

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.04.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Criminal Appeal No.719 of 2013

Nizar Ahamed @ Nizar

... Appellant

Vs

State through
The Inspector of Police,
Mayiladuthurai Police Station,
Nagapattinam District
(Crime No.885 of 2004)

... Respondent

Prayer:- Criminal Appeal filed under Section 374(2) Cr.P.C., to call for the records and set aside the judgment and conviction imposed by the learned District & Sessions Judge, Nagapattinam in S.C.No.163 of 2008 dated 18.10.2012 against the appellant/accused.

For Appellant : Mr.M.H.Abdur Rahman,
Legal aid counsel

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

JUDGEMENT

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

The appellant is A.1 in S.C.No.163 of 2008 on the file of the learned District & Sessions Judge, Nagapattinam. A.2 was one Mr.Vadivel. The trial Court framed as many as four charges against the accused. The first charge was under Section 302 I.P.C., against A.1; the second charge was under Section 302 r/w 34 I.P.C., against A.2; the third charge was under Section 436 I.P.C., against A.1 and A.2 and the fourth charge was under Section 380 I.P.C., against A.1 & A.2. By judgment dated 18.10.2012, the trial Court acquitted A.2 from all the charges and convicted A.1 for offence under Sections 302, 380, 436 & 201 I.P.C. Challenging the said conviction and sentence, the appellant/A.1 is before this Court with this Criminal Appeal.

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

The deceased in this case was one Mr.Eali @ Rajangam. One Ms.Faizil Banu was constructing a house at Neithavasal, Needur Village in Nagapattinam District. The deceased was employed as a Watchman in the said house under construction. During day time, the other workers used to work in the building under construction whereas, the deceased was employed as a Watchman between 6.00 pm and 7.00 am. P.W.3, is the son of the deceased. P.W.1 is the father of Ms.Faizil Banu. He was taking care of the construction of the said building and thus, he only employed the deceased as Watchman. Every day, after the work was over, as soon as all the workers had left, P.W.1 used to lock the main door of the house leaving the deceased to sleep in the car shed, in the same house. The key of the outer gate of the house used to be in the possession of the deceased. At 7.00 am, on the next day, after his duty time was over, it was his practice to hand over the key of the gate to P.W.1 and to leave for his house.

3.On 02.06.2004, as usual, at 6.00 pm, the deceased turned for duty. P.W.1 locked the main door and handed over the key of the outer gate to the deceased and left the house and thus, the deceased alone was in the car shed of the house in the night intervening 02.06.2004 and 03.06.2004. A drilling machine was kept by P.W.1 inside the house.

4.On 03.06.2004, at 9.00 am, P.W.1 returned to the house under construction. He found the outer gate kept opened. He also found that the main door of the house was also opened. The deceased was not seen anywhere. When he entered the house, he found that the main wooden frames in the entrance of the house were all burning. When he further entered into the house, he found the clock, Television set and other articles had already been burnt to ashes. The locks were found broken. Suspecting some foul play, he sought the help of a neighbour and with him, he made a search for the deceased. When they went behind the house, they found the septic tank opened and found the deceased lying inside the same.

5. The hands and legs of the deceased were tied with cloth and the same would indicate that the deceased was done to death by somebody. P.W.1 immediately informed the same to his relatives as well as the relatives of the deceased. Then he rushed to the Mayiladuthurai Police Station, and made a complaint at 3.00 pm on 03.06.2004. In the complaint, he mentioned about the above facts and also mentioned that there was no theft committed from the house. P.W.8, the then Sub Inspector of Police, Mayiladuthurai Police Station, on receipt of the said complaint, registered a case in Crime No.885/2004, for offence under Sections 457, 511, 436 & 302 I.P.C. In the F.I.R., it was mentioned that the assailant was not known. P.W.8, forwarded Ex.P.1 (complaint) and Ex.P.11 (F.I.R) to

Court and the learned Judicial Magistrate, Nagapattinam, received the same on 03.06.2004 at 4.30 pm.

6.The case was taken up for investigation by P.W.14, the then Inspector of Police. He proceeded to the place of occurrence at 4.15 pm on 03.06.2004 and prepared an observation mahazar and a rough sketch in the presence of P.W.5 and another witness and he also recovered a blood stained wooden log and another wooden reaper with blood stains, a broken steel lock, a steel nut and two steel bolts under Ex.P.5 mahazar, in the presence of the same witnesses. Then he conducted inquest on the body of the deceased and forwarded the same for post mortem.

7.P.W.2 - Dr.Maruthappan, conducted autopsy on the body of the deceased on 04.06.2004 at 11.00 am and found the following injuries:-

"External Injuries:-

1.An abrasion seen on the left parietal region of scalp near midline 5 cm x 1 ½ cm with clotted blood.

2.On dissection the subcutaneous tissue ecchymosed and subcutaneous hematoma of 40 grams size present. Fracture of left occipital bone present (crack fracture). Brain membranes congested on left side. Intra cerebral hemorrhage seen on the left cerebral hemisphere. Brain substance soft and pulpy."

8.Ex.P.2 is the post mortem certificate and Ex.P.3 is the chemical analysis report. P.W.2 gave final opinion that the deceased would have died 36 to 48 hours prior to post mortem as a result of shock and hemorrhage due to the head injuries. P.W.14 recovered the cloth materials from the dead body of the deceased. Though he conducted investigation, examined many witnesses and tried his level best to unearth the truth he was unable to make any break through until he was transferred.

9.The investigation was thereafter taken over by P.W.12, the then Inspector of Police. He examined few more witnesses including the Doctor and he also could not make any breakthrough in the case until he was transferred. The investigation was thereafter taken over by P.W.13, the then Inspector of Police on 04.03.2016. He also could not make any breakthrough in the investigation. Finally, the investigation was taken over by P.W.15, the then Inspector of Police. According to him, A.1 was one of the suspects in the case.

10.While so, it is alleged that A.1 appeared before P.W.6 the then Village Administrative officer of Needur Village on

02.06.2007 and wanted to confess. P.W.6 was satisfied that A.1 was willing to confess voluntarily and therefore, he allowed him to confess and he reduced the same into writing. Ex.P.6 is the said confession. Along with Ex.P.6, P.W.6 took A.1 to P.W.15 and produced him at 10.00 am on 02.06.2007. On such production, P.W.15 arrested A.1. While in custody, A.1 made a voluntary confession to P.W.15 in which, he disclosed that he had hidden a drilling machine at his house. In pursuance of the said disclosure statement, A.1 took P.W.15 and P.W.5 to his house and produced M.O.1 drilling machine. P.W.15 recovered the same under a mahazar.

11.A.2 surrendered before the learned Judicial Magistrate on 18.08.2007. P.W.15 took police custody of A.2 and he also gave a voluntary confession but, no fact was discovered out of the same. On completing the investigation, P.W.15 laid charge sheet against both the accused.

12. Based on the above materials, the trial Court framed the charges as detailed in the first paragraph of this judgment against both the accused. The accused denied the same. In order to prove the case of the prosecution, on the side of the prosecution, as many as 15 witnesses were examined and 18 documents were exhibited, besides 19 Material Objects.

13. Out of the said witnesses, P.W.1 is the father of Ms. Faizil Banu. He has stated that the deceased was employed as a Watchman in the house under construction for his daughter Ms. Faizil Banu. He has further stated that on 02.06.2004, at 7.00 pm, the deceased reported for duty and he was alone there. He has further stated that he locked the main door of the house after keeping the drilling machine inside the house. He has further stated that on the next day, when he came to the house at 9.00 am, he found the deceased missing. The outer gate of the house of the house was opened; the door frames were burning inside and the Television set and other articles in the house had been burnt. He found the dead body of the deceased in the septic tank. Hands and legs of the deceased were tied. Then he made a complaint to the Mayiladuthurai Police Station. He also identified M.O.1 drilling machine which was lastly kept by him inside the house. P.W.2 has spoken about the post mortem conducted by him and his final opinion regarding the cause of death of the deceased. P.W.3, the son of the deceased has stated that on 02.06.2004, the deceased left the house for duty and on the next day, he heard that the deceased was lying dead. P.W.4 has also spoken about the same facts. P.W.5 has spoken about the preparation of observation mahazar and a rough sketch and the recovery of Material Objects from the place of occurrence. P.W.6, the then Village Administrative Officer has stated that the deceased appeared before him on 02.06.2007 and made a voluntary confession under Ex.P.6. He has further stated

that, he produced A.1 to P.W.15. A.1 made a voluntary confession out of which, M.O.1, was recovered. P.W.7 has spoken about the photographs taken by him on the body of the deceased as requested by P.W.15. P.W.8 has spoken about the registration of the case and complaint made by P.W.1 at 3.00 pm on 03.06.2004. P.W.9 is the Constable who took the F.I.R., from the Police Station and handed over the same to the learned Judicial Magistrate at 4.30 pm on 03.06.2004. P.W.10 a Grade I Constable has stated that he carried the dead body of the deceased from the place of occurrence to the hospital for post mortem. P.W.11, the Assistant Director of Forensic Department has stated that he examined the internal organs of the dead body of the deceased which revealed that there was neither poison nor alcohol. P.Ws.12 to 14 have spoken about the investigation done by them and P.W.15 has spoken about the final report which was filed by him.

14. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., they denied the same as false. However, they did not choose to examine any of the witnesses nor did they mark any documents on their side.

15. Having considered all the above, the trial Court found the appellant/A.1 guilty under the said charges and accordingly, sentenced him as detailed in the first paragraph of this judgment. The trial Court however acquitted A.2 from all the charges. Aggrieved over the same, the appellant/A.1 is before this Court with this criminal appeal.

16. We have heard the learned counsel appearing for the appellant/A.1 and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

17. This is a case based on circumstantial evidence. The first and foremost circumstance is that lastly, the deceased was seen alive at the place of occurrence on 02.06.2004 at 7.00 pm by P.W.1. There is no denial of the said fact. Therefore, we hold that the prosecution has proved the said circumstance and the prosecution has further proved that the deceased alone was there in the car shed of the house under construction at Needur Village.

18. The next circumstance is, on 03.06.2004, at 9.00 am, the deceased was found dead by P.W.1. The dead body of the deceased was found lying inside the septic tank and his hands and legs were tied by using cloth. Thus, the prosecution has proved that the deceased would have been done to death some time between 7.00 pm on 02.06.2004 and 9.00 am on 03.06.2004.

19. P.W.2, Dr. Maruthappan, who conducted autopsy on the body of the deceased had found head injury and there were also

injuries on the other parts of the body of the deceased. He has opined that the deceased would have died due to shock and hemorrhage due to head injuries and the death would have occurred 36 to 48 hours prior to the post mortem. It tallies with the time of death projected by the prosecution. Thus, from the medical evidence, the prosecution has clearly established that the deceased had been done to death and that he would have been done to death between 7.00 pm on 02.06.2004 and 9.00 am on 03.06.2004.

20. The next question is, "who caused the death of the deceased?" In order to prove that the death of the deceased was caused by the appellant/A.1, the prosecution relies mainly on the extra judicial confession said to have been made by A.1 to P.W.6 on 02.06.2007. P.W.15 has stated that the appellant/A.1 was one of the suspects in the case. But, it is further alleged that M.O.1 was recovered from the house of A.1. It is not explained to the Court as to why there was no house search made for about three full years though, they had suspicion that A.1 would have involved in the murder of the deceased. It is highly unbelievable that after a span of three years, A.1 would have gone to the Village Administrative Officer on 02.06.2007 and made an extra judicial confession. All these three years, A.1 was very much available in the Village and according to P.W.15, the appellant/A.1 was one of the suspects. Though, four police officers in quick succession had investigated the case, no breakthrough could be made. We do not believe that after a period of three years, A.1 would have any need to meet the Village Administrative Officer to make an extra judicial confession. Above all, it is not in evidence that A.1 had any acquaintance with P.W.6 so as to repose confidence in him and to confess. It is again doubtful that he would have chosen a total stranger to confess. For all these reasons, we hold that the said extra judicial confession is highly suspicious.

21. 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 shrouded by suspicion by its very nature is a very weak piece of evidence, unless, the same inspires the fullest confidence of the Court and 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.6 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 the appellant/A.1. Further, in this case, there is no evidence that the appellant/A.1 was anywhere found near the place of occurrence at or about time of occurrence. There is

no other incriminating circumstance against him except the alleged recovery of M.O.1. The recovery was made on the basis of the disclosure statement made by A.1 on 02.06.2007.

22. According to the case of the prosecution, M.O.1 was stolen from the house under construction. But, a perusal of Ex.P.1 - complaint which has been used duly to contradict the evidence of P.W.1 would go to show that no property whatsoever was found missing from the house under construction until, the arrest of A.1 by P.W.15 and the consequential recovery of M.O.1 there was no indication that M.O.1 was found missing. The story that M.O.1 was stolen away from the house of the deceased was propounded for the first time after 02.06.2007. Had it been true that the drilling machine (M.O.1) was found missing that would have come to light immediately after the occurrence or within a reasonable time. The very fact that it was not known for three years would go to show that this story that M.O.1 was found missing from the house of the deceased is a concocted story by the prosecution.

23. According to P.W.1, the door frames were found burning at the time when he entered the place of occurrence. P.W.1 has further submitted that the television set and the valuable articles had been burnt to ashes. If it was a case of murder for gain, the main culprits would not have taken only a small worthless drilling machine after having caused the damage to the valuable properties in the house. From these circumstances, we are of the view that the truth is not before this Court and with a view to complete the formality of investigation, a confession of A.1. has been created and the case has been given a decent burial. P.W.1 has admitted that M.O.1 was not even shown to him before, and for the first time, M.O.1 was identified by him as the stolen property only in Court during trial.

24. In view of the foregoing discussions, we hold that the prosecution has failed to prove the case beyond reasonable doubts. Therefore, the appellant/A.1 is entitled for acquittal.

25. In the result, the Criminal Appeal is allowed and the conviction and sentence imposed on the appellant/A.1 by the trial Court is set aside. The appellant/A.1 is acquitted from the charges levelled against him and he is directed to be set at liberty, forthwith, unless his presence is required in connection with any other case. Fine amount, if any, paid by the appellant/A.1, shall be refunded to him. Bail bond, if any, shall stand discharged.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

jbm

To

- 1.The District & Sessions Judge,
Nagapattinam.
- 2.The Judicial Magistrate No.I,
Mayiladuthurai.
- 3.The Superintendent,
Central Prison,
Cuddalore 04.
- 4.The District Collector,
Nagapattinam.
- 5.The Director General of Police,
Mylapore, Chennai 04.
- 6.The Inspector of Police,
Mayiladuthurai Police Station,
Nagapattinam.
- 7.The Superintendent of Police,
Nagapattinam District.
- 8.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.M.H.Abdur Rahman , Advocate, S.R.No.26992

Crl.A.No.719 of 2013

SKS (CO)
CA (29/06/2016)

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