

CASE NO.:
Appeal (crl.) 1268-1270 of 1999

PETITIONER:
EZHIL & ORS. APPELLANTS

Vs.

RESPONDENT:
STATE OF TAMIL NADU RESPONDENT

DATE OF JUDGMENT: 24/04/2002

BENCH:
R.P. Sethi & Doraiswamy Raju

JUDGMENT:

RAJU, J.

The three accused In Sessions Case No.11 of 1997 on the file of the Additional District and Sessions Judge, Nagai Quaide-e-Milet District in Tamil Nadu, Ezhil (A-1), Saravanan (A-2) and Mohammed Iqbal (A-3), are the appellants before us. They have been charged for offences under Sections 364, 392 and 302 read with Section 34, IPC, and Section 120B of the Indian Penal Code. After trial and on consideration of the evidence and materials placed on record, the learned Trial Judge found the first accused guilty under Sections 364, 302, 392 and 201, IPC, the second and third accused guilty under Sections 364, 302 read with Section 34, 392 read with Section 34 and 201, IPC. So far as the question of sentence is concerned, the Trial Judge imposed death sentence on the first accused for the offence committed under Section 302, IPC. For the offences committed by the accused Nos.1 to 3 under Sections 364, a rigorous imprisonment for a period of ten years was imposed. For the offence committed by accused Nos.2 and 3 under Section 302 read with Section 34, IPC, they were awarded life imprisonment. For the offence committed under Section 392 by the first accused and accused Nos.2 and 3 for the offence committed by them under Section 392 read with Section 34, IPC, they were awarded rigorous imprisonment for ten years. For the offence under Section 201, IPC, the accused were awarded rigorous imprisonment for five years. The sentences awarded as above, except death sentence, were ordered to run concurrently. So far as the charge under Section 120B, IPC, is concerned, the learned Trial Judge held the same to be not proved against the accused.

Thereupon, the accused filed Criminal Appeal Nos.410, 482 and 492 of 1997, which were taken up for disposal along with R. T. No.4 of 1997 for confirmation of the death sentence imposed on the first accused. A Division Bench of the High Court thought fit to set aside the conviction of the accused under Sections 364 and 201 of IPC. The conviction and sentence imposed by the Trial Court for the offence under Sections 302 and 392, IPC, was upheld, with a modification that all the accused shall stand convicted under Section 392, IPC, read with Section 34, IPC., while choosing not to interfere with the quantum of punishment for the offence under Section 392, IPC. So far as the offence under Section 302, IPC, is concerned, while modifying the death sentence against the first accused into one of rigorous imprisonment for life, such sentence imposed by the Trial Court upon accused Nos.2 and 3 came to be affirmed. Hence, the above appeals.

Shri S. Muralidhar, learned counsel for the appellants, strenuously contended that the various circumstances noticed by the courts below to indict

the accused of the offences found guilty cannot be said to be proved or substantiated beyond reasonable doubt and even the circumstances found substantiated do not go to form the necessary link to constitute a chain inevitably leading to the guilt of the accused of the offences charged with and held proved. According to the learned counsel, not only there is a strong and reasonable doubt about the case of prosecution, but the stand of the accused reasonably and plausibly explains away the circumstances noticed to hold them guilty and consequently the appellants are entitled to an order of acquittal in our hands. Shri S. Balakrishnan, learned senior counsel appearing for the respondent-State, while relying upon the findings of the courts below, contended that the decisions recorded against the accused for the various offences were on a proper and objective consideration of all the relevant materials and the reasons assigned in support thereof were based on overwhelming material available on record and this Court may not be pleased to interfere with the same in this appeal filed invoking the jurisdiction of this Court under Article 136 of the Constitution of India.

In order to appreciate the respective stand of the learned counsel appearing on either side and the legality and correctness of the findings recorded, a brief reference to the relevant materials becomes necessary. PW-4, an Inspector of Police attached to Zam Bazaar Police Station, who was on duty from the midnight of 10.3.94 to check the passing vehicles in Marina at Kamarajar Salai, noticed at 5.00 a.m. in the morning of 11.3.1994 a White Ambassador Car bearing registration No.PY-02-0160 coming from south direction and going towards north very fast and stopped the same for verification. At that time, the Car was found driven by A-3 Mohammed Iqbal, and the other two, namely, A-1 Ezhil and A-2 Saravanan, were seated on the rear seat. When PW-4 questioned them and found their replies to be inconsistent, the Car Dicky was opened and a parcel (M.O.8) bearing a label "A.K.Jamal Mohammed Ihmam Dharan-Madras" was found. When further inquired, A-1 replied that he was coming from abroad and on being asked to show his Passport, a Passport (Ex.P15) bearing No.E.025019 dated 25.5.1988 was produced by him. On further finding that the photograph on the Passport did not match with either A-1 or anyone-else in the Car, the Dicky was said to have been again opened and searched, as a result of which a plastic bag was found concealed under the mat containing a blood stained bed-sheet, a pair of blood stained hawai chappals, a blood stained lungi, a blood stained broken knife and a blood stained cigar lighter. Further questioning resulted in the accused claiming that the third accused was the Driver while the second accused was the Cleaner and the Car was hired by the first accused. When M.O.8, a Car Board Box, was opened, number of foreign goods were found in the same. The Police party got suspicious and took the accused in their custody and seized the Car and all the articles found therein. A mahazar was also drawn in the presence of two independent witnesses, namely, PW-5 Dharman and one Ramu. A list of articles found in the Dicky was drawn up. A few other parcels bearing various names were also found therein, of which one was in the name of A.Faizal and another in the name of S.M.Zinnah. A money purse containing some Indian currency and foreign currency was also found with a driving license in the name of one Jamal Mohammed bearing No.12711-B3/88. After preparing the list of all these articles along with a mahazar, the accused were taken to the Zam Bazaar Police Station and were further questioned. A First Information Report (Ex.P17) was given by PW-4 to the Zam Bazaar Police Station and the same was registered In Crime No.409 of 1994 under Sections 41 and 102, Cr. P.C.

While that be the events at Chennai, at a Village called Nallathur under the jurisdiction of Olakkur Police Station, a resident of the Village, who went near Konnerikuppam bridge to pluck water melons, saw a dead-body lying there. Getting frightened, he ran to the Thalaiyari (menial servant) of the Villages Konnerikuppam, Nallathur and Pallipakkam and gave him the information. Thereupon, the Village Administrative Officer was told about the same at 1.00 p.m., who, after a visit to the spot and personal verification, went to Olakkur Police Station at 2.30 p.m. and lodged the report (Ex.P1), resulting in the registration of a case in Crime No.75/94 under Seciton 174(3), Cr.P.C. An FIR (Ex.P44) was said to have been forwarded to the Judicial Magistrate No.1, Tindivanam. The Sub-Inspector of Police, Olakkur Police Station, thereafter

contacted PW-28, the Inspector of Police, Tindivanam Circle, and informed him about the suspicious state in which the body was found. Thereafter, PW-28 went to Olakkur Police Station at 8.20 p.m. and reached the spot where the dead-body was lying and prepared an observation mahazar (Ex.P3). A rough sketch (Ex.P48) was prepared and arrangements made for taking photographs besides conducting an inquest and preparing a report under Ex.P49. Statements of the witnesses, who had found the body, were also recorded and a seizure mahazar of the articles found on the body being clothes, shoes, socks and some currency notes, etc. was prepared and the body was sent for post mortem examination. From the clothes of the deceased, a Tailor Mark "New Gentle Tailor, Vadakarai" was noticed and PW-26, who was put on the job, contacted PW-16, who not only recognized his own tailoring mark but also the person found in the photograph to be that of one Masukuthu Ali, who was working abroad. Thereafter, the father of the said person was contacted and he could recognize the photo to be of his own son. He was also taken to the Government Hospital at Tindivanam along with the relatives and it was confirmed that the deceased was his son Masukuthu Ali. The post mortem was said to have been conducted at 1.00 p.m. on 12.3.1994 by PW-22, and Ex.P35 report prepared by the Doctor. Thereafter the body was said to have been handed over to the relatives of the deceased.

On 13.3.1994, PW-28 got a wireless message from Zam Bazaar Police Station, pursuant to which PW-25, attached to Olakkur Police Station, was sent to Zam Bazaar Police Station and PW-26 collected the whole file from Zam Bazaar Police Station relating to Cr. No.409 of 1994 and handed over the same to PW-28 at Tindivanam. Thereafter, the case, which was registered by Olakkur Police Station under Section 174(3), Cr.P.C., was altered to Sections 120B, 364, 302, 392, 201 read with Section 34, IPC. At that stage, an Express FIR (Ex.P47) was sent to the Judicial Magistrate at Tindivanam as also to the Metropolitan Magistrate No.13 at Chennai, where the accused were remanded. From the materials gathered, it was found that the deceased was the same person in whose favour the Passport (Ex.P15) was issued, though it was found to have been issued in the name of Abdul Jamal Mohammed. The accused thereafter were taken into the custody by PW-28 on 26.3.1994 and brought to Olakkur Police Station. The accused were taken to the scene of occurrence on 27.3.94 in the presence of PW-6 and another and an observation mahazar (Ex.P18) and a rough sketch Ex.P50 were drawn up. On further investigation, PW-28 went to Neyveli and examined PW-8, who was said to have travelled with the deceased and the accused in the Car in question. The accused were thereupon remanded to judicial custody on 28.3.1994. Thereafter, the Inspector General of Police, Madras Crime Branch, made an order on 27.6.1994 transferring the investigation to CB, CID and PW-29 took up the investigation on 16.10.1994. During the investigation made by him, the statement of PW-14, who was running a Driving School at Myladuthurai, who recognized the photograph in the Driving License (M.O.87) and stated that it was issued in the name of Jamal Mohammed. The photograph on Ex.P12 as also M.O.87 were said to be of the same person and these, as noticed earlier, were recovered from the accused persons on 11.3.1994. The elder sister of the deceased was also examined and seized three Passports of the deceased obtained on different dates, namely, Ex.P8, Ex.P10 as also the Driving License Ex.P12, which stood in the name of Masukuthu Ali. After examining the other witnesses, PW-11, the owner of the Car, PW-12, Van Driver, and PW-10, a friend of the deceased, who last saw him alive and on information given by him, PW-9, working in a Petrol Pump where the car in question was stated to have got 20 liters of diesel filled up, seized Ex.P20 cash bill under proper mahazar in the presence of PW-13 and another. The records and the articles seized by PW-4 on 11.3.1994 at Chennai were thereafter sent to the concerned Judicial Magistrate only on 5.12.1994. PW-29, the Investigating Officer, seized the knife and caused the blood stained articles to be sent for chemical examination through the Judicial Magistrate, Tindivanam, on 13.12.1994 and thereafter the investigation was transferred on 5.1.1995 to PW-30, who was said to have got the left thumb impression of the deceased compared with those found in the other exhibits such as passport applications etc. After completing the investigation, a charge sheet was filed on 25.3.1996 against the accused for offences under Sections 120B, 364, 302, 392, 201 and 34, IPC.

The learned Trial Judge as well as the High Court noticed the following incriminating circumstances lending credence to the prosecution case of commission of the offence by the accused and leading to the guilt of the deceased, namely, (1) that the three accused were together in the Car; (2) that the Car was entrusted to the accused persons, particularly A-3 as its Driver and A-2 as its Cleaner; (3) that the Car in which all the three accused were, when it was intercepted at Marina at Chennai, was found carrying the articles, which were proved to be that of the deceased as also those entrusted to him by others and were in his possession; (4) that when PW-4 asked A-1 to show the Passport, he produced the same which really belonged to the deceased and from the suitcase of the deceased found in the Dicky even the driving license of the deceased was retrieved; (5) that all the recoveries of the articles from the car were on the early hours of 11.3.1994 even prior to the discovery of the body of the deceased in almost less than 24 hours; (6) that the articles with blood stains, particularly the bed-sheet, lungi and chappals recovered from the car, were found vide the Serologist Report (Ex.P43) with human blood and there is absolutely no reasonable explanation for the same; (7) that the accused did not give any reasonable explanation for all the stolen articles being found in their possession immediately after the occurrence; (8) that the deceased was serving in Saudi Arabia and when he was due to visit India, he was entrusted with certain articles by PW-15 and PW-23 also, which were identified and proved by them; (9) the arrival of the deceased at Chennai Airport at 6.30 a.m. on 10.3.1994; (10) the recovery of dead-body of Masukuthu Ali and the articles; and (11) the accused showing the scene of offence when taken by PW-26. The High Court, in spite of expressing certain doubts as also want of faith on some of the witnesses and the statements in Court and recording its inability to agree with the observations of the Trial Court in relation to such aspects, chose to place strong reliance upon the recovery of the articles belonging to as well as in the possession of the deceased when he arrived from abroad from the possession and custody of the accused shortly after the commission of the offence and applying the presumption in Illustration-(a) to Section 114 of the Indian Evidence Act and noticing the absence of any plausible or reasonable explanation for being in possession of those articles, finally held that notwithstanding the fact that they cannot be convicted under Sections 364 and 201, IPC, the conviction under Sections 302 and 392 read with Section 34, IPC, would stand affirmed.

The case rests purely on circumstantial evidence and the most vital circumstance to prove the case of the prosecution is the recovery of the articles belonging to and in possession of the deceased as well as the blood stained articles from the car in the exclusive possession of the accused, about which there could be no reasonable or plausible explanation by any of the accused. Since the questions very much depend upon the drawl of presumptions engrafted in Section 106 and illustration (a) to Section 114 of the Evidence Act, over which only there has been serious contest by the learned counsel for the appellant, it is appropriate to notice the principles governing the same, before undertaking any consideration of the justification to apply them to the facts of the case. The entire case law on the subject has been extensively reviewed by this Court in a decision reported in Sanjay Alias Kaka vs State (NCT of Delhi) [2001(3) SCC 190] authored by one of us (R.P.Sethi, J) and it was held that courts can draw presumptions under Section 106 and illustration (a) to Section 114 of the Evidence Act, and to attract and apply illustration (a) to Section 114 the nature of evidence adduced must be seen to find, among other things the 'important time factor'. Though no standard time limits can be fixed to determine whether the possession is recent or otherwise, each case must be judged on its own facts and in a case where there is no plausible explanation by the accused for lawful possession of the articles belonging to the deceased, immediately after the murder, the courts cannot be held to be in error in considering that murder and robbery were integral parts of the same transaction giving rise to the presumption that the appellants not only committed the murder of the deceased but also committed robbery of articles found in the possession of the deceased. As observed by this Court in State of West Bengal vs Mir Mohammad Omar & Others [2000(8) SCC 382], the pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine, admitting no process of an intelligent reasoning even when the doctrine of presumption considered to be not a rule alien to the above has become

statutorily recognized and engrafted in Section 114 and other provisions of the Evidence Act. Permitting a presumption of fact, otherwise doubtful, by a process of reasoning and inference from other proved facts having regard to the common course of natural events, human conduct etc., in relation to the facts of the case, was found necessary by the legislature to ensure a rational, realistic and genuine approach while administering justice in criminal trial for arriving at the truth and there is no scope for adopting any hyper technical approach or extend undue latitudes in favour of the accused, which only tend to cause erosions in the maintenance of law and order in society otherwise essential in the larger interests of society and mankind.

So far as the case on hand is concerned some of the basic and vitally important facts necessary for drawing the presumption by applying illustration (a) to Section 114 of the Evidence Act, are found to have been substantiated and proved beyond reasonable doubt, by overwhelming evidence on record. That the car in question (M.O.91) belonging to PW-11 was entrusted to the third accused and the second accused, the cleaner also accompanied him from Karaikal and they reached Madras Airport by about 2 a.m. on the early hours of 9.3.94 and that on 9.3.94 at 7 a.m. the third accused, who knew earlier the first accused and who used to hire persons for his car at the airport was met and asked whether there are any parties available to return back and from that time onwards till, all the accused were found together in the car when they were intercepted, interrogated and articles seized from the dickey of the car stand proved by the very admissions made in the written statement filed by the third accused under Section 233 (2) of the Cr.P.C. and also stated to have been adopted by the other accused. The presence of all the accused in the car when the same was intercepted and interrogated on the Marina at Chennai with all the articles recovered, in the dickey of the car have been found established by other evidence, even dehors the written statement.

The further facts found proved are that the dickey of the car contained seven parcels of which one was bearing label "A.K. Jamal Mohammed Thamam Dharam-Madras" M.O.8. PW-15 Fazhil Mohammed, who claimed to know the deceased and working in abroad in 1994, has stated that he sent the parcel and the articles in the parcels M.O.96 and M.O.97, identified by him to be the very same carried in the name of A. Faizal. All the seven parcels were found to contain clear cut address slips and noticed even in the mahazar Ex.P16 prepared by PW-4 and the First Information Report Ex.P17. PW-23, S.M. Jinnah, was, at the relevant point of time, working in Saudi Arabia and who knew the deceased working at Thamam also claims to have sent one parcel on 5.3.94 to be delivered to his house at Vadakarai Village, containing M.O.s.15, 18, 19, 24 series, 102 series, 29 series and M.O. 103. Serial No.67(f) mentioned in Ex.P16 bearing the name S.M. Jinnah refers to textile parcel and conforms to the relevant M.Os. Entries at serial No. 2, 6, 7 and 12 conformed to the other articles covered by the M.Os., in respect of which no challenge seem to have been made also in the cross examination. The passports and the driving licence, which belonged to the deceased, though in different names but the identity of the person from the photo in all of them pointing towards the deceased stood established firmly and remained un-assailed. The blood stained articles recovered from a plastic bag, concealed under the mat in the dickey of the car viz., (1) Metal blade (2) Cigar lighter (3) Bed sheet, (4) Chappals and (5) Lungi were sent to chemical examination and the bed sheet, chappals and lungi were found to contain human blood, though due to disintegration, the further grouping or classification in respect of others were found not possible. The ring M.O.89 and watch M.O.90 belonging to the deceased and some of the exclusive personal belongings such as purse, passport were also seized from the car. Though an attempt has been made to disown recovery of these from their possession, the claims and stand taken in this regard on behalf of the accused seem to be not only farfetched but such stories do not inspire any confidence and in our view have been rightly rejected by both the courts below, for valid and just reasons after a proper appreciation the same. There is no justification to discredit, disbelieve or reject the evidence of PW-4 who handled the case from the time of interception till submission of the report and production of the materials recovered before the Court at the first time.

The interception and initial interrogation of the accused in the car was at about 5 a.m. on 11.3.94 and after preparation of mahazar, they were taken to the Zam Bazaar Police Station by 8 a.m. and after further formalities undertaken and preparation of the printed FIR Ex.P17, the accused and the evidence gathered were sent under Form No.95 to the 13th Metropolitan Magistrate Court. In the meanwhile, as noticed earlier at about 12.30 p.m. on 11.3.94 PW-2 first saw the dead body and by about 2.30 p.m. the complaint Ex.P1 was prepared by the village Administrative Officer and lodged with Olakkur Police Station. On receipt of the information from the Sub Inspector, the Inspector of police, Tindivanam, went to the said Police Station at about 3.20 p.m. and after holding inquest and the usual and necessary formalities sent the dead body to the Government hospital by 11 p.m. The autopsy was conducted by PW-22, the Government Doctor at 1 p.m. on 12.3.94 and the post-mortem report Ex.P35, as well as final opinion marked as Ex.P33 (a) was prepared showing that injury No.1 sustained by the deceased could be fatal and cause death and could have been caused by a stab inflicted with the knife M.O.12. During the course of trial, the Doctor opined that the deceased might have died 48 hours prior to the autopsy and the same helped the Courts to fix the death somewhere prior to 1 p.m. on 10.3.94 or within 12 hours prior to that. The death indisputably was a homicidal death.

Though, the learned counsel for the appellants attempted to discredit the evidence by pointing out some minor variations and contradictions, we are of the view that the appreciation of evidence by the High Court, and broadly even by the Trial Court, could not said to be either arbitrary or perverse or considered to suffer any patent infirmities or illegalities so as to vitiate the findings. It is not every discrepancy or contradiction that renders the witness or evidence tendered by him unacceptable or tainted so as to call for their rejection in toto. On a consideration of the evidence, to which our attention has been invited and on going through the judgments of the courts below, particularly of the High Court, we find that the evidence has been carefully scrutinized noticing the contradictions and infirmities wherever found and properly marshelled and analyzed before affirming the verdict of guilt recorded by the Trial Court in respect of offences under Sections 392 and 302 read with Section 34, I.P.C.

The possession by the accused, no doubt in the dicky of the car entrusted to the third accused, in which along with him only the 1st and the 2nd accused alone were found present at all relevant and material points of time, of the articles belonging to as well as those supposed to be in the possession of the deceased having been entrusted with them by PW-15 and PW-23 and others, as per the address slips found on the parcels, some of whom are the personal belongings of the deceased, which should have been only in his custody, have been substantiated by the prosecution by cogent and convincing evidence and accepted concurrently by both the courts below. Such possession by the accused is very much proximate in point of time to the death of the deceased to constitute whole thing an integrated affair and the controversy sought to be raised about the actual date of arrival (whether it is 9th or 10th March, 1994) even pales into insignificance, with the strong material glaringly staring against the accused. The accused have not been able to properly or reasonably explain as to the legitimacy or origin of their possession of the articles carried by the deceased when he arrived from abroad at the airport at Chennai. In such circumstances, since the facts relating to the same being especially within the exclusive knowledge of the accused, the legislature engrafted a special rule in Section 106 of the Evidence Act, to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. The appellants in this case have miserably failed to explain their lawful possession of those articles with them that really belonged to and were in the possession of the deceased when he landed at the airport at Chennai. Consequently, it was legitimate for the courts below, on the facts and circumstances of this case, to draw the presumption not only of the fact that they were in possession of the stolen articles after committing robbery but also committed the murder of the deceased, keeping in view the proximity of time within which the act of murder was supposed to have been committed and body found and the articles recovered from the possession of the accused. The

conclusions, in this regard, concurrently recorded by both the courts below are unassailable and do not call for our interference, within the area permissible for interference in an appeal entertained under Article 136 of the Constitution of India only wherein it is shown that on the proved facts wrong inference of law has been drawn or the conclusions on facts are manifestly perverse and based on no evidence. No such infirmities could be successfully substantiated on behalf of the appellants in this case, to warrant any such interference.

So far as the quantum of sentence also we are not persuaded to differ from the view taken by the courts below. A grave act of depravity, to kill an innocent person only for the purpose of enriching themselves of the fortunes brought by the deceased, who unaware of their diabolical scheme got lured into their company for a safe travel to his destination, deserves to be dealt with iron hand and the imposition of 10 years rigorous imprisonment for the offence of robbery under Section 392, IPC and rigorous imprisonment for life for the offence of murder under Section 302, IPC cannot be considered to be either harsh or so grossly disproportionate as to shock the conscience of this court. The appeals fail and shall stand dismissed.

..J.
[R.P. Sethi]

..J.
[Doraiswamy Raju]

April 24, 2002.