

R.T.(MD) No.1 of 2020 in CrI.A.(MD) Nos.319 and 323 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 06.09.2021

Delivered on : 16.11.2021

CORAM

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN
AND
THE HONOURABLE MRS.JUSTICE J.NISHA BANU

R.T.(MD) No.1 of 2020
and
CRL.A (MD)Nos.319 and 323 of 2021

R.T.(MD) No.1 of 2020:

State Rep. by
The Inspector of Police,
Kallidaikurichi Police Station,
Tirunelveli District.
(Crime No.203 of 2008) .. Complainant

-vs-

1.Vasanthat Kumar @ Ganesan
2.Rajesh @ Rajeshkanna .. Respondents/A3 and A4

Referred Trial under Section 366 of the Code of Criminal Procedure on the judgment of the learned Sessions Judge, Mahila Court, Tirunelveli in S.C.No.555 of 2015 dated 12.02.2020.

For Complainant :: Mr.Hassan Mohammed Jinnah
Public Prosecutor
Assisted by Mr.RMS.Sethuraman
Standing Counsel for State



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For 1st Respondent :: Mr.A.Thiruvadi Kumar
Legal Aid Counsel

For 2nd Respondent :: Mr.G.Karuppasamy Pandian
for Mr.R.Vinoth Bharathi

CRL.A (MD)Nos.319 and 323 of 2021:

Vasanthat Kumar @ Ganesan .. Appellant in CrI.A.(MD) No.
319 of 2021/A3

Rajesh @ Rajeshkanna .. Appellant in CrI.A.(MD) No.
323 of 2021/A4

-VS-

State Represented by
The Inspector of Police,
Kallidaikurichi Police Station,
Tirunelveli District.
(Crime No.203 of 2008) .. Respondent/Complainant in
both the criminal appeals

Criminal Appeals filed under Section 374(2) of the Code of
Criminal Procedure against the judgment of the learned Sessions Judge,
Mahila Court, Tirunelveli in S.C.No.555 of 2015 dated 12.02.2020.

For Appellant in :: Mr.A.Thiruvadi Kumar
CrI.A.(MD) No. Legal Aid Counsel
No.319 of 2021

For Appellant in :: Mr.G.Karuppasamy Pandian
CrI.A.(MD) No. for Mr.R.Vinoth Bharathi
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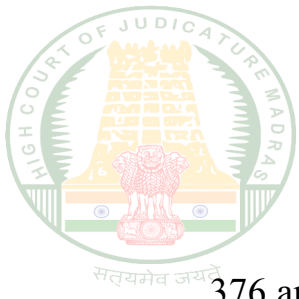
For Respondent in :: Mr.Hassan Mohammed Jinnah
Public Prosecutor
Assisted by Mr.RMS.Sethuraman
Standing Counsel for State

COMMON JUDGMENT

(Judgment of the Court was delivered by V.BHARATHIDASAN, J.)

The reference in R.T.(MD) No.1 of 2020, is made by the learned Additional District and Sessions Judge, Mahila Court, Tirunelveli, under Section 366 Cr.P.C., seeking confirmation of capital punishment imposed on A3 and A4/respondents. CrI.A.(MD) Nos.319 and 323 of 2021 have been filed by A3 and A4, respectively, challenging the conviction and sentence imposed on them, both the matters are heard together and disposed of by this common judgment.

2. Totally there are six accused in this case. A1 to A4 stood charged for the offences under Sections 449, 376, 302 and 397 I.P.C., while A5 stood charged for the offence under Section 212 I.P.C. and A6 stood charged for the offences under Sections 411 and 201 I.P.C. The trial Court, while acquitting the other accused against the respective charges framed against them, convicted A3 and A4 alone, under Sections 449,



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376 and 302 I.P.C. and sentenced them to undergo Life Imprisonment for the offence under Section 449 I.P.C., further sentenced them to undergo 10 years Rigorous Imprisonment for the offence under Section 376 I.P.C. and also sentenced them with the capital punishment of hanging till death for the offence under Section 302 I.P.C. However, the trial Court acquitted A3 and A4 for the offence under Section 397 I.P.C. The trial Court referred the matter to this Court seeking confirmation of death sentence, and the appellants challenging the conviction and sentence, filed CrI.A.(MD) Nos.319 and 323 of 2021.

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

A1 to A4 belongs to Ayan Singampatti village, and they are all friends. The deceased in this case, namely, Tamilselvi, a widow, was working as Village Health Nurse, in the Government Primary Health Centre, Manimutharu. She was staying alone in a rented house in Ayan Singampatti, her son Rajesh Kannan (P.W.6) was doing his Engineering Course at Coimbatore. A1 to A4 were known to the deceased. On 29.09.2008, at about 9.15 p.m., A1 to A4 went into the house of the deceased and all the accused committed rape of the deceased, then, A2



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strangled the deceased with the shawl worn by her, A1 has smothered her with a towel, A2 strangled the deceased with nylon rope and A3 and A4 punched her on the ribs and kicked her on the chest with knee, thereby, all the four accused caused the death of the deceased. Thereafter, A1 has stolen two cell phones belonged to the deceased, A2 has stolen her gold chain, A3 broke opened the steel bero and stolen the gold chain weighing 20 grams and A4 has stolen 7 grams of golden ring belonged to the deceased and escaped from the scene of occurrence.

4. On the next day morning, at about 10.30 A.M., P.W.1, neighbour of the deceased, found the deceased dead. He immediately informed the same to his father P.W.3, then, the message was passed on to the brother of the deceased, one Ilayaraja (not examined). Then, Ilayaraja appeared before P.W.18, Sub-Inspector of Police, attached to the respondent Police, filed a complaint (Ex.P.1) at about 12.30 p.m. Based on that complaint, P.W.18, Sub-Inspector of Police, registered a criminal case in Crime No.203 of 2008 under Sections 302, 380 I.P.C. and sent the F.I.R. (Ex.P.18) to the Judicial Magistrate, Ambasamuthiram, and copies to the investigating officer and other higher officials.



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5.P.W.19, Inspector of Police, on receipt of the F.I.R., commenced the investigation, proceeded to the scene of occurrence, prepared Observation Mahazar (P.W.19) and Rough Sketch (P.W.20) and recovered bloodstained marble floor (M.O.13) and sample marble floor (M.O.14). Thereafter, he conducted inquest on the dead body between 2.30 p.m. and 5.30 p.m., in the presence of witnesses and panchayars, prepared Inquest Report (Ex.P.22), and sent the body for postmortem autopsy to the Government Medical College Hospital, Tirunelveli.

6.Dr.M.Mani, Assistant Professor of Forensic Medicine, Tirunelveli Medical College, Tirunelveli, conducted postmortem autopsy on the dead body and issued postmortem certificate (Ex.P.32), and he found the following injuries:

“INJURIES: 1) Six nail marks each measuring 1 x 25cm seen two on the left side of neck, two on the right side of neck, one each on the right and left side of chin. 2) A complete ligature mark seen encircling the entire neck measuring 43x1cm. It is seen 6cm below the right mastoid. 5cm below left mastoid, 6cm below the chin and 7cm above the suprasternal notch.

On bloodless dissection of neck: Superficial and deep



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planes of ligature mark contused. Soft tissues of thyroid cartilages on both sides found contused. 3) Right forehead contused 4x3cm. 4) Lower lip found abraded over an area of 5x1cm and upper lip found abraded 8x1cm. On dissection of scalp: 17x12cm subscalpal bruising seen on the right fronto-temporo-parietal region. 8X6cm subscalpal bruising seen on the back of left temporo-parietal region. Marked subdural and subarachnoid haemorrhages seen on the the medical aspect of both cerebral hemispheres.

OTHER FINDINGS: Peritoneal and Right Pleural Cavities- empty. Heart – Normal. Coronaries-Patent. LUNGS, LIVER, SPLEEN and KIDNEYS- c/s congested. HYOID BONE- Intact. STOMACH-Contains 50gms of fully digested cooked food particles. No specific smell. MUCOSA-normal. INTESTINE Contains 20ml of bile stained fluid. No specific smell. Mucosa-normal. BLADDER-Empty. Uterus-normal, Laparoscopic rings in situ.

c/s cavities empty. BRAIN-described.

OPINION AS TO CAUSE OF DEATH.

RESERVED PENDING CHEMICAL ANALYSIS REPORT.

Final Opinion:

The deceased would appear to have died of shock and



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hemorrhage and asphyxia due to cumulative effect of Head injury – manual and ligature strangulation. Spermatozoa detected in vaginal smear examination. ”

7.After postmortem, P.W.19, recovered red colour towel (M.O.2), black colour bloodstained half hand nighty (M.O.3), inskirt (M.O.16) and black colour brassier (M.O.17) from the dead body and sent the same to Judicial Magistrate Court, under Form 95. P.W.19, recorded the statements of some of the witnesses and based on the investigation he arrested A1, on 13.10.2008, at 9.00 p.m. On such arrest, A1 has voluntarily given a confession statement, and based on the admissible portion of the confession, he recovered one Nokia Cellphone, (M.O.4) belonged to the deceased. On his statement, P.W.19 arrested A5, who said to have given shelter to A1 to A4 after the occurrence. On such arrest, A5 has voluntarily given a confession and also handed over the receipt for pledging the golden jewels with one Mohan at Nagercoil, on that P.W.19 recovered the jewels. Thereafter, P.W.19 altered the F.I.R. for offences under Sections 302, 380 and 212 I.P.C. and sent the alteration report (Ex.P.27) to the Judicial Magistrate Court. Then, he was transferred.

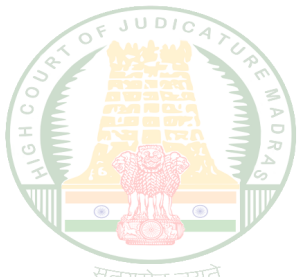


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8. Thereafter, P.W.22, Inspector of Police continued the investigation and after his transfer, P.W.20, Inspector of Police, continued the investigation, recorded the statements of witnesses, filed a final report for offences under Sections 376, 302, 318 r/w 34 I.P.C. against A1 to A4 and for the offence under Section 212 I.P.C. against A5 before the Judicial Magistrate, Ambasamuthiram. Subsequently, P.W.20, arrested A2 to A4 in connection with Crime No.150 of 2014 I.P.C. on the file of Kallidaikurichi Police Station, for the offences under Sections 341, 392 and 506(ii) I.P.C. On such arrest, A2 has voluntarily given a confession, confessing that some of the stolen jewels were handed over to A6, who is his brother-in-law, based on that, P.W.20 arrested A6 and on such arrest, A6, has voluntarily given a confession and based on the disclosure statement, P.W.20, recovered two ear studs (M.Os.6 and 7), and sent them for judicial custody. Once again, he altered the F.I.R. for offences under Sections 376, 302, 318, 212 r/w 34 and 411 I.P.C. and sent the alteration report (Ex.P.30) to the Court. Subsequently, he was transferred.

9. Then, P.W.23, another Inspector of Police, continued the investigation and he applied to the concerned Judicial Magistrate Court



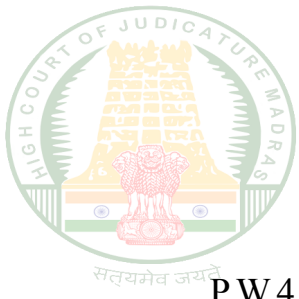
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to send A1 to A4 for DNA test. Then, P.W.24 continued the investigation and examined the doctor, who conducted the potency test on A3 and A4 and on his transfer, he handed over the investigation to P.W.25. After completing the investigation, P.W.25 filed the final report.

10. Based on the the above materials, the trial Court framed the charges as mentioned in paragraph No.2 of the judgment and the accused have denied the charges. In order to prove the case of the prosecution, as many as 25 witnesses were examined, 32 documents were marked and 17 material objects were produced.

11. Out of the said witnesses, P.W.1 is the neighbour of the deceased, who first saw the dead body of the deceased and informed the same to one Ilayaraja, brother of the deceased. He said to have seen all the accused went inside the house of deceased before the occurrence, but, he turned hostile during the trial. P.W.2, Village Menial, witness to the complaint (Ex.P.1), and also recovery of M.Os.1 to 3. P.W.3, neighbour of the deceased, said to have seen A1 to A4 near the deceased's house and informed the death of the deceased to her father. He also turned hostile.



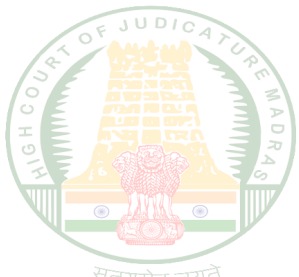
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P.W.4, a Taxi driver, who is known to the deceased, he was treated as hostile witness. P.W.5 is a rice merchant and neighbour to the deceased, he was also treated as a hostile witness.

12.P.W.6, is the son of the deceased. At the time of occurrence, he was doing engineering course at Coimbatore and on hearing the incident, he came to his house and see the dead body. He spoke about the missing of jewels, mobile phones of the deceased, and he identified M.Os.4 to 7. P.W.7 is an auto driver, whom A1, said to have called through the mobile phone of the deceased after the occurrence, but he turned hostile. P.W.8 is the brother of the deceased, his evidence has no substance. P.W.9, a person known to the deceased, also turned hostile. P.W.10, a witness to the Observation Mahazar and Rough Sketch, he was treated as hostile witness.

13.P.W.11, Head Constable, identified the dead body of the deceased for postmortem, after postmortem handed over the visceral parts of the deceased for chemical analysis at the Tirunelveli Forensic Science Laboratory. P.W.12, Doctor working in Tirunelveli Medical

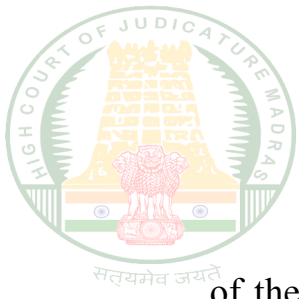


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College Hospital, conducted potency test to A1 to A4. P.W.13, Assistant Director, working in the Forensic Laboratory, Tirunelveli, examined the seminal smear and also conducted vaginal swap test and found no spermatozoa in the vaginal swap and has given a report Ex.P8 to that effect. P.W.14, a nurse, known to the deceased, she turned hostile. P.W.15, nurse, was working with the deceased, she has also turned hostile. P.W.16, is the radiologist, working in the Government Hospital, Tirunelveli and has taken x-ray of the accused and has given certificates that A1 to A4 are in the age group of 25 to 40 years. P.W.17, Finger Print Expert, working in the Tirunelveli District Police Forensic Laboratory and he lifted the chance finger prints available from the scene of occurrence and sent the same to the Forensic Laboratory, Tirunelveli, which was found tally with that of A4.

14.P.W.18, Sub-Inspector of Police, registered the F.I.R. P.W.19, Inspector of Police, who conducted the initial investigation and arrested A1 and A5 and recovered the bloodstained material objects from the scene of occurrence and also from the dead body after postmortem. He also recovered the cellphone belonged to the deceased from A1 and some



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of the stolen jewels on the confession of A5. P.W.20 is the Inspector of Police, who continued the investigation and arrested A2 to A4 and on the confession of A2, he recovered some of the stolen articles from A6. P.W.21, Assistant Director, Forensic Laboratory, Chennai, conducted DNA Test, according to him, the seminal stains found in M.O.3, part of nighty, and M.O.17, part of inskirt, are that of A3 and A4. P.W.22, another Investigating Officer, continued the investigation and examined the witnesses. P.W.23, continued the investigation and sent the accused for DNA test. P.W.24, another Investigating Officer, examined some of the witnesses and finger print expert. P.W.25, completed the investigation and filed the final report.

15. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., all the accused denied the same as false. However, the accused did not chose to examine any witness nor did they mark any documents on their side.

16. Having considered all the above, the trial Court found A3 and A4/appellants guilty under the above said charges and accordingly



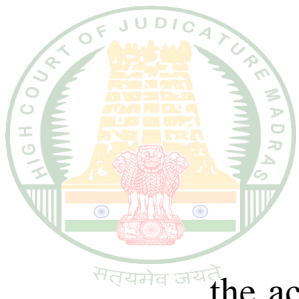
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sentenced them as detailed in the second paragraph of this judgment and acquitted other accused. The trial Court referred the matter to this Court seeking confirmation of the death sentence imposed on the appellants under Section 366 Cr.P.C. and the appellants challenging the conviction and sentence filed the appeals.

17.We have heard Mr.Hassan Mohammed Jinnah, learned State Public Prosecutor, appearing for the State, Mr.A.Thiruvadi Kumar, learned Legal Aid Counsel, appearing for A3/appellant in CrI.A.(MD) No.319 of 2021 and Mr.G.Karuppasamy Pandian, learned counsel for A4/appellant in CrI.A.(MD) No.323 of 2021.

18.Mr.Hassan Mohammed Jinnah, learned State Public Prosecutor, appearing for the State, would submit that, there are two strong circumstances pointing the guilt of the appellants, the first being the DNA test. The seminal stains traced from M.O.3 – nighty, and M.O.16 – inskirt of the deceased tallies with the DNA profile of A3 and A4, and there is no explanation from the accused as to how their semen were found in the deceased's dress. The next circumstance is absconding of



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the accused for nearly six years and when they were arrested in another crime, they have voluntarily confessed the crime. That apart, the medical evidence also clearly proves that it is a homicidal death. Considering the gravity of the offence, in which, a widow has been raped and murdered by these appellants, which falls within the category of “rarest of rare case”. The trial Court considering those circumstances has rightly imposed death sentence on the appellants/A3 and A4, which necessarily be confirmed.

19.Mr.A.Thiruvadikumar, learned legal aid counsel, appearing for A3/appellant in CrI.A.(MD) No.No.319 of 2021, would submit that it is a case of circumstantial evidence, the prosecution relied upon the last seen theory, where A1 to A4 said to be seen in the deceased's house before the occurrence. However, the trial Court disbelieved the same. So far as the medical evidence is concerned, the doctor, who conducted the postmortem was not examined and the cause of death was not established by the prosecution. So far as the recovery is concerned, admittedly the recoveries were made from A1, A2, A5 and A6, but recovery was also disbelieved by the trial Court and they were all acquitted.

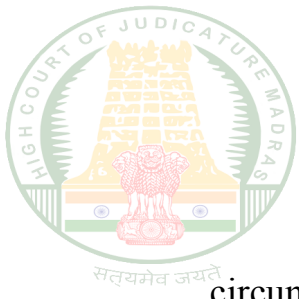


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20.The learned counsel further submitted that the one and only evidence available against A3 and A4, is DNA test, and under Section 45 of Indian Evidence Act, it is only an opinion, that cannot be made as sole basis for conviction. Even assuming that the prosecution has proved the presence of semen of A3 and A4 in M.Os.3 and 16, it will not lead to the conclusion that the appellants have raped the deceased and committed murder, especially, after acquitting similarly placed other two accused, namely, A1 and A2. The learned counsel further submitted that M.O.3 – nighty and M.O.16 – inskirt of the deceased were not collected under separate mahazar and only a part of M.O.3 and M.O.16 were sent, entire nighty and inskirt were not sent to forensic laboratory for examination. The samples of seminal stains were collected in the year 2008, which was compared with the blood samples collected from the appellants only in the year 2016, after eight years, for that a report was given in 2017, hence, the authenticity of the DNA test is highly doubtful, based on that conviction cannot be awarded against these two accused alone.

21.The learned counsel further submitted that so far as the award of death sentence is concerned, it is highly disproportionate. In a case of



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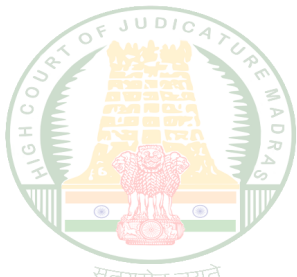
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circumstantial evidence, the Court should not normally award death sentence. The prosecution has failed to prove the guilt of the appellants and the circumstances relied on by the prosecution not conclusively proved the guilt of the accused. He further submitted that in a case of circumstantial evidence, unless the guilt of the accused proved beyond reasonable doubt, the trial Court ought not to have awarded death sentence as the case does not fall under the category 'rarest of rare case'.

22.Mr.G.Karuppasamy Pandian, learned counsel for A4/appellant in CrI.A.(MD) No.323 of 2021 reiterated the submissions made by the learned counsel appearing for A3/appellant in CrI.A.(MD) No.319 of 2021.

23.We have considered the rival submissions and also perused the available materials carefully.

24.Out of six accused, the trial Court acquitted A1, A2, A5 and A6 and convicted these appellants, namely, A3 and A4. It is a case of circumstantial evidence. The prosecution relied upon the following



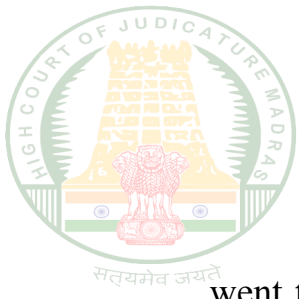
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circumstances to prove the guilt of the accused. The first circumstance is the last seen theory. According to the prosecution on the date of occurrence at 9.15 p.m., A1 to A4 entered into the deceased's house and to support the same, the prosecution examined P.Ws.1, 3 to 5, but all the witnesses turned hostile. The trial Court also disbelieved it and held that the prosecution has failed to prove the last seen theory.

25.The next circumstance relied upon by the prosecution is recovery of a cellphone (M.O.4) from A1. According to the prosecution, after committing rape and murder, A1, has stolen two mobile phones of the deceased and after the occurrence A1 used the mobile phone. Thereafter, on the confession of A1, the mobile phone was recovered from him. However, the trial Court disbelieved the same and came to the conclusion that the prosecution has failed to prove the recovery with acceptable evidence.

26.The next circumstance is the recovery of gold chain of the deceased (M.O.5). The above chain was recovered on the confession of A5. According to the prosecution, after committing the crime A1 to A4



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went to the house of A5 and took shelter in his house, and handed over the jewel to him and A5 has pledged the jewel with one Krishna Banker at Nagercoil. On arrest of A5, he has voluntarily given confession and handed over the receipt for pledging the jewel. Thereafter, the jewel has been recovered from the banker. The trial Court disbelieved that recovery also by holding that the owner of Krishna Banker was not examined and M.O.5, also not identified as that of the deceased.

27.The next circumstance is recovery of M.Os.6 and 7 ear studs of the deceased. According to the prosecution, on 12.05.2014, at about 12.15 p.m., nearly six years after the occurrence, P.W.20, arrested A2 to A4 in connection with another crime in Crime No.150 of 2014, on the file of the Kallidaikurichi Police Station. On arrest, A2 is said to have given a confession that the stolen articles were granted to his brother-in-law, A6. Then, A6 was arrested on 10.02.2014 and on such arrest A6 has voluntarily given a confession, based on the disclosure statement M.Os.6 and 7 were recovered. But the trial Court disbelieved that recovery on the ground that M.Os.6 and 7 have not been properly identified as that of the deceased and the witnesses to the recovery were not available. Holding so, the trial Court acquitted A1, A2, A5 and A6.



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28.The next two strong circumstances relied upon by the prosecution against A3 and A4 are that the finger prints lifted from the scene of occurrence has tallied with the finger prints of A3 and the semen stains traced from M.O.3 and M.O.16 tallied with the DNA profile of A3 and A4, relying upon these two circumstances, the trial Court convicted the appellants.

29.The questions arise for consideration before us is whether these two circumstances have been proved by the prosecution and those two circumstances are sufficient to convict the appellants for the offence of rape and murder.

30.So far as the finger prints, the chance finger prints were lifted from the scene of occurrence by P.W.17, finger print expert in the Tirunelveli District Police, six chance finger prints were lifted from the scene of occurrence, out of which, two chance finger prints lifted from the steel safe tallies with the specimen finger prints of A4.



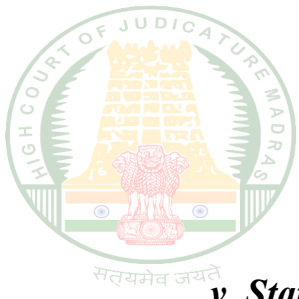
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31.It is the contention of the learned counsel for the appellant/accused that, the specimen finger prints were not taken before the Judicial Magistrate, it is in violation of Section 4 of Identification of Prisoners Act, and from the evidence of P.W.20, investigating officer, it is not known, who has taken the specimen finger prints of the accused. That apart, during the investigation, the original finger prints were not produced before the Court, but, only during trial it was marked, which clearly creates serious doubt on the prosecution case.

32.On perusal of the materials available on record, it is seen that P.W.20, investigating officer, said to have taken the specimen finger prints of the accused and sent it for comparison with chance finger prints lifted from the scene of occurrence. But, during the cross-examination, he has specifically stated that he was not aware, who has taken the specific finger prints of the accused, and no permission was sought for from the concerned Judicial Magistrate.

33.Taking specimen finger prints of the accused in the presence of Judicial Magistrate is concerned, the Hon'ble Supreme Court, in *Sonvir*



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v. State (NCT of Delhi) [(2018) 8 SCC 24], has held that, under Section 4 of the Identification of Prisoners Act, 1920, the police officer can take the specimen finger prints, it cannot be found fault with and on that ground, the evidence of finger prints cannot be discarded. However, from the evidence of P.W.20, it is not even known, who has taken the specimen finger prints from the accused. That apart, during the investigation, the original finger print reports were not collected. Subsequently, an application has been filed by the prosecution before the trial Court under Section 294 Cr.P.C. to produce the original finger print report of the expert, which was allowed by the trial Court and the same was marked as Ex.P.17. On perusal of the petition filed by the prosecution, it is stated that the original finger prints of A4, Rajesh Kanna, along with connected records were misplaced and that could not be traced and hence, the application has been filed to take the finger prints of A4 on file. There is no proper explanation from the prosecution as to how the originals were misplaced and how and when it was traced. It creates a doubt in the prosecution case regarding the finger print evidence.



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34. Even assuming that the finger prints of A4 tallies with the chance finger prints available in the deceased's house, that alone cannot be taken as a circumstance to come to the conclusion that A4 committed the offence of rape and murder. In a similar circumstance, the Hon'ble Supreme Court in *Sonvir* (supra) held as follows:

“82. Even if, we accept that fingerprints of appellant's, chance print Mark Q5 (taken from iron safe) was identical to the specimen of left palm impression of Sonvir, it does not complete the chain of circumstances unerringly pointing out fingers to the appellant, that it was the appellant who committed the murder. Law of conviction based on circumstantial evidences is well settled. It is sufficient to refer to the judgment of this Court in *Ramesh v. State of Rajasthan* [(2011) 3 SCC 685], where in para 17 following has been held: (SCC p. 693)

“17. Before we proceed with the matter, it has to be borne in mind that this case depends upon circumstantial evidence and, as such, as per the settled law, every circumstance would have to be proved beyond reasonable doubt and further the chain of circumstances should be so complete and perfect that the only inference of the guilt of the accused should emanate therefrom. At the same time,



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there should be no possibility whatsoever of the defence version being true.”

35.The next circumstance relied upon by the trial Court for convicting the appellants is the scientific evidence, namely, DNA Test. According to the prosecution, the semen of the appellants/A3 and A4 were found in the nighty and inskirt of the deceased. According to P.W.19, the first investigating officer, after postmortem autopsy, the nighty of the deceased (M.O.3) and inskirt (M.O.16) found on the dead body were recovered and the same were sent to the concerned Judicial Magistrate Court under Form 95. Admittedly, that was not recovered under any mahazar and there is no evidence available to show that those material objects were sent to the Court under Form 95, and the concerned Magistrate Court's official was not examined to show when those materials were received in the Court. As per the evidence of P.W.21, the entire nighty and inskirt were not received for examination and only a portion were received on 04.11.2008 and the DNA profile was done by P.W.21. Thereafter, on 29.09.2016, after 8 years the blood samples of the accused were sent for DNA Test and ultimately it was found that the



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seminal stain found in M.O.3 and M.O.17 tallies with the DNA profiles of A3 and A4.

36. Even though there is no complaint that the samples were tested by unqualified person or it has been tampered with, it is seen from the biological report (Ex.P.8), issued by P.W.13, Assistant Director, Forensic Science Laboratory, that, vaginal smear and vaginal swab were taken from the deceased and sent for examination. As per Ex.P.8, spermatozoa was detected in vaginal smear, but no spermatozoa was detected in vaginal swab, but the same was not sent for DNA profiling, which could be compared with the seminal strain of the accused. That apart, the postmortem report (Ex.P.32) does not indicate any symptom of rape. Further, the doctor, who conducted postmortem autopsy also not examined, as he was not available at the time of trial. From the postmortem report, it could be seen that the deceased would appear to have died of shock and hemorrhage and asphyxia due to cumulative effect of Head injury – manual and ligature strangulation.



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37.It is true that DNA test is scientifically accurate, but the probative value of DNA Test varies depending upon the facts and circumstances of each and every case. DNA evidence is also in the nature of an opinion as contemplated under Section 45 of the Indian Evidence Act. The Hon'ble Supreme Court in *Pattu Rajan v. State of T.N. [(2016) 1 SCC 550]*, it is held as follows:

“52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on the facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible.”

38.In the instant case, the prosecution has not clearly established the recovery of M.O.3 and M.O.16 and the manner in which it was sent for scientific examination. Even accepting the fact that semen of the accused have been present in the garments of the deceased, on that score

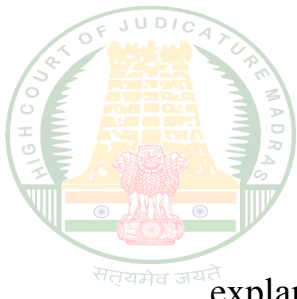


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alone it cannot be held that only these two appellants raped the deceased and murdered her, in the absence of any other circumstances. That apart, in the instant case, the other two similarly placed accused, namely, A1 and A2, also charged with rape and murder of deceased along with these two appellants, were acquitted by the trial Court. The stolen articles were said to have recovered from A1 and A2 alone, however, that was disbelieved by the Trial Court, and nothing was recovered from these two appellants. In those circumstances, we are of the opinion that, based on the scientific evidence alone, it is unsafe to convict the appellants/A3 and A4 for the offences of rape and murder.

39.It is settled position of law that in a case based on the circumstantial evidence, the circumstances from which the conclusive guilt is to be drawn should be fully established and the facts so established should be consistent only with the hypothesis of the guilt of the accused, and it should exclude every possible hypothesis except one to be proved, and the chain of evidence must be so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of



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explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.

40.In *Hanumant v. State of M.P. [A.I.R. 1952 SC 343]*, the Hon'ble Supreme Court held as follows:

“10. ... It is well to remember that in cases, where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. ...”

41.The Hon'ble Supreme Court in *Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116]* held as follows:



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“153.(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established;

(2) The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved; and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

42.In *Trimukh Maroti Kirkan vs. State of Maharashtra, [(2006)*

10 SCC 681], the Hon'ble Supreme Court held as under:

“12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn



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must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.”

43.In a case of circumstantial evidence, the Court may infer from available evidence, which may lead to prove the guilt of the accused and the Courts have to identify the facts in the first place so as to fit the case within the parameters of a “Chain of Circumstances” and then find out the fact of the case and to see that there is a chain of events, which unerringly proving the guilty of the accused beyond reasonable doubt.

44.The Hon'ble Supreme Court in *Suresh v. State of Haryana* [(2018) 18 SCC 654], held as follows:

“42.Circumstantial evidence are those facts, which the court may infer further. There is a stark contrast between direct evidence and circumstantial



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evidence. In cases of circumstantial evidence, the Courts are called upon to make inferences from the available evidence, which may lead to the accused's guilt. In majority of cases, the inference of guilt is usually drawn by establishing the case from its initiation to the point of commission wherein each factual link is ultimately based on evidence of a fact or an inference thereof. Therefore, the courts have to identify the facts in the first place so as to fit the case within the parameters of 'chain link theory' and then see whether the case is made out beyond reasonable doubt. In India we have for a long time followed the 'chain link theory' since ***Hanumant v. State of M.P. [AIR 1952 SC 343]***, which of course needs to be followed herein also.”

45.Following those principles, we are of the considered view that, the circumstances relied upon by the prosecution do not have definite tendency unerringly point out the guilt of the accused and the appellants/A3 and A4 cannot be convicted based on the solitary circumstance of scientific evidence for the offences of committing rape and murder. In these circumstances, the accused are only entitled for acquittal.



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46. In the result,

(a) The conviction and sentence imposed on the appellants/A3 and A4, by the learned Sessions Judge, Mahila Court, Tirunelveli, in S.C.No. 555 of 2015, by the judgment dated 12.02.2020, are hereby set aside.

(b) The appellants/A3 and A4 are acquitted of all the charges levelled against them.

(c) The appellants/A3 and A4 are directed to be released forthwith unless their presence of custody or detention is required in connection with any other case/proceedings.

(d) As ordered by the trial Court, after the expiry of appeal time or appeal M.Os.1 to 3, 8, 13, 14, 16 and 17 are ordered to be destroyed, M.Os.4 to 7 and 15 are ordered to handed over to the legal heirs of deceased Tamilselvi and M.Os.9 to 12 are ordered to be retained with the case records.

(e) CrI.A.(MD) Nos.319 and 323 of 2021 are allowed and the reference in R.T.(MD) No.1 of 2020 is answered accordingly.

(V.B.D.J.) (J.N.B.,J)
16.11.2021

Internet: yes
Index : yes
sj



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Note: *In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.*

To

1. The Sessions Judge,
Mahila Court,
Tirunelveli.
2. The Judicial Magistrate,
Ambasuthiram.
3. The Inspector of Police,
Kallidaikurichi Police Station,
Tirunelveli District.
4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to

The Section Officer,
Criminal Records,
Madurai Bench of Madras High Court,
Madurai.



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V.BHARATHIDASAN, J.

and

J.NISHA BANU, J.

sj

Pre-delivery Judgment in

R.T.(MD) No.1 of 2020

and

Criminal Appeal No.(MD) Nos.319 and 323 of 2021

Delivered on

16.11.2021