

PANNAYAR

v.

STATE OF TAMIL NADU BY INSPECTOR OF POLICE
(Criminal Appeal Nos. 829 of 2008)

AUGUST 17, 2009

[V.S. SIRPURKAR AND DEEPAK VERMA, JJ.]

Penal Code, 1860 – ss 302 and 392 r/w s. 397 – Murder of a lady and theft of gold ornaments worn by her – FIR alleging pair of ear studs and gold chain missing – Arrest of accused with ornaments after 12 days from the dispensary of PW 7-doctor – Evidence of brother of deceased who saw accused following the deceased on the date of incident, recovery of ornaments worn by deceased from accused as also recovery of blood stained cloth of accused and non-explanation by accused of the injuries suffered by him – Conviction and sentence u/ss 302 and 392 r/w s.397 on basis of circumstantial evidence by courts below – Sustainability of – Held: Not sustainable – There was delay in recording statement of brother of deceased as also evidence was inconsistent – Prosecution case as regard recovery of ornaments from accused cannot be believed – Husband failed to establish that the said ornaments belonged to deceased – Recovery of weapons and blood stained jacket of accused also cannot be believed – Trial court erred in allowing new facts to be introduced by re-examination – Motive of robbery not present as accused was known to family members of deceased – Thus, order of courts below set aside.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
Nos. 829 of 2008.

From the Judgment and Order dated 20.02.2006 of the High Court of Madras at Madurai Bench in Criminal Appeal No. 299 of 1997.

A S. Mahendran for the Appellant.

V. Kanagaraj, Tamim Hashimi, Promila (for S. Thananjayan) for the Respondent.

B The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Appellant herein challenges his conviction for the offence under Sections 302 and 392 read with Section 397 of Indian Penal Code (hereinafter called "IPC" for short) by the Trial Court and its confirmation by the Appellate Court. The prosecution case, in brief, is as follows.

2. The Appellant Pannayar was charged with the aforementioned offences on the allegation that on the night between 18.1.1995 and 19.1.1995, he committed the murder of one Thilagavalli (deceased) and also committed theft of the gold ornaments worn by her. The prosecution examined as many as 13 witnesses and relied on 22 documents and also pointed out the 15 material objects. Thilagavalli was married to Subbiah Naicker (PW-1). She was a working woman in the mid-day meal scheme. They used to live in Village Keelamarikadu in Tamil Nadu. On the fateful day, she told her husband at about 8.30 p.m. that she would be going out for attending the nature's call towards south side of the Village. The prosecution alleged that normally, the villagers went near the pond called Kanmai (local tank). When she did not return till 9'O clock, he (Subbiah) started her search alongwith his son. However, they did not go till the end of Kanmai. They made the search throughout the night, but to no effect. In the morning, one Ponnuthai, who had gone to attend the call of nature, informed the son of the deceased that Thilagavalli was lying on the west side of Kanmai. Therefore, they went there at about 6.30 a.m. only to find that Thilagavalli was lying dead there. She was no more and had suffered injuries on her head, forehead, as also on the left side of the mouth. She did not have on her body, the ornaments, namely, gold chain weighing three sovereign, her

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bowl type thali and also the ear studs, worth about Rs.10,000/ A
- to Rs.12,000/-. Subbiah (PW-1), therefore, contacted one
Raja, the Village Administrative Officer of his village and
lodged a complaint with him. Both of them then went and lodged
a report in the Police Station almost immediately. In that, he
narrated the whole story including the details of the lost B
ornaments. He referred to a "pair of ear studs" as missing. On
the basis of this, investigation started. The body was sent for
post-mortem, wherein it was established that the deceased had
suffered anti-mortem injuries. On the next day, her funeral took
place in the same village, which was allegedly attended by the C
accused also. The relatives also attended the said funeral
including Thiru Alwarsamy (PW-4). Ultimately, on the basis of
this investigation, the accused was arrested after 12 days in
the dispensary of one Doctor Anandraj, examined as PW-7. It
was found that the accused had suffered some injuries, which D
were grievous injuries, being fractures. He had suffered the
fracture on lower 3rd right tibia, middle 3rd left ulna and oblique
fracture lower 3rd right tibia. He was also medically examined.
The prosecution claims that at the time he was arrested, the
accused produced the aforementioned ornaments including the E
gold chain and the thali, and conveyed that he had sold one
ear stud to Shankar (PW-6), who ran a jewellery shop in
Kovilpatti. The investigating team went to the said shop and
seized "one pair of ear studs". At the time when the accused
was arrested, his clothes were also seized, which were blood F
stained and one lathi and one aruval (a sharp weapon) were
also seized on the information supplied by the accused. On this
basis, the prosecution filed the chargesheet and sought for the
conviction of the accused.

3. Since the accused abjured his guilt, he was tried by the G
Additional District and Sessions Judge cum Chief Judicial
Magistrate, Kamarajar District, Srivilliputhur, who accepted the
prosecution story based entirely on the circumstantial evidence.
The High Court confirmed the verdict of conviction and the
sentence, necessitating the present appeal. H

A 4. The Learned Counsel, appearing on behalf of the
 appellant mainly contended that the whole prosecution story
 depended upon the circumstantial evidence. The basic
 circumstances appearing against the accused, according to the
 Learned Counsel, as found by the Trial and the Appellate Court
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- (i) the evidence of Thiru Alwarsamy (PW-4) to the effect that he had seen the accused following Thilagavalli in the evening when she was going for answering the call of nature;
- C (ii) the recovery of ornaments worn by Thilagavalli before her death. In that, when the accused was arrested, he had produced the gold chain and the thali bowl, whereas he had agreed to discover the ear stud which he had sold in the shop of Shankar (PW-6);
- D (iii) the blood stained clothes of the accused, which were ultimately proved to be smeared with the human blood.
- E (iv) the non-explanation by the accused of the injuries suffered by him.

F The Trial Court, as well as, the Appellate Court have accepted these circumstances and have come to the conclusion that since the accused is found to be in possession of the ornaments worn by the deceased, he was not only guilty of theft, but also murdering her, relying on Section 114 of the Indian Evidence Act. The Appellate Court has also more or the less accepted all these circumstances and without culling them out in detail in the judgment.

H 5. The Learned Counsel for the appellant urged that none of these circumstances could be held to have been proved against the accused persons and, therefore, the accused was

entitled for acquittal.

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6. As against this, Shri V. Kanagaraj, Learned Senior Counsel, appearing for the State of Tamil Nadu supported the judgment and pointed out that these circumstances ordinarily were enough not only to hold the accused guilty of robbing Thilagavalli of her ornaments, but also committing her murder, which was done in the same transaction.

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7. We would take up the first circumstance. The witness Alwarsamy (PW-4), in his evidence, very clearly admitted that he was not on the talking terms with Thilagavalli, who was none else, but his own sister. At the time when he saw the accused, he (Alwarsamy) was accompanying his real elder brother, namely Ramasubbu. The prosecution did not bother to examine Ramasubbu, though his statement was also recorded. It has come in the cross-examination of this witness that he attended the funeral, though he was on cross terms with the family of the deceased and during the whole funeral, the accused was actually present. What surprises us is that inspite of this, this witness did not say anything either to Subbiah (PW-1), the husband of Thilagavalli or even to the Police and his statement was not recorded for good long three days. Now, if the witness had seen the accused following Thilagavalli and he also knew about the violent death of Thilagavalli, and had seen the accused at the funeral, one wonders as to why the witness kept quiet without telling it to anybody. As if this is not sufficient, Krishnasamy (PW-13), the Investigating Officer was specifically asked the question as to why these witnesses, namely Alwarsamy (PW-4), one Perumalsamy and Ramasubbu were not examined by him. The Investigating Officer has admitted that he could not give any reason for not examining any of these witnesses on the same day. He also claimed that the Investigating agency had suspected the accused only after the examination of Alwarsamy (PW-4) and Ramasubbu. It is an admitted position that the statement of these witnesses were not recorded till 21.1.1995. It was obvious, therefore, that the

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- A delay in recording the statement of these witnesses and the stony silence maintained by Alwarsamy (PW-4) would make him an extremely unreliable witness. In our opinion, the Trial, as well as, the Appellate Court have not given the due weight to this weighty circumstance. The Appellate Court has almost apologetically observed that the prosecution would have done better by examining Alwarsamy (PW-4) without any waste of time. However, the Appellate Court chose to accept his evidence. Unfortunately, the Appellate Court has not even applied its mind to the circumstance that according to this witness, the accused was present in the funeral. That crucial circumstance seems to have been escaped the notice of the Appellate Court. Ordinarily, we would not discuss the evidence in our appellate jurisdiction, however, when it is found that the crucial circumstances have escaped the notice of the Appellate Court and/or the Trial Court, this Court would consider the evidence lest any injustice is caused. In our opinion, the evidence of Alwarsamy (PW-4) should not have been believed. This takes care of the first circumstance.

8. The second circumstance is of course, the recovery of the ornaments from the accused. In this behalf, we must go back to the evidence of Subbiah (PW-1), who in his First Information Report, had mentioned that both the ear studs of Thilagavalli were missing from her body. We have seen the original First Information Report (FIR) where there is a clear reference to a "pair of ear studs". When we see his evidence, there also Subbiah (PW-1) spoke about both the ear studs not being available on her person. It is the prosecution story that after his arrest, the accused confessed that he had sold one ear stud in the shop of Shankar (PW-6), meaning thereby, as if he had removed only one ear stud and the remaining ear stud remained with the dead body. When we see the Inquest Panchanama (Exhibit P-20), it is apparent that there was one ear stud on the body of the deceased. Therefore, this gives a shattering blow, firstly to the evidence of Subbiah (PW-1) and

secondly, to the credibility of the investigating agency. As if this is not sufficient, when the accused was arrested about 12 days after the incident on 1.2.1995, he is said to have confessed that he had sold 'one' ear stud in the shop of Shankar (PW-6). When we see the evidence of Shankar (PW-6), it comes out that the witness said that the accused had come to sell an ear stud, but he had refused to buy, as it was only one piece of ear stud out of the pair that accused had offered to sell. He, therefore, says that he gave one pair of ear stud to the investigating agency, which pair ultimately has come up before the Court as Material Object (M.O.) 7. This gives a shattering blow to the very credibility of the investigating agency, as obviously the pair of ear studs seems to have been seized from the shop of Shankar (PW-6), when the case of the prosecution was that the accused had sold only one ear stud, the other stud having remained with the dead body of Thilagavalli. In his cross examination by prosecution, Shankar (PW-6) was made to say that when the accused came, he had brought one chain and that he would buy the said chain, as it was his business only to sell the ornaments and not to buy the same. The witness also, very significantly, identified the chain being M.O. 5. In his cross examination by the defence, he candidly admitted that M.O. 7 series was 'his' property and that there were number of chains like M.O. 5 Chain, which is a common ornament. He also owned up that he could not give any specification of the chain, as there could be so many wheat design chains like the concerned chain. The other witness, on the discovery, has not been examined. It is, therefore, obvious that the theory of the accused having stolen one of the ear studs of Thilagavalli and then his having sold it in the shop of Shankar (PW-6), is a myth and we are also amazed with the attempt of the investigating agency to replace a pair of ear studs in place of the one concerned ear stud. In fact, in his examination-in-chief, Shankar (PW-6) says that he was called to the Police Station and since that was peak hours, he gave one pair of ear stud. He also identified to the same and there is no question put on the

- A subject of the ear studs at the instance of the prosecution. It is, therefore, obvious that the theory of the immediate possession of the ornaments of Thilagavalli, at least insofar as it relates to the ear studs, must fall down. The investigating agency has not been fair in presenting the pair of ear studs as if those ear
- B studs were recovered from the accused.

9. This takes us to the other two ornaments, namely, gold chain and the thali bowl weighing three sovereign. They are M.Os. 5 and 6. As the prosecution story goes, those ornaments
- C were given by the accused immediately on his arrest near the dispensary of Dr. Anandraj (PW-7). PW-7 has been examined. He does not support either the event of arrest or the recovery of gold ornaments from the accused. The material witness is PW-5 Damodaran. His evidence also does not inspire any confidence. On his arrest, the accused took out M.Os. 5 and
- D 6. In the absence of any positive evidence that the accused was in fact arrested in the dispensary of Dr. Anandraj (PW-7), we do not think that the story of such accidental recovery from the accused is worth believing. It is to be noted that the accused was arrested in this case after 12 days of the incident. It will
- E be unreasonable to believe that the accused would be moving alongwith the ornaments all the time and he would take them to the Doctor, where he had gone for treatment. On this backdrop, when we see the evidence of Krishnasamy (PW-13), he claims that arrest was made on 1.2.1995 on receipt of
- F information, in front of Alangulam Anandraj Hospital in presence of Muthuraj and Damodaran. Very significantly, there is no arrest card prepared by the investigating agency, though it is a common practice in Tamil Nadu to prepare such a card. In the absence of any contemporaneous evidence, we do not think
- G it will be possible for us to hold that the ornaments were found on the person of the accused and he gave away those ornaments with a confessional statement. We have already disbelieved the so-called story of the discovery of a stud at the instance of the accused. Under the circumstances, we do not
- H feel safe to accept the story put forward by the prosecution in

respect of the recovery of these ornaments from the accused. A
The investigating officer Krishnasamy (PW-13), in his evidence,
stated that thereafter at about 9 a.m., he seized the stick (lathi)
and aruval in the presence of same witnesses. Very
significantly, that aruval was never sent for ascertaining as to
whether it had any blood on it and on lathi, there was no blood B
found. Therefore, that is also a most insignificant circumstance.

10. As if all this is not sufficient, when we again go back
to the evidence of Subbiah (PW-1), in his examination-in-chief,
he did not even distantly whisper about the identification of the C
said ornaments nor did he claim specifically regarding any
identifying marks of the said ornaments. The public prosecutor,
who conducted this matter, had probably totally forgotten to get
the ornaments identified at least by Subbiah (PW-1) in his
examination-in-chief. Very significantly, after his cross D
examination was over, it was in his re-examination that for the
first time, the subject of his wife's clothes and jewels worn by
her was broached and he then went on to identify M.O. 1 the
Saree worn by her, M.O. 2 her yellow colour petticoat, M.O. 3
her blue colour blouse, M.O. 4 thali rope, M.O. 5 wheat design
gold chain of three sovereign and M.O. 6 thali bowl. Very E
significantly, he also identified the ear studs, which were M.O.
7 series, in respect of which it is a concluded position that
those ear studs never belonged to his wife and were in fact
given away by Shankar (PW-6). In his cross examination, he
admitted that the chain was made out of the old jewelleries and F
he could not remember the date, on which the chain was made.
This slipshod evidence, therefore, is very hopelessly insufficient
in establishing the fact that the so-called ornaments belonged
to and were on the person of Thilagavalli. We do not know what
was the public prosecutor doing at the time of the examination- G
in-chief and why he did not confront the witness on these
ornaments. We do not know as to how the Trial Court permitted
these questions in re-examination. The purpose of the re-
examination is only to get the clarifications of some doubts
created in the cross examination. One cannot supplement the H

- A examination-in-chief by way of a re-examination and for the first time, start introducing totally new facts, which have no concern with the cross examination. The Trial Court has obviously faulted in allowing such a re-examination. Be that as it may, even if we accept that the Trial Court was justified in allowing the re-examination, the evidentiary value of the contents of the re-examination, in our firm opinion, is nil.

11. This takes us again to the apathy on the part of the Investigating Officer in not getting the ornaments identified by holding a Test Identification Parade. We do not know why that was not done and why such a weak type of evidence (identification for the first time in the Court) was introduced. Therefore, in our opinion, alongwith the first circumstance, second and third circumstance also loses all its significance and it cannot be said that the accused was in possession of the ornaments of Thilagavalli immediately after her death.

12. As regards the fourth circumstance, we think that it was for prosecution to explain the fracture suffered by the deceased. Even otherwise that circumstance is extremely insignificant.

13. It has also come in evidence of Subbiah that the accused was a known person to his family members. One wonders as to why would the accused whom the deceased knew would venture to rob her. Motive of robbery does not seem to be present in the present case. The absence of motive in a case which depended on circumstantial evidence is more favourable to the defence.

14. Shri V. Kanagaraj, Learned Senior Counsel for the State of Tamil Nadu tried to draw some support from the fact that the jacket on the person of the accused was said to have had human blood. In our opinion, this circumstance is insignificant, particularly because the blood group is not tested upon and secondly, it is actually absurd thing that the accused would keep on wearing the same blood stained clothes for 12

days. In short, we are of the clear opinion that both the Courts A
below have erred in convicting the accused of the offences
under Sections 302 and 392 read with Section 397 of IPC. We,
therefore, allow this appeal, set aside both the judgments of the
Trial Court and the Appellate Court and direct the acquittal of
the accused of all the offences. The accused shall be released B
forthwith unless required in any other case.

N.J.

Appeal allowed.

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