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TAMILSELVAN

v.

STATE REP. BY INSPECTOR OF POLICE, TAMIL NADU
(Criminal Appeal No. 1071 of 2006)

B

AUGUST 5, 2008

(ALTAMAS KABIR AND MARKANDEY KATJU, JJ.)

Criminal Trial:

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Murder/Culpable homicide – Accused sandalwood smugglers allegedly shot down a forest guard and injured others – Trial Court found six accused persons guilty of committing offence of murders punishable under S.302 IPC and sentenced them to life imprisonment – High Court acquitted all the accused except appellant – Correctness of – Held: Nobody named as accused in FIR but later accused persons by name have been implicated – Material inconsistencies found between version given in FIR and deposition made before trial Court – Prosecution witnesses could not have identified any of the accused merely by moonlight or in the light of a torch allegedly carried by accused – Thus, identity of accused not satisfactorily established – On facts, prosecution failed to prove its case beyond reasonable doubt – Since case of accused-appellant not different from accused nos.2 to 6 who have been acquitted by the High Court, conviction of appellant no.1 alone can not be upheld – At any event, in the facts and circumstances of the case, benefit of doubt has to be given to appellant.

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Informant, a Forest Guard lodged an FIR in the Police Station stating that some Sandalwood Smugglers shot down a forest guard and injured a gardener while they were on vigilance duty in the forest area. Police investigated the matter and submitted the charge sheet against the accused persons. Trial Court found accused nos.1 to 6 guilty of committing the offence of murder punishable under S.302 IPC and sentenced them to life im-

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prisonment. On appeal, the High Court acquitted accused nos. 2 to 6 but upheld the conviction and sentence as against accused No.1. Hence the present appeal. A

Allowing the appeal, the Court

HELD: 1.1 On perusal of the FIR, it appears that nobody has been named as an accused in the FIR. The accused have been described as unidentified persons in a group consisting of 50 persons. The FIR was lodged on 28.1.1996 at 6.30 a.m., whereas the date and time of the occurrence was 27.1.1996 at 10.30 p.m. Thus there is a time gap of eight hours between the time of the occurrence and the lodging of the FIR. (Para – 6) [893-E-F] B C

1.2 Various material inconsistencies have been found between the version given in the FIR and in the deposition before the trial court. It is difficult to accept the version of the prosecution witnesses that they could have identified any of the accused merely by the moonlight. In the evidence of the prosecution witnesses it is stated that the accused were carrying torches, but there is no indication whether the victims, including the deceased, the Forest Guard and other a Gardener, who sustained fire injuries, carried torches. Since it was the accused who allegedly carried torches, it is difficult to believe how the prosecution witnesses could have identified the assailants. The position would have been different if the forest guards had been carrying torches and had been pointing them at the assailants, but here the position is just the reverse. In fact due to the torches of the assailants the prosecution witnesses would have been partially blinded by the light of the torch, and would not have been able to identify anybody. (Paras – 7 & 9) [893-G,H, 894-C-D] D E F G

1.3 Nobody has been named as an accused in the FIR. It is only later that the accused 1 to 6 have been implicated by name. The FIR was lodged 8 hours after the incident. Thus there was opportunity of subsequent improve- H

A ment in the prosecution case. PW 1, the Forest Guard,
the first informant, has stated in his deposition before the
Trial Court that he had not mentioned the names of the
accused in the FIR because he was shocked due to the
assault and because of the death of the another Forest
B Guard, and hence the names of the accused did not strike
his mind. This version of the informant cannot be accepted
because the FIR was not lodged immediately after the in-
cident, but 8 hours thereafter. Hence the shock in the mind
of the informant would have subsided after these 8 hours,
C and there was no good reason why he did not name the
accused in the FIR, if he had actually seen and identified
them. (Para – 10) [894-E-F,G,H]

1.4 PW-3, the Gardener, in his evidence has stated that
he told the police during the investigation that some uni-
D dentifiable unknown persons had fired on him and others.
This also corroborates the defence version that in fact no
assailant was identified by the prosecution witnesses, and
it was only a subsequent improvement which was sought
to be made in the prosecution case. PW. 3 has also stated
E that after the incident the police inspector did not ask him
to identify the accused. Since he has stated that unidenti-
fied persons had fired on him and the deceased, his ver-
sion in the examination-in-chief that accused no.1 had fired
at them cannot be believed. This Court is of the opinion
F that unidentified persons fired at the deceased and another.
At any event, the benefit of doubt has to be given to the
appellant. (Paras – 14 & 15) [895 G,H, 896-B,C]

1.5 Another inconsistency in the deposition of the
informant, PW 1 is that while in his cross-examination he
G has mentioned that accused no.1 had fired from a coun-
try made gun due to which the deceased, the Forest Guard
and another, the Gardener sustained fire injuries, but in
his cross-examination he has stated that when accused
no.1 fired at him nothing happened to him or others but
H only the Gardener sustained wounds. There is no men-

tion in the cross examination that deceased also sustained fire injuries by the firing of accused no.1. (Para – 11) [895-A,B,C]

2.1 It appears from the evidence that about six unidentified persons had fired which caused the death of a forest Guard and injuries to a Gardener, and that the rest had thrown stones, but the identity of these assailants was not satisfactorily established, particularly since it was 10.30 p.m. in the night and there was no light except moonlight. It would be unsafe to uphold the conviction of the appellant on these facts, and the appellant has to be given the benefit of doubt which is an established principle in criminal law. Furthermore, there is no evidence to indicate that of the six persons who are alleged to have fired, it was the shot fired by the appellant which caused the death of the deceased. (Para – 12) [895 C D E]

2.2 The case of the appellant is not very different from that of accused nos. 2 to 6 because in the evidence it has been stated that all the six accused had fired. Since accused 2 to 6 have been acquitted, conviction of appellant no.1 alone cannot be upheld. (Para – 13) [895 E,F]

2.3 On the facts of the case the prosecution has not been able to prove its case beyond reasonable doubt. Hence, the conviction of the appellant under Section 302 and other provisions of IPC is set aside. (Para – 17) [896 E,F]

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal
No. 1071 of 2006

From the final Judgment and Order dated 9/11/2004 of the High Court of Judicature at Madras in Criminal Appeal No. 1438 of 2002

M. Karpaga Vinayagam, B. Balaji, R. Rajeswaran,
Vinayagam Balan and Satya Mitra Garg for the Appellant.

V.G. Pragasam for the Respondent.

A The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. This appeal has been filed against the impugned judgment of the Madras High Court dated 9.11.2004 in Criminal Appeal No. 1438 of 2002.

B 2. Heard learned counsels, Shri M. Karpagavinayagam for the appellant and Shri V. Kanagaraj for the respondents.

C 3. Before the Trial Court there were 10 accused persons accused under Section 302 and other provisions of the IPC. Accused nos.1 to 6 were found guilty under Section 302 and the other provisions of the IPC by the Trial Court and they were convicted to life imprisonment and awarded various other punishments under various other provisions of the IPC.

D 4. On appeal before the High Court, accused nos.2 to 6 were acquitted but the conviction of accused no.1, the appellant before us, under Section 302 etc. was upheld. Aggrieved, the accused no.1 has filed this appeal before us.

5. The F.I.R. in the case was filed by one S. Elangovan, Forest Guard. The FIR reads as follows:

E "To the Inspector of police, Ayilpatti police station, subject the complaint regarding the death of Shri Swaminathan, Forest Guard, due to the firing of sandal wood smugglers in Pilenadu reserved forest during the prevention of smuggling activity duty. Humbly submitted, yesterday
F 27.1.1996 night about 10.30 p.m. myself along with Shri Kaliaperumal, Forest Guard of Pilenadu Beat, Shri Ramalingam, Forest Guard of Pudupatti West beat, Shri Rajendran, Forest Guard of Pilenadu North beat, Shri Swaminathan, Forest Guard of Namakkal range currently
G in the special duty in Rasipuram range. Chinnamnian Forest Guard and Raja the gardener were performing the vigilance duty in Kolladedu passage in Vialankuttai in Kanavai Patti village which is about ½ kilometers from the eastern boundary in Pilenadu Reserved Forest. At that
H time we saw a crowd coming towards us having

sandalwood logs on their heads. They alerted ourselves and I fired in the air once with my double-barreled gun, warning them to download the wooden blocks. Immediately the assailants also fired at us from their direction. Mr. Ramalingam, Forest Guard, who was standing near to me, also fired once cautioning the assailants. We came to know that the assailants would be in a group of 50 to 60 in numbers. The above said persons after downloading the wooden blocks came towards us pelting stones and firing at us. That time Shri Swaminathan among us fell down on the spot after being shot down. As there was threat to our lives we ran away from the spot and came out of the reserved forest. After coming out of the forest I gave information to the Forest Ranger. The Forest Ranger came with a team and along with them I visited the place of occurrence. We found Swaminathan lying dead in a pool of blood. The sandalwood smugglers were not on the spot. We made arrangements for protection of the dead body and this complaint has been submitted after coming to the police station, Ayilpatti. I humbly request you to take action on my complaint. Copy to the Forest Ranger of Rasipuram for appropriate action".

6. On a perusal of the above FIR, it appears that nobody has been named as an accused in the FIR. In column 6 at the beginning of the FIR the accused have been described as 'unidentified persons in a group consisting of 50 persons'. This FIR was lodged on 28.1.1996 at 6.30 a.m., whereas the date and time of the occurrence was 27.1.1996 at 10.30 p.m. Thus there is a time gap of eight hours between the time of the occurrence and the lodging of the FIR.

7. Although nobody was named in the FIR as an accused, Elangovan, Forest Guard (who lodged the FIR) in his deposition before the Trial Court has named accused 1 to 6 as the persons who fired guns in the incident. We have carefully gone through the evidence before the Trial Court and we find various material inconsistencies between the version given in his FIR and in the deposition before the trial court.

A 8. Before dealing with these glaring inconsistencies it may
be pointed out that the incident occurred at 10.30 p.m. on
27.1.1996. It is alleged by the prosecution witnesses that they
identified the accused in moonlight. We find it difficult to accept
this version of the prosecution witnesses that they could have
B identified any of the accused merely by the moonlight. In the
evidence of the prosecution witnesses it is stated that the ac-
C cused were carrying torches, but there is no indication whether
the victims, including the Forest Guard Swaminathan (de-
ceased) and Raju, Gardener, who sustained fire injuries, car-
ried torches.

9. Since it was the accused who allegedly carried torches,
we find it difficult to believe how the prosecution witnesses could
have identified the assailants. The position would have been dif-
ferent if the forest guards had been carrying torches and had been
D pointing them at the assailants, but here the position is just the
reverse. In fact due to the torches of the assailants the prosecu-
tion witnesses would have been partially blinded by the light of
the torch light, and would not have been able to identify anybody.

E 10. As regards the material contradictions we have already
stated above that nobody has been named as an accused in
the FIR. It is only later that the accused 1 to 6 have been impli-
cated by name. It has already been noted above that the FIR
was lodged 8 hours after the incident. Thus there was opportu-
nity of subsequent improvement in the prosecution case. PW
F 1- Elangovan, who was also the first informant, has stated in his
deposition before the Trial Court that he had not mentioned the
names of the accused in the FIR because he was shocked due
to the assault and because of the death of Swaminathan, and
hence the names of the accused did not strike his mind. We
G find it difficult to accept this version because the FIR was not
lodged immediately after the incident, but 8 hours thereafter.
Hence the shock in the mind of Elangovan would have been
subsided after these 8 hours, and there was no good reason
why he did not name the accused in the FIR, if he had actually
H seen and identified them.

11. Another inconsistency in the deposition of Elangovan is that while in his cross-examination he has mentioned that accused no.1 (the appellant herein) had fired from a country made gun due to which Swaminathan the Forest Guard and Raju the Gardener sustained fire injuries, but in his cross-examination he has stated that when accused no.1 fired at him nothing happened to him or others but only Raju sustained wounds. There is no mention in the cross examination that Swaminathan also sustained fire injuries by the firing of accused no.1. Thus this is also a material inconsistency in the statement of PW1- Elangovan.

12. It appears to us from the evidence that about six unidentified persons had fired which caused the death of Swaminathan and injuries to Raju, and that the rest had thrown stones, but the identity of these assailants was not satisfactorily established, particularly since it was 10.30 p.m. in the night and there was no light except moonlight. In our opinion it would be unsafe to uphold the conviction of the appellant on these facts, and the appellant has to be given the benefit of doubt which is an established principle for criminal law. Furthermore, there is no evidence to indicate that of the six persons who are alleged to have fired, it was the shot fired by the appellant which caused the death of Swaminathan.

13. We are also in agreement with Shri Karpagavinayagam, learned counsel for the appellant, that the case of the appellant is not very different from that of accused nos. 2 to 6 because in the evidence it has been stated that all the six accused had fired. Since accused 2 to 6 have been acquitted we cannot uphold the conviction of appellant no.1 alone.

14. PW-3 Raju in his evidence has stated that he told the police during the investigation that some unidentifiable unknown persons had fired on him and others. This also corroborates the defence version that in fact no assailant was identified by the prosecution witnesses, and it was only a subsequent improvement which was sought to be made in the prosecution case.

A 15. It is curious to note that while PW-3 Raju mentioned in his examination-in-chief that the appellant had fired with a country made gun which caused Swaminathan and him to sustain injuries, in his cross-examination he has stated that in the police investigation he said that unidentified and unknown persons fired at them. This is another glaring inconsistency in the deposition of PW3-Raju. Raju has also stated that after the incident the police inspector did not ask him to identify the accused. Since Raju has stated that unidentified persons had fired on him and Swaminathan, his version in the examination-in-chief that accused no. 1 had fired at them cannot be believed. We are of the opinion that unidentified persons fired at Swaminathan and Raju. At any event, the benefit of doubt has to be given to the appellant.

D 16. Learned counsel for the appellant made several other submissions before us e.g. that no stones were recovered, there were no stone injuries on anyone, there were no weapons on accused 1 to 6 at the time of their arrest, the pellets were not sent for chemical examination, there was no test identification parade, etc. but it is not necessary for us to go into these submissions.

F 17. On the facts of the case we are of the opinion that the prosecution has not been able to prove its case beyond reasonable doubt. The appeal is, therefore, allowed. The conviction of the appellant under Section 302 and other provisions of IPC is set aside. The appellant shall be set at liberty forthwith unless required in some other criminal case.

18. Before parting with the case we would like to state that learned counsels for both the parties argued the case before us with great ability and deep knowledge of criminal law.

S.K.S.

Appeal allowed.