

BAIL SLIP

The Appellant/1st Accused Viz., Soundar @ Soundarrajan, aged 34 years S/o.Kandhasamy in Crl.A.No.311 of 2013 was directed to be released on bail as per Order of this Court dated 14.06.2013 made in M.P.No.1 of 2013 in Crl.A.No.311 of 2013.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.03.2016

CORAM

THE HONOURABLE MR. JUSTICE M. JAICHANDREN

AND

THE HONOURABLE MR. JUSTICE S. NAGAMUTHU

CRL.A.Nos.311 of 2013 and 532 of 2013

&

M.P.No.2 of 2013 in Crl.A.No.532 of 2013

Soundar @ Soundarrajan

... Appellant/A1 in  
Crl.A.No.311 of 2013

Sridevi

... Appellant/A2 in  
Crl.A.No.532 of 2013

Versus

The State represented by  
The Inspector of Police  
Ethappur Police Station  
Salem District.  
(Crime No.597 of 2007)

... Respondent in  
both the appeals

Appeals filed under section 374 Cr.P.C., against the judgment passed by the learned Principal Sessions Judge, Salem in SC.No.266/2008 on 22.11.2012.

For Appellant in : Mr.B.Gopinath,  
Crl.A.No.311/2013 Legal Aid Counsel

For Appellant in : Mr.B.Sundarapandiyan for  
Crl.A.No.532/2013 Mr.M.V.Muralidharan

For Respondent in : Mr.M.Maharaja  
both the appeals Additional Public Prosecutor

## COMMON JUDGMENT

[Judgment of the Court was delivered by S. NAGAMUTHU, J,]

The appellant Soundar @ Soundarrajan in CrI.A.No.311/2013 is arrayed as A1 and the appellant Sridevi in CrI.A.No.532/2013 is arrayed as A2 in SC.No.266/2008 on the file of the learned Principal Sessions Judge, Salem. They stood charged for the offence u/s.302 read with 34 IPC. By the judgment dated 22.11.2012, the Trial Court convicted the appellants herein for the offence u/s.302 read with 34 IPC and sentenced each of them to undergo imprisonment for life and to pay a fine of Rs.1000/- each [no default sentence was imposed]. Challenging the said conviction and sentence, the appellants/A1 and A2 are before this Court with these appeals.

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

[A] The deceased in this case was one Chinnapaiyan. A2 [Sridevi] is his wife. They had children also. The deceased and A2, along with their children, were residing together at Edayapattipudur Village. P.W.1 [A.Kandasamy] is the brother of the deceased. His house is situated by the side of the house of the deceased. P.W.3 [Periyasamy] is the son of P.W.1. He was residing with P.W.1. It is alleged that A2 used to go for farm work in the farm of the deceased. In course of time, A2 developed illicit intimacy with A1 [Soundar @ Soundarrajan]. This came to the knowledge of the deceased. On few occasions, he gave warning to A2 and wanted her to correct herself. But, she did not stop her illicit intimacy with A1. Eight days prior to the occurrence, it is alleged that the deceased reprimanded A1 himself in this regard. A1, in that quarrel, took a vow that he would do away with the deceased shortly. Thus, according to the case of the prosecution, in order to continue their illicit relationship, A1 and A2 decided to do away with the deceased. This is stated to be the motive for the occurrence.

[B] It is further alleged that on 27.10.2007 at about 22.00 hrs., when the deceased was sleeping at his house, A2 held his legs and A1 smothered the deceased with a woolen blanket. The deceased died on the spot. Then, A1 left the house of the deceased. A2, according to the case of the prosecution, pretended as though the deceased, while trying to put on the Television, got electrocuted and became unconscious. She went to the house of P.W.1 at 00.00 hrs., [midnight] and informed P.W.1 to come and immediately disconnect the electricity supply. P.W.1 rushed to the house of the deceased, disconnected the electricity supply and went inside the house. P.W.1 found the

deceased lying on the floor. He found some injuries on the deceased. P.W.1 suspected some foul play. Therefore, he went to Ethappur Police Station and made a complaint [Ex.P.1] at 04.30 hrs. on 28.10.2007.

[C] P.W.12, the then Inspector of Police attached to Ethappur Police Station, during the relevant point of time, on receipt of the complaint under Ex.P.1, registered a case in Cr.No.597/2007 for the offence u/s.174 Cr.P.C. [Suspicious Death] at 04.30 hrs. on 28.10.2007. Ex.P.19 is the printed First Information Report. He forwarded both the documents, viz., Complaint-Ex.P.1 and the Printed FIR-Ex.P.19, to the Court and to his higher officials. The said documents were received by the learned Judicial Magistrate concerned at 12.15 hrs., on the same day.

[D] Taking up the case for investigation, P.W.12, went to the place of occurrence at 06.00 hrs. on 28.10.2007 and prepared the Observation Mahazar [Ex.P.3] and a Rough Sketch [Ex.P.20] in the presence of P.W.5 [Perumal] and one Nallathambi. Thereafter, he held inquest on the dead body of the deceased in the presence of the Panchayatdars and other witnesses and prepared the Inquest Report [Ex.P.21]. He also arranged for a photographer, viz., P.W.9-Saddhique Basha, to take photographs at the scene of crime. The said photographs were marked as M.O.3 series and the negatives were marked as M.O.4 series. Then he forwarded the body of the deceased for postmortem through P.W.8-Jayaraman, Head Constable attached to the said police station.

[E] P.W.11-Dr.Panneerselvam, the then Assistant Professor, Forensic Science Department of the Government Mohan Kumaramangalam Medical College and Hospital, Salem, at the relevant point of time, conducted the autopsy on the body of the deceased on 28.10.2007 at 16.45 hours. He found the following injuries:-

"External Injuries:-

I Dark reddish brown abrasions seen over:-

- [1] Left suprascapular region 3.5x0.25 cms.  
[2] Right side of mandibular region 1.5x1 cm.

II An oblique continuous dark brown ligature mark seen over front, both sides and back of neck measuring 22 cms total length, 1/5 to 2 cms width, with serrated edges-at the level

of thyroid cartilage. The upper border of ligature mark lies 6 cms below midchin, 7 cms below right mastoid process and 5 cms below left mastoid process. On dissection:- contusion on right side of neck 12x4x0.5 cms and on left side of neck 10x6x1 cms. Hyoid bone and all neck structures - intact. Contusion on posterior aspect of trachea 5x3x0/5 cms.

Findings:-

I General appearance:- Face looks lyanosa and congested. Multiple petechial hemorrhages seen over bulbar conjunctive of both eyes.

II O/D Head, Scalp, skull membranes-intact. Brain O/S. Congested.

III O/D Thorax and Ribs - intact. Heart-normal in size. Right side cavities contained fluid blood and left side empty. Valves and great vessels-patent. Lungs c/s congested and oedematous. Multiple petechial hemorrhages seen over the visceral surface of interlobar tissues and pleurs.

IV O/D Abdomen:- stomach-355 gms of partly digested cooked rice food with no specific smell. C/S congested liver, spleen and both kidneys-c/s congested. Bladder-empty. Genitalia-no injuries made out. Pelvis-intact.

V O/D Spinal Column- intact."

Ex.P.17 is the Postmortem Certificate. He gave the opinion that the deceased would have died of asphyxia due to pressure over the neck.

[F] Continuing the investigation, P.W.12, he examined P.W.5, Nallathambi, Alamelu and Manmadaraja, at the scene of crime on 28.10.2007 and recorded their statements. When the investigation was in progress, it is alleged that A2 [Sridevi], voluntarily appeared before P.W.4-Balakrishnan [Village Administrative Officer, Edayapattipudur village] and on such appearance, she expressed her willingness to confess to the guilt. P.W.4 allowed her to confess and reduced the same into writing. Ex.P.2 is the said extra-judicial confession of A2. Along with Ex.P.2, P.W.4 took A2 to the Police Station at about 16.30 hrs on 28.10.2007 and produced her before the Investigating Officer [P.W.12]. At 17.00 hrs., P.W.12 arrested

A2 in the presence of P.W.6-Chandran, Village Administrative Officer of Ethappur Village. P.W.12 also altered the case into one under section 302 IPC. Ex.P.22 is the altered FIR. At 17.15 hours, A2 came forward to give a voluntary confession statement in the presence of the said witnesses. In the said confession, she disclosed the place where she had hidden the woolen blanket. In pursuance of the said disclosure statement, she took the police and the witnesses to the place of hide out and produced M.O.1 - Woolen blanket and on returning to the Police Station, P.W.12 forwarded A2 to the Court for judicial remand and also handed over the material object. On the same day, at about 22.30 hrs., P.W.12 arrested A1 in the presence of P.W.7-Rangaraju, Village Administrative Officer, Puthiragoundampalayam Village, and another witness at Puthiragoundampalayam Bus Stop. On such arrest, A1 made a voluntary confession, in which, he disclosed the place where he had hidden a rope. In pursuance of the same, he took the police and the witnesses to his cattle shed and produced M.O.2-rope. P.W.12 recovered the same under the cover of Mahazar. On returning to the Police Station, P.W.12 forwarded A1 to the Court for judicial remand and also handed over the material object. Then, P.W.12 made a request to the learned Chief Judicial Magistrate concerned, to record the confession of A2. The learned Judicial Magistrate, Athur, in pursuance of the said request made and on the orders of the learned Chief Judicial Magistrate, ordered the Jail Authorities to produce A2 before him on 21.11.2007. Accordingly, A2 was produced. Learned Magistrate gave the statutory warning to A2 and sent her back to the prison. On 23.11.2007, again A2 was produced before the learned Magistrate and after giving the statutory warning, he recorded the confession of A2. Ex.P.14 is the judicial confession of A2 u/s.164 of the Code of Criminal Procedure. P.W.12 also examined P.W.11, the doctor who conducted the autopsy and also collected the medical records and on completion of the investigation, he laid the charge-sheet against the accused.

[G] Based on the above materials, the Trial Court framed a lone charge against both the accused as detailed in the first paragraph of the Judgment. The accused denied the same. In order to prove the case on the side of the prosecution, as many as 12 witnesses were examined, 24 documents and 4 material objects were also marked.

[H] Out of the said witnesses, P.W.1 is the brother of the deceased. He has stated about the illicit relationship between A1 and A2 and the fact that the deceased reprimanded both the accused. He has further stated that on 27.10.2007, at 00.00 hrs., A2 came to his house and cried for help to

disconnect the electricity supply. He has also stated that he went inside the house of the deceased, after disconnecting the electricity and found the dead body of the deceased inside the house. He has also spoken about the complaint made by him to the police. P.W.2 is yet another brother of the deceased. He has stated that on 27.10.2007, at about 23.30 hours, when he was in his farm house, he found A1 moving towards his house from the location of the house of the deceased. P.W.3 is the son of P.W.1. He has also spoken to the same facts as spoken to by P.W.1. P.W.4 has stated that on 28.10.2007, at 15.00 hrs., A2 appeared before him and made an extra-judicial confession under Ex.P.2. P.W.5 has spoken about the preparation of the Observation Mahazar and the Rough Sketch at the place of occurrence. P.W.6 has spoken about the arrest of A2 on being produced by P.W.4. He has further stated about the disclosure statement made by her and the recovery of M.O.1-woolen blanket. P.W.7 has spoken about the arrest of A1 and the disclosure statement made by him and the recovery of M.O.2-Rope. P.W.8 is the police constable who took the dead body for postmortem. P.W.9, has spoken about the photographs taken at the place of occurrence. P.W.10 has spoken about the judicial confession recorded by him from A2. P.W.11, Dr.Panneerselvam, has spoken about the postmortem conducted by him and his final opinion regarding the cause of death. P.W.12 has spoken about the registration of the case, investigation done and filing of the final report.

3. When the above incriminating materials were put to the accused u/s.313 Cr.P.C., they denied the same as false. However, they did not choose to examine any witness on their side nor marked any document.

4. Having considered all the above, the Trial Court convicted the appellants herein for the charge u/s.302 read with 34 IPC and sentenced them as stated in the first paragraph of this judgment. Challenging the said conviction and sentence, the appellants/accused are before this Court.

5. Since Mr.T.K.Sampath, learned counsel on record, appearing for the appellant/A1 in CrI.A.No.311/2013, is no more, we have appointed Mr.B.Gopinath, learned counsel as the Legal Aid Counsel today, to argue the matter.

6. We have heard the learned Legal Aid Counsel appearing for the appellant/A1 in CrI.A.No.311/2013 and Mr.B.Sundarapandiyan, learned counsel representing Mr.M.V.Muralidharan, learned counsel on record for the appellant/A2 in CrI.A.No.532/2013 and the learned Additional Public Prosecutor appearing for the State and we also perused

the materials placed on record carefully.

7. This is a case based on circumstantial evidence. So far as A1 [Soundar @ Soundarrajan] is concerned, it is alleged that he had developed illicit intimacy with A2 [Sridevi, wife of the deceased] and on coming to know of the same, the deceased quarreled with A1. This is stated to be the motive. This has been spoken to by P.Ws.1 to 3. In our considered view, the prosecution has succeeded in establishing the ill-feeling between the deceased and A1.

8. Similarly, insofar as A2 is concerned, P.Ws.1 to 3 have spoken about the illicit relationship between her and A1. They have also stated that there were frequent quarrels between the deceased and A2 on account of the same. Thus, the prosecution has established that there were frequent quarrels between the deceased and A2.

9. The next circumstance is that on 27.10.2007, at about 00.00 hrs. [midnight], A2 came to the house of P.W.1 and cried for help to disconnect the electricity service connection. When P.Ws.1 to 3 went to the house of the deceased, after disconnecting the electricity supply, they found the deceased dead. From this circumstance, the prosecution has clearly established the fact that the deceased would have died before 00.00 hrs. midnight.

10. P.W.11, the doctor, who conducted autopsy, has stated that the death was due to asphyxia due to pressure mounted on the neck. From this medical evidence, the prosecution has established that the death of the deceased was due to homicidal violence.

11. Now, the next question is, as to who caused the death of the deceased. In order to prove this fact, the prosecution relies on the extra-judicial confession given by A2 to P.W.4 and the judicial confession given by A2 to P.W.10. The respective learned counsel for the appellants would submit that the extra-judicial confession said to have been given by A2 to P.W.4 on 28.10.2007 at about 15.00 hours, cannot be true. In order to substantiate this contention, learned counsel would take us through the evidence of P.W.1, who has stated that at the time when the police came to the place of occurrence, both the accused were present and at 06.30 hrs. the police took both the accused into their custody. From this evidence, we find that there is some doubt regarding the said so-called extra-judicial confession said to have been given by A2 to P.W.4 on 28.10.2007. Apart from that, it is not as though A2 had acquaintance with P.W.4. It is a common knowledge that a culprit would not, in

general, choose a total stranger to confess. Here, in the instant case, P.W.4 is, admittedly, a stranger to A2 and therefore, it is doubtful as to whether A2 would have chosen P.W.4 to confess. Further, in view of the positive admission made by P.W.1 that both the accused were taken into custody on 28.10.2007 by the police at 06.30 hrs. itself, it is highly impossible for A2, on her own, would have gone to P.W.4 to make the extra-judicial confession on 28.10.2007 at 15.00 hrs. Therefore, this extra-judicial confession of A2 to P.W.4, cannot be believed.

12. Then comes the judicial confession, said to have been given by A2 to P.W.10-learned Judicial Magistrate, No.2, Athur. We have gone through the proceedings of the learned Magistrate and also the oral evidence. He has stated that A2 was produced before him on 21.11.2007 and on that day, according to him, he gave the statutory warning to her, as required u/s.164 of the Code of Criminal Procedure and gave time to her to relax. A2 was taken back to the prison and she was again produced before P.W.10 on 23.11.2007. The learned Magistrate, in his evidence, has stated that again he gave the statutory warning to A2 and only on such warning, A2 still wanted to confess. The confession was accordingly recorded by him. A perusal of the said confession, recorded by P.W.10, would go to show that at the foot of the said confession, the learned Magistrate, has appended the following certificate:-

"It was taken and dictated to typist in my presence and typed by Typist and was read over to the person making it and admitted by her to be correct and it contains full and true account of the statement made by her."

In our considered view, this certificate does not satisfy the legal requirement of section 164 of the Code of Criminal Procedure.

13. Sub-section [4] of Section 164 of the Code of Criminal Procedure reads as follows:-

"[4] Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession ; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

"I have explained to [name] that he is not bound to make a confession and that, if he does so, any confession he may make may be

used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him."

14. A perusal of the oral evidence of P.W.10-learned Magistrate, would go to show that he has not offered any explanation as to why he consciously omitted the first part of the Memorandum provided under sub-section 4 of section 164 of the Code of Criminal Procedure, which mandates that he has to record his belief that the confession was voluntarily made by the accused. The confession of the accused, unless is voluntary, is not admissible in evidence and the same cannot be acted upon. The extra-judicial confession carries no solemnity as the person who speaks about the said extra-judicial confession, may not state as to whether he had satisfaction that the confession was voluntary or not. Solemnity to the judicial confession is attached because the learned Judicial Magistrate, who is an independent judicial authority, by following the procedure contemplated u/s.164 of the Code of Criminal Procedure, should have satisfied his judicial conscience that the accused made the confession voluntarily. It is only the satisfaction of the judicial conscience of the learned Magistrate about the voluntariness of the confession, that attaches solemnity to the confession. In the instant case, had the learned Magistrate been satisfied that the confession was made voluntarily by A2, he would not have omitted to record the same by incorporating the same in the footnote as mandated under sub-section [4] of section 164 of the Code of Criminal Procedure. We have to presume that the learned Magistrate had consciously omitted to record the voluntariness of A2. The very fact that while under examination, he has not offered any explanation as to why he omitted to record his belief that the confession was made voluntarily, would give rise to presumption that the confession was not made voluntarily by A2.

15. In this regard, we may also refer to a Judgment of the Hon'ble Supreme Court in Chandran Vs. The State of Madras reported in AIR 1978 SC 1574. In the said case, the learned Magistrate had appended the footnote to the confession. While doing so, the learned Magistrate, instead of recording that "he believed" that the confession was voluntarily made, recorded that "he hoped" that the confession was voluntarily made. The Hon'ble Apex Court found vast difference in meaning between the words "believe" and the "hope". The Hon'ble Apex Court has further held in that case, that the learned Magistrate had

consciously omitted to use the expression "believe" and instead, he has used the expression "hope", which itself would give rise to a presumption that the learned Magistrate had no belief that the confession was made voluntarily. In those circumstances, the Hon'ble Supreme Court doubted the voluntariness of the said retracted confession.

16. For better appreciation, the relevant paragraphs of the said judgment, viz., Chandran's case [cited supra], reads thus:-

"30. In the instant case, the Magistrate, has nowhere in the record of the confession, certified his satisfaction or belief about the voluntariness of the confession. In the Memorandum [Ex.P.28] appended by him at the foot of the confession, he has merely expressed a "hope" that the confession was voluntarily made. Even in his oral evidence at the trial, the Magistrate [P.W.18] did not vouch for the voluntariness of the confession. He did not say that the use of the word "hope" by him in the memorandum [Ex.P.28] was due to some accidental slip or heedless error. P.W.28 is a Sub-Divisional Magistrate and a member of the Judicial service. He is supposed to be a judicial officer of standing and experience. The memo, Ex.P.28, is in English and in the handwriting of the Magistrate. It is, therefore, not possible to hold that the Magistrate was ignorant of the difference in the meaning of the words "hope" and "believe" and that he unwittingly chose the former, while in reality, he intended to express what was meant by the latter. There is every probability that the use of the word "hope" instead of "believe". In the memorandum, Ex.P.28, by the Magistrate was deliberate and not inadvertent. There is a marked difference in what is connoted by "hope" and "believe" ; "to hope" means "to want and expect" ; "to look forward with expectation and desire". "Hope" is a wishful feeling floating on nebulous foams projected into the unknown future. Deep hidden in "hope" dwells a lingering doubt, a speck of suspicion, that what is desired and expected may not turn out true. Not unoften, in the mind of the person hoping, there lurks subconscious fear that the "hope" may turn out a "dupe". In the sense in which, it is used in S.164, has 'logical confidence' or

'rational conviction' as its essential element. It imports a very high degree of expectation wrought by reason, a satisfaction fast-rooted interra firma, free from doubt as to the truth of the fact perceived and believed.

31. In the light of the above discussion, we are of opinion, that the Magistrate advisedly chose to use the word "hope", instead of "believe", in the Memorandum Ex.P.28, because he was not fully convinced that the confession, Ex.P.27 had been voluntarily made, the Magistrate's mind being troubled by suspicion and doubt as to the voluntariness of the confession. The retracted confession, Ex.P.27, therefore, must be excluded from consideration."

Here, in the instant case, the learned Magistrate has not at all recorded his belief that the confession was made voluntarily. Thus, we find no option, but to hold that the said confession, which now stands retracted, was not made voluntarily. Therefore, the same is inadmissible and the same cannot be acted upon.

17. If the extra-judicial confession given by A2 to P.W.4 and the judicial confession given by A2 to P.W.10, which now stands retracted, are rejected from consideration for the reason which we have dealt with elaborately hereinabove, we find that there is no other evidence against the accused. So far as A1 is concerned, the only evidence is that P.W.2 had seen A1 moving towards his house from the locality of the house of the deceased. Acting on this circumstance alone, A1 cannot be convicted. Thus, we find that the prosecution has failed to prove its case against both the accused. Therefore, the accused are entitled for acquittal.

18. In the result, the criminal appeals are allowed. The conviction and sentence imposed on the appellants by the Trial Court for the offence u/s.302 read with 34 IPC in SC.No.266/2008 vide judgment dated 22.11.2012, are hereby set aside and the appellants/A1 and A2 are acquitted of the charge leveled against them.

19. Since it is reported that A2 [Sridevi] is in jail, she is directed to be released forthwith, unless her presence is required in connection with any other case. The Bail Bonds, if any executed by A1 [Soundar @ Soundarrajan], stand discharged. Fine amount, if any paid, shall be refunded to the appellants.

20. Before parting with the matter, this Court appreciates the role played by Mr.B.Gopinath, the Legal Aid Counsel, appearing for the appellant in CrI.A.No.311/2013, in properly projecting the case. The Tamil Nadu State Legal Services Authority, is requested to pay him the remuneration as per norms. Consequently, connected M.P. is closed.

Sd/-  
Assistant Registrar(CS VII)

//True Copy//

AP Sub Assistant Registrar  
To

1. The Principal Sessions Judge,  
Salem.
2. The Inspector of Police  
Ethappur Police Station  
Salem District.
3. The Judicial Magistrate No.1,  
Athur.
4. -Do- Through The Chief Judicial Magistrate,  
Salem.
5. The Superintendent,  
Central Prison, Coimbatore.
6. The Public Prosecutor  
High Court, Chennai.
7. The Section Officer,  
'B' Section, High Court, Madras.
8. The Section Officer,  
'F' Section, High Court, Madras.
9. The Assistant Registrar(AD),  
High Court, Madras.
10. The Secretary,  
Tamilnadu State Legal Services Authority,  
High Court, Madras.

CrI.A.Nos.311 & 532 of 2013

VD(CO)  
CA(18/05/2016)