



BAIL SLIP

The Appellant/Accused Viz Sivakumar @ Sukumar, aged 25 years S/o.Durairaj, be and hereby was directed to be released on bail as per direction of this Court dated 28/2/2013 made in MP.No.1/2013 in CrI.A.No.77/2013.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21-3-2016

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

CRIMINAL APPEAL No.77 of 2013

Sivakumar @ Sukumar .. Appellant/accused

vs

State by:

Inspector of Police

Erode Town Police Station

Erode (Crime No.1064 of 2008) .. Respondent/complainant

Criminal appeal preferred under Section 374(2) of Code of Criminal Procedure against the judgment passed by the Court of Principal Sessions Judge, Erode, in S.C.No.101 of 2012 dated 1.10.2012.

For Appellant : Mr.R.Rajasekaran

For Respondent : Mr.M.Maharaja
Additional Public Prosecutor

JUDGMENT

(Judgment of the Court was delivered by M.SATHYANARAYANAN, J.)

The sole accused in S.C.No.101 of 2012, on the file of the Court of Principal Sessions Judge at Erode, is the appellant and he was charged, tried, convicted and sentenced vide judgment dated 1.10.2012, as under:-



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CHARGES	CONVICTION	SENTENCE
Section 302 IPC	Section 302 IPC	Life Imprisonment with a fine of Rs.2,000/- with default sentence of 3 years Simple Imprisonment
Section 404 IPC	Section 404 IPC	1 year Rigorous Imprisonment with a fine of Rs.1,000/- with default sentence of 3 months Simple Imprisonment
Section 201 IPC	Section 201 IPC	7 years Rigorous Imprisonment with a fine of Rs.1,000/- with default sentence of 1 year Simple Imprisonment

Challenging the legality of conviction and sentence passed by the trial Court, the appellant/accused, filed this appeal.

2.The facts leading to the filing of this appeal briefly narrated, are as follows:-

2(i) The deceased in this case, is one Audikesavan and he and his brother Murali (P.W.1) were doing business in sand and brick in the name and style of "M.P.Adhi Sand Booking Office", at Erode and Audikesavan was in-charge of the business. His brother Murali (P.W.1) also used to visit the place of business. A motorcycle viz. YAMAHA, (M.O.2) and a mobile phone (M.O.1) were purchased in the name of Murali (P.W.1) and were used by Audikesavan. The appellant/accused was employed as a Driver of "Mini Door Vehicle" under Audikesavan and joined the said service about 4 months prior to 23.8.2008.

2(ii) The appellant/accused came to the Office of Audikesavan at about 9.00 A.M. on 23.8.2008, in connection with his employment, and demanded from his employer, a sum of Rs.2,000/- on account of the fact that Audikesavan was found in possession of huge money and it was refused to be given by him. Audikesavan due to inebriated condition, slept in his Office.

2(iii) While Audikesavan was sleeping, the appellant/accused in order to steal the money, cell phone and motorcycle, smothered him with a pillow (M.O.8), and after committing the crime, took the body outside the Office of the deceased Audikesavan and buried the same in a sand heap in front of the Office.

2(iv) P.W.1 Murali, as the brother of the deceased, went to his house for taking lunch and his mother informed that Audikesavan, who left the house in the morning, did not return back to have lunch. P.W.1 went to the Office of his brother



Audikesavan at about 5 P.M. on that day, wherein, he noted the presence of the appellant/accused and when he enquired him, the appellant/accused informed him that after having lunch, he returned back and the deceased Audikesavan was not found. P.W.1 made attempts to contact his brother through mobile phone; but, it was switched off. P.W.1 made a search to trace his brother; but, he could not find him and hence, lodged a complaint before the respondent - police station. Ex.P1 is the complaint.

2(v) P.W.16 was the Head Constable attached to the respondent - police station and on receipt of the complaint given by P.W.1, he registered a case in Crime No.1064 of 2008 for "man missing" at about 12.30 hours on 7.9.2008. The printed First Information Report was marked as Ex.P24. P.W.16 despatched the original complaint as well as the FIR to the Court of Judicial Magistrate No.II, Erode and copies of the same to P.W.17, who was the Sub-Inspector of Police, Law and Order of Erode Town Police Station.

2(vi) P.W.17 proceeded to the scene of occurrence and examined P.W.1, Chandra, Pandurangan, Ramadoss and Mohanasundaram and recorded their statements and to trace Audikesavan along with his body, he sent necessary notification to all the Police Stations through the District Crime Bureau.

2(vii) On 13.9.2008, at about 11.30 A.M., P.W.4, the Village Administrative Officer (VAO) of Kasipalayam, has produced the appellant/accused along with a statement and special report marked as Exs.P2 and P3 respectively, and on receipt of the same, P.W.17 altered the crime from "man missing" to Sections 302 and 201 of IPC and the alteration report was marked as Ex.P23 and it was forwarded to the jurisdictional Magistrate Court. P.W.17, on transfer, has handed over the investigation to P.W.18.

2(viii) The appellant/accused voluntarily came forward to give a confession statement and it was recorded by P.W.18 in the presence of the VAO - Alagurajan (P.W.5) and the Village Assistant - Manickam. Pursuant to the admissible portion of the confession statement marked as Ex.P4, a sum of Rs.463/- (M.O.6) and a blue colour chappal (M.O.7) were seized under a cover of mahazar Ex.P25. The appellant/accused also took P.W.18 to the Office of the deceased Audikesavan and pointed out the place where the body was buried. P.W.18 also prepared an observation mahazar, marked as Ex.P5, and a rough sketch, marked as Ex.P6. The accused produced M.Os.8, 9 and 10 and they were seized under a cover of mahazar Ex.P7. P.W.18 also recovered M.Os.1 and 2 under a cover of mahazar Ex.P8, and thereafter, brought the appellant/accused to the police station and subsequently, sent him for judicial custody and also sent the articles under Form 95, to the jurisdictional Magistrate Court.



2(ix) P.W.18, in order to exhume the body and also to conduct postmortem, made a requisition under Ex.P26, to P.W.12, the Tahsildar, and on the same day (13.9.2008), examined P.Ws.4 and 5, and witnesses Udayan and Manickam and recorded their statements and subsequently, secured the custody of the appellant/accused from Pollachi Borstal Jail and produced him before the jurisdictional Magistrate Court and thereafter, lodged him at Sub-Jail, Erode.

2(x) P.W.18 got permission from the Court to take the appellant/accused to police custody and thereafter, took him to the scene of crime and the appellant/accused pointed out the place, in which, the body of Audikesavan was buried. P.W.18 in the presence of P.W.12, the Tahsildar, exhumed the body. P.W.12 conducted inquest in the presence of witnesses and panchayatdars and prepared Ex.P16 inquest report. P.W.18, in the presence of P.W.6 and another, took the sand (M.Os.11 to 13) and a pair of chappal (M.O.14) under a cover of mahazar Ex.P9, and sent the material objects to the Court. He examined P.W.1. P.W.1 produced two postcard size photos of his brother Audikesavan as well as of his father and mother. He examined P.Ws.2, 3, 6, 7, 12, 14 and other witnesses and recorded their statements. He produced the appellant/accused before the jurisdictional Magistrate Court and also forwarded the photographs taken in the scene of occurrence, as well as the material objects seized, to the Court.

2(xi) P.W.11, the District Police Surgeon and Professor, Forensic Medicine, Coimbatore Medical College and Hospital, on receipt of the body, commenced postmortem at about 1.35 P.M. on 17.9.2008, and noted the following features:-

"ANTEMORTEM INJURIES

1)Decomposing reddish blue coloured
Contusions seen in the following regions:-
a)3 x 2 cms in the lateral right upper hip.
b)8 x 6 cms in the left lateral upper hip.

Internal Injuries

a)Contusion inner end of left clavicle 5 x 4 cms.
b)Fracture left 3rd and 4th ribs on its costocondral junction with surrounding bruising 10 x 8 cms.
c)Bruising around mouth and nostrils over an area of about 12 x 12 cms with bruising of gums in anterior aspect.

OTHER FINDINGS:

-Peritoneal and pleural cavities - empty
-Lungs - identifiable, cut section shows decomposition changes.
-Heart - flabby shows decomposition changes.



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- Hyoid bone - intact.
- Liver, Spleen & Kidneys - identifiable, cut section shows decomposition changes.
- Dura intact, Brain matter empty
- Urinary Bladder - empty."

2(xii) On 23.9.2008, P.W.18 made a requisition for sending the material objects for chemical analysis and also sent the viscera and skull along with the photo of the deceased and the materials collected from Coimbatore Medical College and Hospital, to Forensic Laboratory after getting necessary permission. On 10.11.2008, he examined two witnesses and recorded their statements and also made a requisition on 12.1.2009, to conduct DNA test as well as superimposition test, under Ex.P27. Since P.Ws.2 and 3 came forward to give statements under Section 164 of Cr.P.C., P.W.18 made necessary arrangement to record their statements and produced them before the Court and on transfer, he handed over the investigation to his successor.

2(xiii) P.W.19, has continued the investigation and produced the materials collected during investigation, and did not record any statement and after completing the investigation, filed the charge sheet charging the accused for the commission of offences under Sections 302, 392 and 201 of IPC.

3.The Court of Judicial Magistrate No.II, Erode, on filing of the final report, took it on file in PRC No.16/2009 and issued summons to the appellant/accused and on his appearance, furnished to him, copies of the charge sheet under Section 207 of Cr.P.C., and having found that the case is exclusively triable by the Sessions Court, committed it to the Principal Sessions Judge, Erode, who took it on file in S.C.No.101 of 2012.

4.The trial Court, on appearance of the accused, has framed the charges and questioned him and the appellant/accused pleaded not guilty to the charges framed against him.

5.The prosecution in order to sustain the case, examined P.Ws.1 to 19 and marked Exs.P1 to P32 and M.Os.1 to 18. The accused was questioned under Section 313(1)(b) of Cr.P.C., with regard to the incriminating circumstances made out against him, and he denied it as false. On behalf of the appellant/accused, no oral evidence was let in and no document was marked. The trial Court on a consideration of oral and documentary evidences, has found him guilty and convicted and sentenced the appellant/accused as stated above and hence, this appeal.

6.The learned Counsel appearing for the appellant/accused, made the following submissions:-



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(a) The case of the prosecution rests upon circumstantial evidence and there are inconsistencies and further, the chain of events linking the appellant/accused to the commission of crime, is also not complete and therefore, the trial Court ought to have acquitted him.

(b) Though the appellant/accused was missing from 23.8.2008, the complaint was lodged only on 7.9.2008, and no tenable explanation has been offered as to the belated lodging of the complaint.

(c) The complaint Ex.P1, as well as the FIR Ex.P24, reached the Court on the next day i.e., 8.9.2008, at about 10.45 A.M.. and no explanation has been offered as to the belated despatch of the said documents.

(d) The extra-judicial confession under Ex.P2, stated to have been given by the appellant/accused to P.W.4, cannot be believed at all and in any event, the same is not supported by any material.

(e) The body was also exhumed only 11 days after the lodging of FIR and according to the prosecution, the body was buried just in front of the Office of the deceased. When it was exhumed, except the bones and some tissues, nothing was there and if really the offence was committed on 23.8.2008, there was no possibility of such deterioration in the condition of the body. Therefore, the prosecution has failed to provide the exact date of death and that apart, according to P.W.11, the Doctor, no final opinion could be given as to the cause of death, though it was observed by him that findings during autopsy, are not inconsistent with death due to asphyxia due to smothering and it is self-contradictory. In the absence of any information as to the exact cause of death, the appellant/accused cannot be charged for the commission of offence of murder.

7. In sum and substance, it is the submission of the learned Counsel appearing for the appellant/accused, that since the prosecution has miserably failed to link the chain of circumstances in a complete and conclusive manner, the trial Court ought to have acquitted the appellant/accused and he prays for setting aside the conviction and sentence by allowing the appeal.



8.Per contra, the learned Additional Public Prosecutor appearing for the respondent/State, would contend that the prosecution through oral and documentary evidences, coupled with the scientific evidence, has proved the case beyond any reasonable doubt, and the chain of circumstances projected by it, is complete in all respects, and the trial Court, on a thorough and proper consideration of the materials, has rightly reached the conclusion and convicted and sentenced the appellant/accused and prays for dismissal of the appeal.

9.This Court has carefully considered the rival submissions and also perused the oral and documentary evidences and other materials as well as the case records.

10.Where the prosecution rests its case on circumstantial evidence, for conviction, the following conditions must be fulfilled:-

- (1) The circumstances from which the conclusion of the guilt is to be drawn should be fully established;
- (2) The facts so established should be consistent not only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (3) The circumstances should be of conclusive nature and tendency;
- (4) They should exclude every possible hypothesis except the one to be proved and
- (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused.

11.A conviction on the basis of circumstantial evidence is permissible only when circumstances relied upon, are proved beyond doubt and are incompatible with the innocence of the accused as has been held in CHATTAR SINGH V. STATE OF HARYANA (AIR 2009 SC 378).

12.This Court keeping in mind, the above said principles, has carefully scanned and analysed the materials placed before it.

13.The following circumstances are projected by the prosecution:-



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17.The successor of P.W.18 viz. P.W.19, in the cross-examination, would depose that Ex.P30, alteration report, was produced before the Court only on 5.6.2009, and both SIM Cards stand in the name of P.W.1 and not in the name of the deceased.

18.It is to be pointed out at this juncture, that admittedly, the deceased and the appellant/accused are not strangers for the reason that even according to the prosecution, the appellant/accused was employed under Audikesavan as a Driver and therefore, there is nothing wrong in being together. As to the treatment given by P.W.2 to the deceased in the hospital on 23.8.2008, admittedly, no case sheet was maintained and though P.W.2 would admit that necessary entries will be made, it was not done for the reason that the deceased was known to her. The Investigation Officer - P.W.18 would state in the cross-examination, that she (P.W.2) was originally employed along with the appellant/accused under the deceased and left the services for the reason that she was paid a very low salary.

19.In the absence of any acceptable proof and evidence as to the treatment taken by the deceased, and as to the visit of the deceased to the hospital, in which P.W.2 was employed as a Nurse, it was difficult to accept the case of the prosecution as to the treatment taken by the deceased, and the presence of the appellant/accused in the hospital pursuant to the telephonic conversation between P.W.2 and him. Though the mobile phone of the deceased was recovered, no steps have been taken by the prosecution to verify the call records, and if done, it would have revealed the call made from the mobile phone of the deceased to the appellant/accused.

20.The prosecution also relied upon the extra-judicial confession under Ex.P2, given by the appellant/accused before the VAO P.W.4. A scrutiny of the testimony of P.W.4 would disclose that the appellant was an utter stranger to him. It is also to be pointed out at this juncture, normally, if a concerned person feels that he may be subjected to third degree method at the hands of the police if he surrenders, he would approach the VAO. But, it was not so in the case on hand.

21.In AIR 1975 SC 258 (STATE OF PUNJAB V. BHAJAN SINGH), it has been held that extra-judicial confession by itself is a very weak type of evidence and when the Court, taking into consideration surrounding circumstances, entertains doubt about its voluntary nature, it will not be safe to rely upon it. In (1997) 8 SCC 158 (PAKKIRISAMY V. STATE), it has been held that it is a rule of caution that the Court would generally look for an independent reliable corroboration before placing reliance upon an extra-judicial confession and it is no doubt true that extra-judicial confession by its very nature is



rather a weak type of evidence and it is for this reason that a duty is cast upon the Court to look for corroboration from other reliable evidence on record.

22. In the case on hand, as already pointed out, the Court is not inclined to believe the testimony of P.W.2, who is said to have seen the appellant/accused and the deceased together, and it was also pointed out, since both were known to each other as employer and employee, there is nothing unusual about the appellant/accused having conversation with or been in the company of the deceased.

23. The prosecution also relied upon the recovery of the dead body from the sand heap just in front of the Office of the deceased. This Court has also perused the photograph and finds, except bones and some tissues, nothing was there and P.W.11, the Doctor, who conducted autopsy, stated that since the body was in a highly decomposed state, he was not in a position to tell the cause of death. He has further stated that no definite opinion could be given as to the cause of death, and however, findings during autopsy are not inconsistent with the death due to asphyxia due to smothering. The opinion given by P.W.11, appears to be inconsistent and a grave doubt has been created in the mind of the Court, as to whether the death was homicidal or suicidal. Since the medical expert, who conducted postmortem examination, was not sure even about the cause of death, the Court cannot draw a presumption that Audikesavan was murdered.

24. It is also pertinent to point out at this juncture, that P.W.1 is none other than the brother of the deceased and though he was found missing from 23.8.2008, the complaint was lodged only on 7.9.2008, based on which, the FIR was registered at about 12.30 P.M., and it reached the jurisdictional Magistrate Court only at 10.45 A.M. on 8.9.2008. Though the prosecution has projected the case as one of murder for gain, no evidence has been collected as to the stealing of money said to have been possessed by the deceased, and the case of the prosecution bristles with many infirmities and inconsistencies. The chain of circumstances projected by the prosecution, is not complete in all respects. Therefore, it is wholly unsafe to sustain the conviction and sentence imposed by the trial Court on the appellant/accused, and the benefit of doubt shall enure in his favour.



25. In the result, the criminal appeal is allowed and the judgment of conviction and sentence passed by the Court of Principal Sessions Judge at Erode, in S.C.No.101 of 2012, dated 1.10.2012, is set aside. The appellant/accused is acquitted of the charges framed against him. Fine amount if any paid, shall be refunded to him and since he is on bail, the bail bond executed by him, shall stand terminated/discharged.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To:

1. The Principal Sessions Judge, Erode
2. The Judicial Magistrate No.II, Erode
3. The Inspector of Police
Erode Town Police Station
Erode (Crime No.1064 of 2008)
4. The Public Prosecutor
High Court, Madras.
5. The Chief Judicial Magistrate Erode
6. The Superintendent Central Prison,
Coimbatore

+1 cc to Mr.Rajasekaran Advocate sr.18194/16

CRL.A.No.77 of 2013

aa18/04/2016