

BAIL SLIP

The Appellant/Accused namely Shankar S/o.Mohan was directed to be released on bail by the order of this Court dt.15.12.14 made in MP.No.1/14 in CrI.A.No.613/14.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.06.2015

CORAM:

THE HON'BLE MR.JUSTICE P.DEVADASS

CrI.A. No.613 of 2014

Shankar ... Appellant /Accused

Vs.

State rep. by
B-2 Vishnu Kanchi Police Station,
Kancheepuram District.
(Cr.No.293/2011)

... Respondent/Complainant

Petition filed under Section 374(2) of the Code of Criminal Procedure, to call for the records in S.C.No.75 on the file of the Learned Sessions Judge-II, Kancheepuram, Kancheepuram District and set aside the judgment dated 28.02.2013.

For Petitioner : Mr. E.Kannadasan

For Respondent : P.Govindarajan,

Additional Public Prosecutor.

O R D E R

The sole accused, who is stated to be a transgender is the accused in the Sessions case in S.C.No.75/2011 on the file of Sessions Court No.II, Kanchipuram.

2. In the said court he was tried for an offence under Section 302 IPC. Ultimately, the trial court convicted him under Section 304 (i) and sentenced him to undergo 7 years R.I. and fined him Rs.2000/- , i/d. 6 months R.I.

3. The case of the prosecution runs as under:

(1) PW2 Subhashini's husband is Vinoth @ Selvakumar. On 07.05.2011, at about 10.30 a.m., he was lastly seen alive. On that day, at 6 p.m., behind Udayam Theater in Reddipettai, Kanchipuram, he was found dead with head injuries. On the same day, at about 9 pm, at the B2 Vishnu Kanchi Police Station, Kancheepuram, PW1 Sridharan, brother of PW2 gave Ex.P1 complaint to Santharaj, Inspector of Police. He registered this case for an offence under Section 302 IPC. (Ex.P.11 F.I.R). He sent the express F.I.R to the concerned court.

(2) Inspector Santharaj took up his investigation. He visited the scene place. Drew Ex.P.12 Rough sketch. In the presence of PW6 Siva and one Elangovan, prepared Ex.P3 Observation Mahazar. In their presence, the Inspector recovered the blood stained sand (M.O.2), ordinary sand (MO3), blood stained cement portion (MO1) under Ex.P4 Mahazar. The Inspector also seized a lady's bicycle (M.O.4) under Ex.P5 Mahazar. He examined the witnesses and recorded their statement. In the presence of Panchayathars, he held inquest over the dead body (Ex.P13 Inquest Report). He requested the hospital authorities to conduct postmortem on the dead body of the deceased.

(3) On 08.05.2011, at the Government Headquarters Hospital, Kanchipuram, PW11 Dr.Durai conducted postmortem on the dead body of the deceased and found the following:

"Laceration lower eye lid 3 x 2 x 1 crush injuries. Occipital region. Laceration above L1 Nabal L Eye multiple injuries in two fold. Frontol bone fracture. Head injury. Skull fracture".

(4) PW11 issued Ex.P.10 Postmortem certificate opining that the deceased would have died of the head injuries.

(5) After postmortem, the Head Constable recovered the blood stained colour pant(M.O.7), blood stained fullhand shirt (M.O.8), inner garment(M.O.9) from the dead body and handed over them to the Investigation Officer. He recovered them under Form-95(Ex.P14). The corpse was handed over to the relatives to conduct last rites. The Investigation Officer handed over the case-properties to the court. He requested the court to send the blood stained items to chemical lab for analysis and report.

(6) On 15.05.2011, at about 9 a.m, when PW8 Selvakumar, VAO was in his office at T.K.Nambi street, Kanchipuram, the accused appeared before him. He confessed that he offered to have oral sex with the deceased for Rs.150, however, the deceased refused to pay him, so he put a big boulder on his head and he died. PW8 reduced the said extra-judicial confession into writing. It is Ex.P6. Thereafter, he produced the accused along with his letter Ex.P7 to the Investigation Officer. The Investigation Officer received them. The accused gave him Ex.P17 confessional statement and in pursuance of that, the accused took him to a place near Udayam Theatre. The accused was sent to court for judicial custody. Subsequently, PW12 Mathivanan, Inspector of Police, continued the investigation. He received Ex.P19 Scientific Report. After completing the investigation, PW12 filed the Final Report for an offence under Section 302 IPC as against the appellant before the concerned court.

4. The case was committed to the court of Sessions. The trial court upon hearing both and on consideration the Final Report and the documents attached there to framed a charge under Section 302 IPC as against the accused.

5. The accused pleaded not guilty to the charge.

<https://hcservices.ecourts.gov.in/hcservices/>

6. To substantiate the charge, prosecution examined PWs1 to 12, marked Ex.P1 to Ex.P.19 and exhibited MOs.1 to 9.

7. On the incriminating aspects in the prosecution evidence, the trial court examined the accused under Section 313 Cr.P.C.

8. He denied his complicity in this case. He did not examine any witness nor mark any document on his side.

9. Appreciating the above evidence, the trial court convicted and sentenced him as stated in para 2, supra.

10. According to the learned counsel for the appellant, Ex.P6, the alleged extra-judicial confession of the appellant to PW.8, VAO is not voluntary, is not genuine and it is concocted. The evidence of PW7 establishes this aspect. In such circumstances, Ex.P6 have to be eschewed from our zone of consideration and consequently Ex.P17 confession to police also liable for rejection. When they are so excluded, nothing incriminating remains as against the appellant. However, this vital aspect has been missed by the trial court. The trial court placed heavy reliance on the evidence of PW8 VAO and Ex.P6 to mulct the appellant with criminal liability. In the facts and circumstances, the appellant is entitled to the benefit of doubt.

11. On the other hand, the learned Additional Public Prosecutor submitted that the extra-judicial confession is also a good piece of evidence. The charge against the accused has been substantiated by the evidence of PW8 and Ex.P6. In such circumstances, trial court convicted him and taking note of the mitigating circumstances, it had awarded him only a lesser sentence.

12. I have anxiously considered the rival submissions, perused the Impugned judgment and the evidence on record.

13. Now, the question is whether the accused has committed an offence under Section 304(i) IPC.

14. In this case, it is beyond doubt from the evidence of PW11 the autopsy Doctor that the deceased died due to homicidal violence. (See Ex.P10 Postmortem Certificate). Question is whether it was caused by the appellant.

15. The specific allegation as against the appellant, a transgender is that he has demanded Rs.150/- from the deceased for oral sex, since he refused, the accused killed him by putting a big boulder (MO1) on his head.

16. In this case, prosecution pressed into service Ex.P6 extra-judicial confession stated to have been given by the accused to PW8 VAO and Ex.P17 confessional statement by the accused to the Investigation Officer.

17. PW8 stated that on 15.05.2011, at about 9 a.m., when he was in his office, the appellant appeared before him and recounted that he had killed Vinoth @ Selvakumar because he has refused to give him Rs.150/- for oral sex with him, by putting MO1 Slab stone on the head of the deceased and Ex.P6 is his extra-judicial confession. This piece of evidence was accepted and acted upon by the trial court to record a finding of guilty as against the accused.

18. Section 17 of the Indian Evidence Act deals with 'Admission.' 'Admission' if refers to rights and liability, it relates to a civil case. But, when it contains an acknowledgment of committing a crime/confessing the commission of a crime, it is 'confession'. Thus, confession is a species of the generic 'admission'.

19. As per Section 25 of the Indian Evidence Act, 'confession made to police is inadmissible'. The said bar has been stressed again in 1st part of Section 26 of the Act and the embargo was partially lifted in Section 27 of the Act to the extent it leads to a recovery. The said bar is against using it to record a conviction as against a person. When confession has been made to any one other than a police person, then it is admissible under Section 24 of the Evidence Act as it is the extra-judicial confession of the accused. It is also accepted as a relevant piece of evidence, because it emanates from the very accused. It comes from the very horse's mouth. But, there is danger always, because of its nature, stature and stage. Generally, when such extra-judicial confessions comes to picture, already police will be doing their job and F.I.R will be already registered. Extra judicial confessions are branded as weak-piece of evidence.

20. Thus, courts must be extra cautions in scanning the extra judicial confessions. To assess them various tests have been laid down by our Hon'ble Apex Court in several cases. The extra-judicial confession must be voluntary, genuine, true, not snatched from the mouth of a person, not obtained from him under coercion, duress by employing some third decree methods or by giving him some sort of allurements, or by torturing/ favouring a person/s, in whom the accused is interested. This is not a rule of law, but rule of prudent.

21. There is no harm or wrong in a person making extra-judicial confession to a VAO. As it has been remarked that an VAO is an obliging witness court must be doubly cautious unless the extra-judicial confession is stated to have been made before a VAO. Extra judicial confession mostly pressed into service by police in very grave crime cases. The evidence of the person to whom, the accused has given extra judicial confession, must inspire confidence in him. It should not be unnatural. Instead a stranger, when the extra-judicial confession is given to a person with whom normally the accused reposes confidence, for instance his teacher, his professor, his Guru, a close relative of him. Further, the court delve deep into the contents of extra-judicial confession to see whether it suffers from any inherent improbabilities. Court should also verify, cross check the extra-judicial confession with other materials on record to assure itself the genuineness of the extra-judicial confession. These tests appears to be very rigorous. But, deprivation of one's personal liberty, displacing of one's '(human) right of presumption of innocence must be strictly in accordance with law, as suspicion and the surmises, however, strong may not take the place of legal proof.

22. Now, in this case, as per the prosecution, on 15.05.2011, at about 9 a.m., in the office of PW8, the accused gave Ex.P6 extra-judicial confession containing the entire prosecution version of the case. The accused used to have shelter in PW7 Mallika's house. PW7 knows the accused very well. According to her, on 14.04.2011, at about 7 p.m., when the accused came to her house, she told him that one Vinoth was found dead behind Udayam Theatre, at that time, police men accompanied by two persons came to her house and took him away with them. Prosecution did not declare PW7 hostile. The evidence of PW7 remains as it is. No permission of the court has been sought for by the prosecution to test such evidence of PW7. The court cannot simply ignore evidence of PW7 unless when acceptable reasons are given, especially when prosecution itself has not seriously disputed the evidence of PW7.

23. Now, viewing Ex.P6 extra judicial confession from the evidence of PW7, it is crystal clear that on 14.05.2011 itself the police had taken the accused from P.W.7's house, thereafter he was produced before PW8 and Ex.P6 extra-judicial confession has been prepared and PW8 the VAO is an obliging. There are strong reasons that Ex.P6 extra-judicial confession pressed into service in this case, is not voluntary, is not genuine, obtained from the accused while he was in the custody of the police. In the circumstances, PW8 does not inspire confidence in him, who is an utter stranger to the accused and whose office is just few buildings after the police station.

24. In this case, the trial court missed the said vital aspects while appreciating the evidence of PW8 and his evidence. Thus, the extra-judicial confession pressed into service in this case is required to be eschewed from our zone of consideration.

25. Ex.P17 confession of the accused is to the effect that he has shown the Investigation Officer, the place of occurrence on 15.05.2011 at about 11 am in the presence of PW8 VAO and his assistant Ashokkumar. In this case it is pressed into service as a disclosure statement for the purpose of Section 27 of Evidence Act, namely, 'so much of information' leading to the 'discovery or recovery of the fact'. Since it was immediately after Ex.P6, and also before the obliging VAO PW8, Ex.P17 appears to be a 'stage managed' discovery and it is unreliable. Therefore, Ex.P17 also has been excluded from our zone of consideration.

26. Now, what remains is nothing incriminating against the accused except suspicion and surmises, which is not a substitute to legal evidence to substantiate the charge. Thus, I hold that the charge levelled against the accused has not been proved beyond all reasonable doubts. He is entitled to the benefit of doubt.

27. In the result, this Criminal Appeal succeeds. The conviction recorded under Section 304(1) and the sentence imposed upon the appellant by the learned Sessions Judge No.II, Kanchipuram in S.C.No.75/2011 are set-aside. Fine amount paid shall be refunded to the appellant. The Superintendent, Central Prison, Vellore shall release the appellant, if he is no longer required in connection with

any other case or proceedings.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1. The Sessions Judge No.II,
Kanchipuram.
 2. -do- thro'The Principal Sessions Judge, Kanchipuram.
 3. The Inspector of Police,
B2 Vishnu Kanchi Police Station,
Kanchipuram.
 4. The Superintendent, Central Prison, Vellore.
 5. The Public Prosecutor,
High Court, Madras.
 - 6.The Judicial Magistrate No.I, Kanchipuram
 - 7.do thro'The Chief Judicial Magistrate, Kanchipuram.
 8. Section Officer,
Criminal Section,
High Court, Madras.
- +1 cc to Mr.E.Kannadasan, Advocate, SR.30516.

Nm(co)
krd 10/7

सत्यमेव जयते

CRL. A. NO. 613 of 2014

WEB COPY