of the accused so as to impel him to arrest these accused. It is not known how P.W.19 came to the conclusion that the accused Nos.1 to 3 and 5 had involved in the crime. Thus, the evidence of P.W.19 deserves to be rejected as the above doubt has not been cleared by the Prosecution.

19. According to the evidence of P.W.13 - the Doctor who conducted the autopsy, the deceased died due to shock and hemorrhage to the injuries and from his evidence, we can safely conclude that the deceased died out of homicidal violence and the occurrence would have taken place between 07.45 a.m., and 08.15 a.m., on 29.01.2004.

20. Since we have already held in the previous paragraphs that there is no evidence connecting the accused with the heinous crime of murder, we have no option before us except to acquit all the accused.

21. Before parting with the case, we would like to mention two features in the judgment in appeal by the learned Trial Judge with regard to the framing of charges and questioning under Section 313 Cr.P.C. The additional ground has been raised by the appellants at the time of arguments that the procedure adopted by the Trial Court under Section 313 Cr.P.C. for questioning the accused is not correct. We find this common defect in many trials. The entire evidence of a witness is put to the accused and he has asked if he accepts it for which he naturally says 'no' and the accused has no opportunity to focus his attention on any of the incriminating facts elicited in the evidence with regard to which he can make a specific denial.

(a) In 2005 (6) SCC 101(State of Punjab V. Swaran Singh), the manner in which 313 statement should be recorded has been dealt with. The relevant paragraphs are extracted as follows:

“As regards the questioning of the accused under Section 313 CrPC, the relevant provision is as follows:

“313. Power to examine the accused.—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court—

(a) may at any stage, without previously warning the accused, put such questions to him as the court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons case, where the court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.”

10. The questioning of the accused is done to enable him to give an opportunity to explain any circumstances which have come out in the evidence against him. It may be noticed that the entire evidence is recorded in his presence and he is given full opportunity to cross-examine each and every witness examined on the prosecution side. He is given copies of all documents which are sought to be relied on by the prosecution. Apart from all these, as part of fair trial the accused is given opportunity to give his explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to him and answers elicited from the

accused. If there were circumstances in the evidence which are adverse to the accused and his explanation would help the court in evaluating the evidence properly, the court should bring the same to the notice of the accused to enable him to give any explanation or answers for such adverse circumstance in the evidence. Generally, composite questions shall not be asked to the accused bundling so many facts together. Questions must be such that any reasonable person in the position of the accused may be in a position to give rational explanation to the questions as had been asked. There shall not be failure of justice on account of an unfair trial.

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14. In Shivaji Sahabrao Bobade vs. State of Maharashtra (1973 (2) SCC 793) a three-Judge Bench of this Court considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, widening the sweep of the provision concerning examination of the accused after closing prosecution evidence made the following observations: (SCC p. 806, para 16)

"It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."

Further, in that case the Supreme Court held that the accused was not in any way prejudiced by not having an opportunity to answer specifically regarding the evidence of the witnesses. In this case all the questions are put to all the accused together who jointly say "no".

(b) In AIR (31) 1944 Madras 42 (In re Shekur) the Division Bench held thus:

"The procedure which is laid down in S.342, Criminal P.C., - a procedure designed to give accused persons an opportunity to explain circumstances appearing against them – has been in substance disregarded in this case.

The committing Magistrate put the whole of the case for the prosecution in one long statement beginning - "You heard the witnesses depose that you and Bapulal were cooks in the R.A.F. quarters and Bapulal used to beat you at times as he was the senior cook." Then he sets out the evidence of the witnesses for the Crown and ends up by "What have you to say." This is not a compliance with the mandatory provisions of the Code."

We hope more care is taken while recording Section 313 statement. The judges are bound to apply their mind while asking the questions. It is perhaps the only opportunity when the accused can give his explanation. The accused shall not suffer because the Court failed in its duty under Section 313 Cr.P.C. We also note that generally the evidence of hostile witnesses is not put to the accused during Section 313 questioning. If the hostile witnesses' evidence is to be rejected in toto then that evidence need not be put to the accused. But if the prosecution has elicited something from the hostile witness to support its case e.g. presence of the accused at the scene of occurrence after which the witness turn

hostile, then that portion which is in favour of the prosecution must be put to the accused, so that the accused has an opportunity to explain his case. Questioning under Section 313 Cr.P.C. is not an empty formality, it is an important part of the trial and the Trial Judges would do well to remember this. Therefore all the incriminating evidence elicited from witnesses including the hostile witnesses should be put to the accused during the 313 questioning.

(c) The other feature is with regard to the framing of charges. In this case, the charge includes offences under Sections 120B, 341, 302 r/w 34, 394 and 402 IPC. But the ingredients relating to the different sections are not found in the charge that is framed. There is nothing in the charge relating to conspiracy. We earnestly hope that more care should be given with regard to framing of charges. This aspect of the matter should be borne in mind by all the Trial Judges. In criminal trials, judges are dealing with the right of liberty and in cases under 302 IPC, right of life too. So they must remember that they are dealing with Constitutional rights. The procedure adopted by them shall not violate these rights.

22. In the result, these Criminal Appeals are allowed and the conviction and sentence imposed on the appellants by Judgment dated 18.04.2006 of the learned Additional District and Sessions Judge, (Fast Track Court No.II), Madurai in S.C.No.9 of 2006 are set aside and the appellants are acquitted of all the charges. The appellants are directed to be released forthwith, unless their detention is required in any other case.