

BAIL SLIP

The appellant/A1 viz.Chittu @ chithra was directed to be released on bail as per order of this Court in MP.No.1/2012 in Crl.A.517/2012, dt.12.10.2012.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.03.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

Criminal Appeal Nos.517 of 2012 and 323 of 2015

Chittu @ Chithra ... Appellant in Crl.A.No.517/2012
Pandian @ Marutha Pandian ... Appellant in Crl.A.No.323/2015

Vs

State rep. By Inspector of Police,
Erode South Police Station,
Erode District.
Crime No.863 of 2005.

... Respondent in both the Crl.A

Common Prayer:- Criminal Appeals filed under Section 374(2)
Cr.P.C., against the judgment dated 03.08.2012 made in S.C.No.32 of
2011 passed by the learned II Additional District Sessions Judge,
Erode.

Crl.A.No.517 of 2012:-

For Appellant : Mr.S.Ashok Kumar, Senior Counsel
for Mr.A.Amarnath

For Respondent : Mr.M.Maharaja,
Additional Public Prosecutor

Crl.A.No.323 of 2015:-

For Appellant : Mr.Philip Ravindran Jesudoss

For Respondent : Mr.M.Maharaja,
Additional Public Prosecutor

COMMON JUDGEMENT

(Judgment of the Court was delivered by S.Nagamuthu.J)

The appellant in Crl.A.No.517 of 2012 is A.1 and the appellant
in Crl.A.No.323 of 2015 is A.2 in S.C.No.32 of 2011 on the file of
the learned II Additional District Sessions Judge, Erode. The

trial Court framed charges for offences under Sections 302 r/w 34 and 201 I.P.C., against A.1 and Sections 302 r/w 34, 506(ii) and 201 I.P.C., against A.2. By judgment dated 03.08.2012, the trial Court convicted both the accused and sentenced them to undergo imprisonment for life and to pay a fine of Rs.100/- each in default to undergo rigorous imprisonment for six months for the offence under Section 302 r/w 34 I.P.C and to undergo rigorous imprisonment for five years (no fine amount was imposed for this offence) for offence under Section 201 I.P.C. The trial Court ordered the above sentences to run concurrently. However, the trial Court acquitted A.2 from the charge under Section 506(ii) I.P.C. Challenging the above conviction and sentence, the appellants/A.1 & A.2 are before this Court with these Criminal Appeals.

2.The case of the prosecution, in brief, is as follows:-

The deceased in this case was one Mr.Mirasu @ Rasu. A.1 was running a business under the name and style of "Balamurugan Pandal Stores" in Soorampatti Village. A.2 was employed there. In due course of time, it is alleged that A.2 had developed illicit intimacy with the daughter of A.1. This was witnessed by the deceased Mr.Rasu. Using the same, he started intimidating A.1 and A.2, demanding money. As and when he was in need of money, he threatened A.1 and A.2, that he would make the above said affair public, in the event, they fail to give money to him. At one point of time, A.1 and A.2 were vexed with the above repeated demands made by the deceased. Therefore, they decided to do away with the deceased. This is stated to be the motive for the occurrence.

3.It is further alleged that the deceased was found missing from 11.08.2005 onwards. P.W.1 is the wife of the deceased. She went in search of him but, could not find. However, she did not make any complaint to the Police. On 01.11.2005, for the first time, she went to the Police Station and made a complaint. The said complaint was received by P.W.19, the then Inspector of Police of Soorampatti Police Station, Erode District. On receipt of the said complaint under Ex.P.1, P.W.19 registered a case in Crime No.863/2005 for "man missing". Ex.P.29 is the F.I.R. Then, he took up the case for investigation and examined many witnesses. At 1.00 p.m., on 01.11.2005, he went to the house of the deceased and prepared an observation mahazar and a rough sketch in the presence of witnesses. But, he was not able to get any breakthrough. While so, it is alleged that at 6.15 pm on 06.11.2005, A.1 appeared before P.W.8, the then Village Administrative Officer and wanted to confess. After having ascertained that A.1 was going to voluntarily confess, P.W.8 started recording the same as verbatim. Ex.P.2 is the confession so recorded by him from A.1. Then P.W.8 took A.1 along with the confession and his special report and produced him before P.W.19. At 7.30 pm on 06.11.2005, on such production, P.W.19 arrested A.1 in the presence of the same witnesses. He gave a voluntary confession in which, he had disclosed the place where he had hidden

a spade with handle and a crow bar. He also disclosed the place where the dead body had been buried.

4. Based on the said confession, A.1 took the Police and witnesses to the place of hide out and produced the spade with handle (M.O.5) and a crow bar (M.O.4). P.W.19, then made a request to the Tahsildar to be present at the place of occurrence and to exhume the body. He also made a request to the Doctor for conducting post mortem at the place of occurrence itself. In pursuance of the same, on 07.11.2005, P.W.17 - Tahsildar, exhumed the body from the place of occurrence between 8.00 am and 11.30 am. P.W.19 prepared an observation mahazar and a rough sketch in respect of the place of occurrence. On information, on 30.11.2005, P.W.19 arrested A.2 near Perundurai Road, Pazhayapalayam Bus Stop in the presence of witnesses. On such arrest, A.2 gave a voluntary confession, in which, he had disclosed the place where he had hidden the knife and he also disclosed the place where the dead body was buried. Based on the said confession, A.2 took the Police and witnesses to the place of hide out and produced the knife (M.O.11) and also identified the place where the dead body of the deceased was buried. Then, P.W.19 forwarded A.1 and A.2 to the Court for judicial remand. Then P.W.16 conducted autopsy on the body of the deceased on the same day at 2.15 pm. The dead body was in a highly decomposed condition. Except bones, nothing more was found. The cause of the death could not be found out. P.W.19 collected the bones and sent the same for examination by an Expert. The Expert also could not give any definite opinion regarding the cause of death, as, except bones, nothing else was available. P.W.19 made arrangements for sending the skull of the deceased for super-imposition. The super-imposition revealed that the dead body was that of the deceased. Then on completing the investigation, he laid charge sheet against both the accused.

5. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgment. In order to prove of the case of the prosecution, as many as 19 witnesses were examined and 36 documents were exhibited besides 11 Material Objects.

6. Out of the said witnesses, P.W.1 is the wife of the deceased and she has stated that her husband was found missing from 11.08.2005 and she made complaint only on 01.11.2005. She has further stated that the dead body was exhumed on 07.11.2005. P.Ws.2 and 4 have turned hostile and they have not supported the case of the prosecution in any manner. P.W.3 has stated that many days before the body was exhumed, he found A.2 and the deceased together. P.W.5 has stated that at 10.45 pm, some time before the body was exhumed, he found A.2 and the deceased together near a hotel. P.Ws.6 and 7 have spoken about the examination done by the Tahsildar. P.W.8 has spoken about the confession given by A.1 at 6.30 pm on 06.11.2005. P.Ws.9 & 10 have turned hostile and they have not supported the case of the prosecution in any manner. P.W.12 has spoken about the photographs taken at the place of occurrence. P.Ws.13 to 15 have turned hostile and they have also

not supported the case of the prosecution in any manner. P.W.16 has spoken about the post mortem conducted and he has further stated that no opinion could be given regarding the cause of the death of the deceased. P.W.17 has spoken about the exhumation done. P.W.18 is the Head Clerk of the Court, who forwarded the Material Objects for chemical examination. P.W.19 has spoken about the registration and investigation done in this case.

7. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., they denied the same as false. On their side, no witness was examined and no document was marked. Their defence was a total denial.

8. Having considered all the above, the trial Court found the accused guilty under the said charges and accordingly, sentenced them to undergo imprisonment for life. Aggrieved over the same, the accused/appellants are before this Court with these Criminal Appeals.

9. We have heard the learned counsel for the appellants and the learned Additional Public Prosecutor appearing for the State and also perused the records carefully.

10. Mr. S. Ashok Kumar, learned Senior Counsel appearing for the first appellant would submit that except the so-called extra judicial confession said to have been given by A.1 to P.W.8 at 6.15 pm on 06.11.2005, there is no evidence against both the accused. The learned Senior Counsel would further submit that though it is alleged that the deceased was found missing from 11.08.2005, the complaint was made only on 01.11.2005 for which, absolutely, there is no explanation. He would further submit that it is too difficult to believe that A.1 would have chosen a total stranger like P.W.8 to make a confession. The learned Senior Counsel would further submit that if once the so-called confession said to have been given by A.1 to P.W.8 is false, then both the accused are entitled for acquittal, as there is no other evidence against them.

11. However, the learned Additional Public Prosecutor appearing for the State would oppose these appeals. He would submit that the confession of A.1 made to P.W.8 deserves to be accepted, as P.W.8 had no axe to grind against the accused. P.W.8, in other words, is an independent witness. Therefore, there is no legal impediment to accept the evidence of P.W.8. It was only on the confession of A.1, the dead body of the deceased was discovered. From these evidences, according to the learned Additional Public Prosecutor, the prosecution has proved the case beyond reasonable doubts and therefore, the conviction and sentence imposed on the appellants by

the trial Court do not require any interference at the hands of this Court.

12. We have considered the above submissions.

13. Even according to the positive case of the prosecution, the deceased was found missing from 11.08.2005. As pointed out by the learned Senior Counsel appearing for A.1, it is not known as to why no complaint was made till 01.11.2005 i.e., for more than three months. It is not as if these two accused were absconding from the village. They were very much available. When that be so, it is very difficult to believe that A.1 would have gone to P.W.8 to make a confession. A.1 had no acquaintance with P.W.8. P.W.8 was a total stranger. When that be so, we find it difficult to accept the evidence of P.W.8 to hold that A.1 had given a confession to him at 6.15 pm on 06.11.2005.

14. Apart from that, so far as A.2 is concerned, the so-called confession given by A.1 cannot be used against him, in view of the law laid down in *Kashmira Singh v. State of Madhya Pradesh* (1952 AIR 159) wherein, the Hon'ble Supreme Court has held that an extra judicial confession of the co-accused is not a substantive evidence against the other accused and the proper approach to the confession of the co-accused is to keep the same aside first and then, to marshal the other evidences available against the accused excluding the confession altogether from consideration and on such marshaling and on such appreciation, if the court is able to come to the conclusion that the accused has committed the said offence, the court can look into the confession given by the co-accused as a last resort to add strength to the said conclusion. In the instant case, as against A.2, absolutely there is no other evidence so as to arrive at a conclusion that he has committed the crime as charged. Therefore, the extra judicial confession said to have been given by A.1 to P.W.8 cannot be the sole basis for convicting A.2.

15. So far as A.1 is concerned, assuming that the extra judicial confession could be taken into consideration, in our considered view, as per the settled law, since an extra judicial confession by its very nature is a very weak piece of evidence, unless the same inspires the fullest confidence of the Court or there are evidences from other sources to corroborate the said extra judicial confession, it is not safe to rely on the doubtful extra judicial confession and to convict the maker of the confession. In this case, as we have already pointed out, the extra judicial confession said to have been given by A.1 to P.W.8 is highly doubtful and since there is no other evidence available on record to corroborate the said extra judicial confession, it is not safe to act upon the same, so as to convict A.1.

16. Though it is stated that the dead body of the deceased was discovered on the confession of A.1, since we are not prepared to believe that A.1 would have appeared before P.W.8 and made a voluntary confession on 06.11.2005, as a corollary, all the consequential events are also to be disbelieved. Above all, P.W.19 in his evidence has not at all stated that A.1 identified the place from where the dead body was later on exhumed. Thus, we find absolutely there is no evidence against A.1 also.

17.If we examine the question as to whether the deceased had died of homicide, we find no evidence. The Doctor has opined that the cause of death could not be found out. When that be so, we have to necessarily hold that the prosecution has failed to prove that the death of the deceased was due to homicide.

18.In a case based on circumstantial evidence, the prosecution has to prove the circumstances projected by it beyond reasonable doubts and all such proved circumstances, should form a complete chain without any break, so as to unerringly point to the guilt of the accused and there should not be any other hypothesis which is inconsistent with the guilt of the accused.

19.Here, in this case, as we have already pointed out, the prosecution has not proved any incriminating circumstance against the accused so as to prove the guilt of the accused beyond reasonable doubts. The Courts of law, cannot convict an accused on mere surmises and conjectures. In this case, the trial Court has convicted the accused on the basis of an evidence, which is unbelievable and on the basis of mere surmises. Therefore, we have no hesitation to set aside the conviction and sentence imposed on the appellants.

20.In the result, these criminal appeals are allowed and the conviction and sentence imposed on the appellants by the trial Court are set aside and they are acquitted of all the charges. The fine amount, if any paid by the accused, shall be refunded to them.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

To

1.The II Additional District Sessions Judge,
Erode.

2.-do- thro'The Principal Sessions Judge,
Erode.

3.The Judicial Magistrate No.3,
Erode.

4.The District Collector,
Erode District.

5.The Superintendent of Police,
Erode District.

6.the Superintendent,
Special Prison for Women,
Vellore.

7.The Superintendent,
Central Prison, Coimbatore.

8.The Inspector of police,
Erode south Police Station,
Erode.

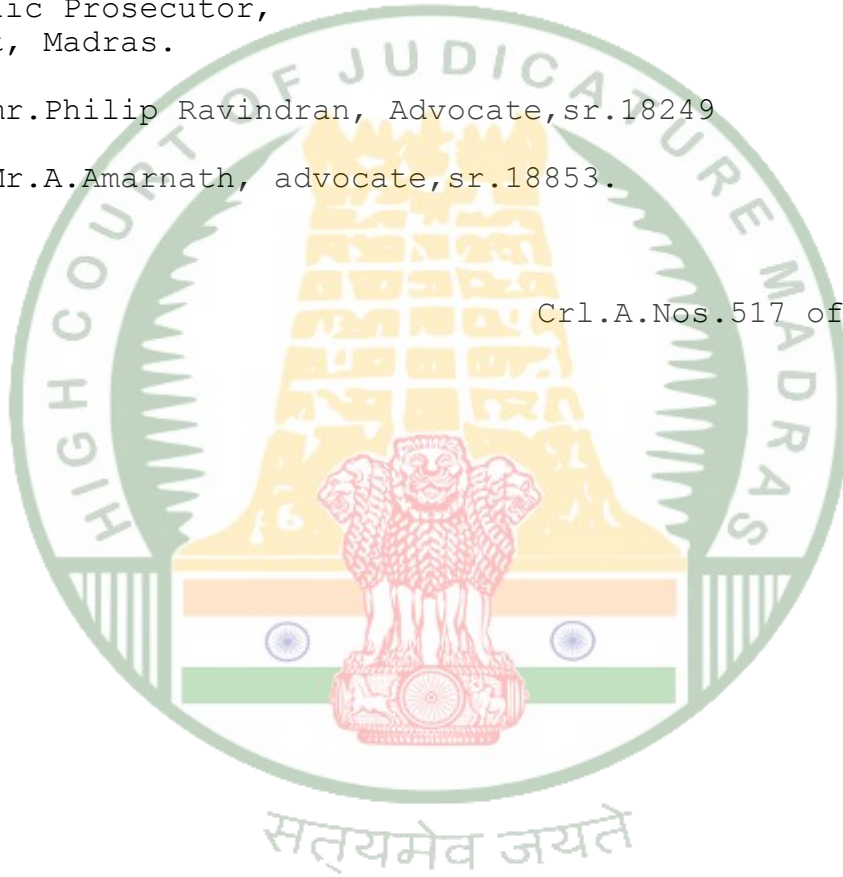
9.The Public Prosecutor,
High Court, Madras.

+1 cc to mr.Philip Ravindran, Advocate,sr.18249

+1 cc to Mr.A.Amarnath, advocate,sr.18853.

bvr(co)
krd 21/7

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