

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.06.2015

PRONOUNCED ON : 24.11.2015

CORAM :

THE HONOURABLE DR.JUSTICE S.TAMILVANAN
and
THE HONOURABLE MR.JUSTICE C.T.SELVAM

Crl.A.No.708 of 2013

Sakthivel .. Appellant / A1

vs.

State, Rep. by the Inspector of Police,
Thevoor Police Station,
Salem District.

.. Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure, against the Judgment of the learned Additional District Sessions Judge, Fast Track Court No.I, Salem, Salem District made in S.C.No.159 of 2009 dated 02.02.2011.

For Appellant : Mr.T.R.Ravi
For Respondent : Mr.V.M.Rajendran,
Additional Public Prosecutor

JUDGMENT

(Judgment of the Court was delivered by Dr.S.TAMILVANAN, J.)

The Criminal Appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure, by the appellant / A1 against the judgment of conviction, dated 02.02.2011 made in S.C.No.159 of 2009 on the file of the Additional District Sessions Judge, Fast Track Court No.I, Salem.

2.The appellant / A1 stands convicted and sentenced by the learned Judge thus:-

Sl.No	Conviction under Section	Sentence of imprisonment
1.	U/s.120-B and 302 of IPC	Rigorous Imprisonment for life together with a fine of Rs.100/- with a default sentence of 3 months rigorous imprisonment under each charge.
2.	Under Section 379 of IPC	Rigorous imprisonment for a period of three years

All the sentences were ordered to run concurrently.

3.The case of the prosecution, in a nut shell, is as follows:-

P.W.1 - Devi is the wife of the deceased, viz., Sakthivel. She married the deceased about 9 years prior to the year 2010. Her husband/the deceased was employed as a welder in Thirumurugan Lathe Works at Bhavani Mettur Road. Subsequently, for the purpose of earning higher income, he shifted his job to Nasira Lathe Works at Erode. P.W.1 used to ventilate the sufferings undergone by her at the hands to her husband, who was addicted to alcohol. The appellant herein/A-1, in order to marry P.W.1, decided to do away with the life of the deceased Sakthivel and, accordingly, he hatched a conspiracy with his friends, namely, A-2 and the juvenile accused, viz., Chinnaraj. In furtherance of the said conspiracy, on 30th August, 2008, at about 10.00 p.m., all the accused came to the house of the deceased Sakthivel and took him in a TVS-50 two-wheeler bearing Registration No.TN-33-B-9683 (M.O.8) and after making him to consume alcohol, in an intoxicated condition, took him to the banks of the River Sarabanka. The juvenile accused, viz., Chinnaraj, caught hold of the legs of the deceased and A-2, by using the hand glove (M.O.6), smothered his mouth and the appellant/A-1, by using M.O.9 - rose colour nylon rope, strangled the deceased and as a result of the strangulation, the deceased died of asphyxia and shock on the spot itself.

4. P.W.1 was the wife of the deceased and she lodged a complaint under Ex.P-1 to P.W.20 - the Sub-Inspector of Police of Thevoor Police Station stating among other things that her husband left the house at about 8.00 a.m. on 30th August, 2008 in connection with his avocation and he did not return till the night hours. She contacted him on his cell phone bearing No.9952595773, but there was no response. P.W.1 also made enquiries with her neighbours and came to know on the morning hours of 31st August, 2008 that the body of her husband was found

near the banks of River Sarabanka. She, along with her relatives, rushed to the spot and found the body of the deceased. She found blood oozing from the nostrils of the deceased and also found injuries on account of being bitten by fish. P.W.1, suspecting some foul play in the death of her husband, lodged the said complaint - Ex.P-1 and P.W.20 - the Sub-Inspector of Police of Thevoor Police Station, on receipt of the same, registered a case in Crime No.250/08 under Section 174 Cr.P.C. at about 10.00 hours on 31st August, 2008 and prepared Ex.P-17 - FIR.

5. P.W.21 was the Inspector of Police, Sankagiri Circle and he received the FIR - Ex.P-17 on the morning hours on 31st August, 2008 and proceeded to the scene of occurrence at about 11.00 a.m. and in the presence of P.W.5 - Village Administrative Officer of Irugatur Village and one Subramani, prepared Ex.P-2 - Observation Mahazar and drew the rough sketch - Ex.P-18. Thereafter, P.W.21, in the presence of panchatayadars, at about 12.00 noon on 31st August, 2008, conducted inquest over the dead body of the deceased and prepared Inquest Report - Ex.P-19. P.W.21, in the presence of P.W.5 and another, recovered M.O.1 - one Rs.100 note, M.O.2 - TNSTC Bus Ticket, M.O.3 - Kingfisher Empty Beer bottle, M.O.4 - 180 ml. Old Monk Deluxe Rum empty bottle, M.O.5 - Hans pocket and M.O.6 - Orange colour hand gloves from the scene of occurrence. At about 2.40 p.m. on the same day, P.W.21 recovered M.O.12 - dark cement colour pant and M.O.14 - polythene cover under the cover of mahazar - Ex.P-20. P.W.21, thereafter, sent the body of the deceased through P.W.18 - Shanmugam, Head Constable, to the Government Medical College Hospital, Salem for conducting post-mortem.

6. P.W.13 - Tutor of Forensic Medicine, Government Medical College Hospital, Salem, on receipt of the body of the deceased on 1st September, 2008, commenced postmortem at about 10.05 a.m. and during postmortem, noted the following features :-

"Injuries :-

- I) A complete transverse ligature mark of 32 cms total length and 0.25 cms to 0.5 cms breadth seen over front, sides & back of neck - encircling the entire neck, below the level of thyroid cartilage - with serrated edges. The upper border of ligature mark lies 6.5 cms below both mastoid process and 6.5 cms below the chin and 12 cms above the suprasternal notch.
- II) On dissection dark reddish brown contusion seen over right side of neck - above the strap muscles - 5 x 4 cms and over left side of neck - above the strap muscles 7 x

- 6 cms. Dark reddish brown contusion seen over posterior aspect of trachea 12 x 6 x 0.5 cms.
- III) Dark reddish brown contusion both sterno mastoid right side 4 x 2 cms and left side 3 x 1 cms.
- IV) Dark reddish brown contusion right greater horn of hyoid bone 2 x 1 cms with fracture right greater horn of hyoid bone.
- V) Dark reddish brown contusion over the occipital region of scalp 5 x 2 cms.
- VI) Sub dural and subarachnoid hemorrhage both cerebral hemisphere.
- VII) Fissured fracture of right posterior cranial fossa 4 cms.
- All the above injuries are antemortem in nature.
- Postmortem changes observed :-
- I) Fish bite marks seen over both upper eyelids, lips and nasal mucosa.
- II) Marbling changes seen over left & right shoulder and left upper chest.
- III) Blackish brown discolouration right flank. (Postmortem changes).
- Other findings : (Antemortem) :-
- I) General appearance - Both eyes - conjunctiva. Congestion present. Both eyes - Black eye seen. Face appears congested and oedematous.
- II) O/D Head - Vide injury column. Membranes intact.
- III) O/D Neck - Vide injury column.
- IV) O/D Thorax - Heart - Right side chambers contained fluid blood and left side chambers empty. Great vessels & valves - patent.
- Lungs c/s - congested and edematous. Multiple petechial hemorrhages seen over the visceral surface of pleura & pericardium.
- V) O/D Abdomen - Stomach - 150 gms of partly digested cooked rice particles with fruity odour. Mucosa congested. Liver, spleen & both kidneys - c/s - congested. Capsule - intact. Bladder empty. Genitalia - No injuries made out. Pelvis - intact.
- VI) O/D Spinal column - Intact. Sternum, lung bits and all viscera preserved & sent for chemical analysis."

P.W.13, after completion of postmortem, issued Ex.P-5 - postmortem certificate whereby expressed opinion that the

deceased would appear to have died of asphyxia due to strangulation about 36 to 38 hours prior to autopsy. He further opined that head injury was also seen. Viscera was collected and sent for expert opinion and the report was marked as Ex.P-6.

7. P.W.21 continued with his investigation and examined P.Ws. 1, 2, 4 and other witnesses and recorded their statements. He forwarded the material objects, collected from the scene of occurrence, under Form-95 to the jurisdictional Magistrate Court on 1st September, 2008 and it was marked as Ex.P-20. P.W.21 recorded the statement of P.W.13 - the doctor, who conducted postmortem on the body of the deceased and recorded his statement. He also recorded the statements of P.W.7 and one Dakshinamurthy and, thereafter, altered the section of offence from Section 174 Cr.P.C. to one under Section 302 IPC. P.W.21 also recorded the statement of one Kuppusamy and P.W.18 - Shanmugam, Head Constable, who took the body for postmortem. On 13th September, 2008, P.W.21 recorded the statements of P.Ws. 6, 8, 9, 10, 11, 12 and 14. P.W.21, on 14th September, 2008, once again recorded the statements of P.Ws. 1, 2, 10 and others.

8. On 15th September, 2008, at about 9.30 a.m., P.W.21 received information from P.W.15 - Village Administrative Officer of Kaveripatti Agraharam Village that A2 appeared before him and he gave a confession statement. He immediately proceeded to the office of P.W.15 and got the confession statement of the 2nd accused given to P.W.15 and also the report of P.W.15 and, thereafter, effected the arrest of the 2nd accused. At that time, the 2nd accused, volunteered to give a confession statement and it was recorded in the presence of P.W.15 and his assistant Velumani, the admissible portion of which was marked as Ex.P-23. Based on the admissible portion of the confession statement of the 2nd accused, M.O.7 - cell phone, belonging to the deceased Sakthivel, was recovered under the cover of mahazar - Ex.P-10. Thereafter, P.W.21 took A-2 and effected the arrest of the appellant/A-1 and the juvenile accused, viz., Chinnaraj on 15th September, 2008 at about 12.30 p.m. and the 1st accused volunteered to give a confession statement. Based on the admissible portion of the confession statement of the appellant herein/A-1, marked as Ex.P-24, M.O.8 - TVS-50 two-wheeler was recovered under the cover of mahazar - Ex.P-14 and M.O.9 - nylon rope, which was used for the commission of the offence was recovered under the cover of mahazar - Ex.P-15. Thereafter, P.W.21 sent the appellant/A-1 and the 2nd accused for remand. Under Ex.P-24, P.W.21 altered the section of offence from Section 174 of Cr.P.C. to one under Sections 302 and 379 IPC and forwarded the same to the jurisdictional Magistrate Court. P.W.21, thereafter, recorded the statement of P.W.15 and his assistant Velumani. On 17th September, 2008, P.W.21 recorded the statement of P.W.20 and

other witnesses and after completion of investigation, filed the final report against the accused on 25th October, 2008, charging A-1 and A-2 for the commission of the offence under Section 302 r/w 120-B and 379 IPC before the Judicial Magistrate No.I, Sankagiri.

9. The Judicial Magistrate No.I, Sankagiri, has taken cognizance on the same in PRC No.27/08 and on appearance of the accused, furnished them copies of the charge sheet and other documents under Section 207 Cr.P.C. Since the case was exclusively triable by the Court of Sessions, the said court committed the case to the Principal Sessions Court at Salem, which, in turn, made over the case to the Court of Additional District & Sessions Judge, Salem.

10. The Court of Additional District & Sessions Judge, Salem, on appearance of the accused, framed charges under Sections 120-B, 302 and 379 IPC and questioned both the accused, and they pleaded not guilty of the charges framed against them.

11. The prosecution, in order to sustain their case, examined P.Ws. 1 to 21 and marked Exs.P-1 to P-24 and also marked M.Os. 1 to 14. Both the accused were questioned under Section 313 (1) (b) Cr.P.C. in respect of the incriminating circumstances made out against them in the evidence tendered by the prosecution and they denied the same as false. On behalf of both the accused, neither any oral evidence was let in nor any documents were marked. The trial court, on a consideration of oral and documentary evidence found that both the accused were guilty for the commission of the offence under Sections 120-B, 302 and 379 IPC and imposed the sentence as stated above. Challenging the vires of the same, the appellant/A-1 has preferred this appeal.

12. The learned counsel appearing for the appellant/A-1 submits that the case of the prosecution rests upon circumstantial evidence and the following are the circumstances projected by the prosecution against the appellant/A-1 :-

- i) Motive through the testimony of P.Ws. 1 & 6;
- ii) Conspiracy;
- iii) Last seen theory;
- iv) Extra-Judicial confession of A-2 under Ex.P-7 to P.W.15 - the Village Administrative Officer;
- v) Recovery of M.O.7 - cell phone on the basis of the admissible portion of the confession statement of A-2, marked as Ex.P-23; and
- vi) Scientific evidence in the form of Ex.P-5 - postmortem certificate issued by P.W.13 - the doctor, who conducted postmortem.

13. The learned counsel appearing for the appellant/A-1 submits that with regard to motive, the prosecution examined P.W.s 1 and 6 and P.W.1 admittedly made improvements by leaps and bounds during the course of her testimony and it is not at all corroborated by P.W.6, who turned hostile. As regards the conspiracy, no witnesses have been examined to prove and establish that there was meeting of minds on the part of the accused to do away with the life of the husband of P.W.1. Further, it is submitted that the deceased was last seen in the company of the accused, as spoken to by P.Ws. 9 to 12, whose evidence, as could be seen does not inspire the confidence of the Court. P.W.15 - the Village Administrative Officer of Kaveripatti Agraharam Village, who is said to have recorded the extra-judicial confession, as per his own admission, does not know the 2nd accused and even assuming that the said testimony is believable, in the absence of corroboration through the testimony of other witnesses/materials placed by the prosecution, it cannot be the sole basis for convicting the appellant/A-1. The recovery of M.O.7 - cell phone, belonging to the deceased, also cannot be believed for the reason that the prosecution has miserably failed to prove that M.O.7 - cell phone was used by the deceased Sakthivel. Though the evidence of P.W.13 - the doctor, coupled with Ex.P-5 - postmortem certificate issued by him, prove that the death was on account of strangulation, the prosecution has miserably failed to establish that it was the 1st accused, who played a role in the commission of the offence along with A-2 and the juvenile accused, viz., Chinnaraj. Lastly, it is submitted by the learned counsel for the appellant that admittedly P.W.21, who recorded the statements of the material witnesses after 13 days from the date of occurrence, has failed to explain the delay in examining the said witnesses. Further, Ex.P-1 - complaint given by P.W.1 on 30th August, 2008, as well as the FIR reached the jurisdictional Magistrate court only on 11th September, 2008 and the FIR marked as Ex.P-16, reached the jurisdictional Magistrate Court at about 1.00 p.m. on 2nd September, 2008 and P.W.21 and the investigating officer, has failed to explain the reasons for the belated dispatch of the abovesaid vital documents. The arguments of the learned counsel for the appellant, in sum and substance, is that since the case of the prosecution rests solely on circumstantial evidence and the chain of circumstances projected by the prosecution is not complete, the benefit of doubt should have been given to the appellant/A-1. However, the trial court, without properly appreciating the oral and documentary evidence, has committed an error in convicting and sentencing the appellant/A-1. The learned Counsel for the appellant further submits that the co-accused/A2 was acquitted by this Court by judgment dated 22.08.2012 made in C.A.No.305 of 2011, and, hence, prays for setting aside the conviction and sentence awarded by the trial court on the appellant/A1.

14. Per contra, the learned Additional Public Prosecutor submits that the prosecution, through the testimony of witnesses, more particularly the extra-judicial confession given by A-2 to P.W.15 - the Village Administrative Officer, has cogently and properly explained the circumstances beyond reasonable doubt and the trial court was right in convicting and sentencing the appellant/A-1. He further submits that it is not as though the co-accused was acquitted by this Court, the appellant is also entitled for acquittal, and, hence, prays for the dismissal of this appeal.

15. We have considered the submissions made by the learned counsel for the appellant/A-1 and the learned Additional Public Prosecutor and also perused the oral and documentary evidence available on record.

MOTIVE THROUGH THE TESTIMONY OF P.Ws.1 & 6 :

16. P.W.1 is the wife of the deceased and according to her, her husband was employed as a welder and he was in the habit of consuming alcoholic drinks and that he was also known to the accused. She further deposed that her husband left home at about 8.00 a.m. on 30th August, 2008 and till 10.00 p.m. on that day, he did not return and when she contacted him over cell phone, there was no response and, hence, she informed the said fact to her father-in-law, viz., P.W.2. P.W.1 further deposed that P.W.4 has informed her that the body of her husband was found near the banks of River Sarabanka and she along with her relatives rushed to the spot and, thereafter, she went to Thevoor police station and lodged the complaint - Ex.P-1 to P.W.20 - the Sub-Inspector of Police and, subsequently, came to know that A-1 and A-2 surrendered before P.W.15 and also produced the sum of Rs.600/-, stolen from the deceased. P.W.1 also deposed that she, along with the wife of P.W.6, used to go for the work as construction helper and that she used to go with A-1 in his two-wheeler and A-1 had told her that he would marry her and asked her to come out of her matrimonial home and he also used to misbehave with her and, hence, she stopped going to work. In cross-examination, she deposed that she used to go to work with A-1 for about one month and unable to bear the torture given by A-1, hence she stopped going to work and when she found the body of the deceased, there was no money available in the shirt pocket of the deceased.

17. P.W.6 was examined by the prosecution to corroborate the version of P.W.1 with regard to the misbehaviour on the part of A-1 and since he did not support the case of the prosecution, he was treated as hostile. In cross-examination P.W.6 deposed that P.W.1 told him about the harassment given by the appellant/A-1 and while P.W.1 was employed under him, she did

not make any complaint with regard to the activities of A-1 and he was not aware of the registration number of the vehicle owned by A-1.

18. P.W.21, the Investigating Officer, in cross-examination, deposed that during the course of inquest, panchayatadars did not say anything about the accused and so also P.W.6 and his wife, viz., Shanthi. P.W.21 further deposed that P.W.1, during the course of investigation did not state about the loss of her husband's cell phone, salary and bus ticket and that he did not recover any money from the accused after their arrest. It was further deposed by P.W.21 in cross-examination that P.W.1 did not state that she stopped going to work after one month.

19. Admittedly, neither P.W.1 nor P.W.6 have spoken anything about the misbehaviour on the part of the appellant/A-1, P.W.21 deposed that the said conduct on the part of A-1 was not spoken to by P.Ws. 1 and 6 during investigation. Since the case of the prosecution rests upon circumstantial evidence, motive assumes importance and in the considered opinion of this Court, the prosecution has failed to establish motive on the part of the appellant/A-1 to do away with the life of the husband of P.W.1.

CONSPIRACY :

20. Admittedly, none of the witnesses have spoken about the conspiracy and the prosecution has failed to establish the meeting of minds between A-1, A-2 and the juvenile accused to murder the husband of P.W.1/ the deceased, so as to enable A-1 to marry P.W.1. In the absence of any evidence as to the conspiracy hatched by the accused, the conviction and sentence recorded by the trial court under Section 120-B IPC cannot be sustained.

LAST SEEN THEORY :

21. P.W.9 deposed that prior to September 2010, he was having tea at Pullakoundanpatti at about 5.30 p.m. and at that juncture he saw A-1, A-2 and the juvenile accused with M.O.8 - TVS-50 two wheeler. In cross-examination, P.W.9 deposed that during the course of investigation, he was examined by the police and he did not state that the accused went in TVS-50 two-wheeler and he also did not know the registration number of the TVS-50 two-wheeler. P.W.9 further deposed that he does not know their address and has seen the accused while they were going for their job and he was examined by the police 10 days after the occurrence and only after their arrest he became aware of their role. It is further deposed by P.W.9 in cross-examination that the police did not ask him to identify the accused and for the

first time at the time of giving evidence only he could see the accused and in his statement recorded by the police, he deposed that while crossing the speed breaker, the accused proceeded slowly.

22. P.W.21, the Investigating Officer, deposed that P.W.9 did not state in the course of his examination during investigation about the accused proceeding slowly while crossing the speed breaker.

23. A perusal of the testimony of P.W.9 would disclose that since the accused proceeded slowly in the two-wheeler, while crossing the speed breaker, he could see the accused and, admittedly, he did not state so during the course of his examination and, therefore, his testimony that he has seen the accused is clearly an improvement.

24. P.W.10 was proceeding to Kumarapalayam to purchase household articles and at about 8.00 p.m., he was waiting at the bus stop on the particular day and at that juncture, A-1, A-2 and the deceased came in the TVS-50 two-wheeler - M.O.8 and accused boarded the bus and on the next day, he came to know of the death of the husband of P.W.1. In cross-examination, P.W.10 deposed that he did not state before the police that he went to Kumarapalayam for purchasing household articles and though he went to the house of P.W.1 after two days, he did not tell P.W.1 about seeing her husband in the company of A-1 and A-2 and further deposed that P.W.9 only told the police about him. It is further deposed by P.W.10 that after seeing the accused about two years prior to September 2010, he was seeing the accused for the first time in court and he did not tell who were A1 and A2.

25. P.W.21, the Investigating Officer, in cross-examination, admitted that P.W.10 did not state during the course of his examination that he was proceeding to Kumarapalayam for purchasing household articles. If P.W.10 did not proceed to Kumarapalayam for purchasing household articles, there could be no necessity or occasion for him to see A-1 and A-2 in the company of the deceased and his testimony to that effect is clearly an improvement.

26. P.W.11 deposed that two years prior to September 2010, he went to Edapadi and returned at about 8.45 p.m. and got down from the bus at about 9.00 p.m. and was proceeding to his house and on the way, there was a speed breaker and that light was also burning near that place and he further deposed that he saw the deceased and the accused with the two-wheeler, were walking together and on the next day he came to know about the death of the husband of P.W.1/the deceased. In cross-examination, P.W.11 deposed that he had not seen the accused prior to the said date and the police also did not ask him to identify the accused and

he was examined by the police after 15 days and till he was examined by the police, he did not state about seeing the appellant/1st accused and the deceased to anyone and that his name was given to the police by P.W.9.

27. It is to be pointed out at this juncture that admittedly P.W.11 did not know the accused and the police did not ask him to identify the accused and for the first time in court, he has seen the accused nearly after two years. Therefore, his testimony is of no help to the prosecution to establish the guilt on the part of the appellant/A-1.

28. P.W.12 deposed that he visited his daughter's house about 2 years prior to September 2010 and at about 9.30 p.m. he boarded the bus for returning to Pullakoundanpatti and was seated near the conductor's seat. At that juncture, he saw four persons near the temple with a TVS-50 two-wheeler and one among them was the deceased. In cross-examination, P.W.12 deposed that he did not know the father's name of the accused and he is having sight in only one eye and further deposed that he did not state before the police that he went to Thevoor to see his daughter and also the alighting of four passengers from the bus. P.W.12 further deposed that police did not ask him to identify the accused.

29. P.W.21, the Investigating Officer, in cross-examination, admitted that the said eyewitness did not state during the course of his examination that he went to Thevoor to see his daughter and also did not state that he saw the accused. Therefore, the testimony of P.W.12 is also not helpful to the prosecution to establish the fact that the deceased was last seen in the company of the accused.

EXTRA-JUDICIAL CONFESSION & RECOVERY OF CELL PHONE - M.O.7 :

30. The prosecution primarily and heavily relied upon the testimony of P.W.15 - the Village Administrative Officer of Kaveripatti Agraharam Village and on 15th September, 2008, he along with his assistant were verifying the voters' list and at that juncture, A-2 came to his office and told him that police are looking for him and further stated that he, along with his friends, murdered a person and gave an oral statement, which was reduced into writing and, thereafter, P.W.15 telephonically informed Thevoor police station and, subsequently, contacted P.W.21, who came to his office at about 9.30 p.m. on 15th September, 2008 and he handed over the statement recorded from the accused under Ex.P-7 and his special report under Ex.P-8. Thereafter, Ex.A-2 voluntarily came forward to give a confession statement and it was recorded in their presence and he also subscribed his signature, marked as Ex.P-9 and pursuant to the confession statement, A-2 produced the cell phone - M.O.7, used

by the deceased, which was recovered under the cover of mahazar - Ex.P-10. In cross-examination, P.W.15 deposed that he has no acquaintance with A-2 and when A-2 came to his office, he enquired him and A-2 voluntarily gave a statement admitting his guilt. P.W.15 deposed that he did not follow the procedure as to the forwarding of the report to his superior official and in the special report, he did not state about contacting P.W.21 over phone and also absent subsequent handing over of the statement given by the accused and his special report.

31. P.W.21, the investigation officer, in cross-examination, deposed that P.W.15, through land line, contacted him and that he went to his office and P.W.15 handed over the confession statement of A-2 and his special report and in the special report he did not state that A-2 was in his custody and the further fact that he telephonically contacted him.

32. According to P.W.21, on effecting the arrest of A-2, he voluntarily came forward to give a confession statement and as per the admissible portion of the confession statement - Ex.P-23, the cell phone - M.O.7, used by the deceased was recovered under the cover of mahazar - Ex.P-10. As regards the said recovery, P.W.21 was extensively cross-examined and he deposed that in the SIM card, cell phone number was not available and in the cell phone, IMEI number would be available and P.W.8 told him that he took the SIM card in his name and handed over the same to his brother-in-law, viz., A-2. P.W.21 further deposed that for getting the SIM card, one must produce identification proof, photo and application and he did not seize the original application and was not in a position to recover the SIM card because it was destroyed by A-2. In M.O.7 - cell phone belonging to the deceased, recovered on the basis of the confessional statement of A-2, the IMEI number is given as 353271011819208, whereas in the call details pertaining to the said cell phone, different IMEI number is available. P.W.21 admitted that with regard to the use of M.O.7 - cell phone, he did not examine the officials of the service provider and also not verified the IMEI number pertaining to M.O.7 - cell phone.

33. In Harishchandra Ladaku Thange - Vs - State of Maharashtra (AIR 2007 SC 2957), it has been held 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 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 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".

34. This Court, keeping in mind the said ratio laid down by the Hon'ble Supreme Court in the above-cited decision, has carefully analysed the testimonies of P.Ws. 9 to 12 coupled with the testimony of P.W.21. Admittedly, the witnesses, viz., P.Ws. 9 to 12, examined by the prosecution to prove that the deceased was last seen in the company of A-1 and A-2 at the relevant point of time, have made with many improvements in their testimonies from that of their statements recorded during investigation. It is very pertinent to point out at this juncture that none of the witnesses had previous acquaintance with the accused and, admittedly, the police did not ask them to identify the accused during the course of investigation and they have seen the accused for the first time in court after two years. Therefore, the testimony of the above said witnesses is of no help to the prosecution that A-1 was seen in the company of the husband of P.W.1/the deceased along with other accused before he was done to death.

35. As regards the extra-judicial confession, P.W.15 admitted that he had never seen A-2 nor had acquaintance with each other and in the special report, he did not state anything with regard to contacting P.W.21 through telephone and as to the availability of the accused with him.

36. It is trite law that extra-judicial confession can be the basis of conviction, provided, it should not suffer from any material discrepancies and inherent improbabilities and in view of the discrepancies pointed out above, it is not safe to rely upon the extra-judicial confession said to have been given by A-2 to P.W.15. Moreover, the prosecution has miserably failed to establish that the cell phone - M.O.7 was used by the deceased and P.W.21 had admitted that the IMEI number relating to M.O.7 cell phone did not tally with the call details provided by the service provider and he did not seize the original application form given by P.W.8 for getting the SIM card and also not examined the concerned officials of the service provider with regard to the IMEI number pertaining to the cell phone - M.O.7. Hence, the recovery of M.O.7 cell phone is also of no help to the prosecution to sustain the case against the accused.

SCIENTIFIC EVIDENCE :

37. Though the testimony of P.W.13 - the doctor, who conducted post-mortem on the body of the deceased coupled with the post-mortem certificate - Ex.P-5 disclose that the deceased died on account of asphyxia due to strangulation, the prosecution has failed to establish the fact that A-1 was present at the time of commission of the offence and as already held in the earlier paragraph, there is absolutely no evidence

as to the hatching of conspiracy among the accused. Though the death of the husband of P.W.1/the deceased is on account of homicidal violence, as found from the evidence of P.W.13 coupled with the postmortem certificate - Ex.P-5, there is no link in the circumstance connecting A-1 with the commission of the offence and the prosecution has miserably failed to establish the said fact beyond reasonable doubt by cogent evidence that it was only A-1, who committed the said offence and also the role played by A-1 in the commission of the offence.

38. It is well settled position of law that in cases, where prosecution rests its case upon circumstantial evidence, all the links in the chain of circumstances should be complete that it should lead to the conclusion that it is the accused and none other who was responsible for the commission of the offence. As held in Harishchandra Ladaku Thange's case (supra), there must be a chain of evidence so far complete as not to leave any reasonable ground for 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.

39. In the case on hand, the prosecution has failed to establish the chain of circumstances to implicate the appellant/A-1 with the commission of the offence and the chain of circumstances is not complete. The case of the prosecution bristles with infirmities and inconsistencies and it is not safe to convict the appellant/A-1 on the basis of the extra-judicial confession said to have been given by the 2nd accused to P.W.15, the Village Administrative Officer. In the considered opinion of this Court, the prosecution has failed to establish the guilt on the part of the appellant/A-1 beyond reasonable doubt and, therefore, the benefit of doubt shall enure in his favour.

40. In the result, the appeal is allowed and the conviction and sentence imposed on the appellant/A-1, Sakthivel Annamalai, vide judgment dated 2nd February, 2011, by the learned Additional District & Sessions Judge/FTC-I, Salem, in S.C. No.159 of 2009 is set aside and he is acquitted of all the charges framed against him. Fine amount, if any, paid by the appellant/A-1, shall be refunded. The appellant/A-1 is directed to be released forthwith unless his custody is required in connection with any other case.

Sd/-

Assistant Registrar(CS-III)

True Copy

Sub Assistant Registrar

To

1. The Addl. District & Sessions Judge / FTC-I,
Salem.

2.The Principal sessions Judge,
Salem.

3.The Judicial Magistrate No.I,
Sankagiri.

4.The Chief Judicial Magistrate,
Salem.

5. The Inspector of Police,
Thevoor Police Station,
Salem District.

6. The Superintendent of Prison,
Central Prison,
Coimbatore.

7. The Public Prosecutor,
High Court,
Madras - 104.

8.The District Collector,
Salem.

9.The Director General of Police,
Mylapore, Chennai.

Pre-delivery Judgment in
Crl.A.NO.708/2013

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srg 15/12/2015

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