

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

Criminal Appeal No.198 of 2017

Sasikumar .. Appellant/Accused

Vs

State by the Inspector of Police,
Namakkal Police Station,
Namakkal District,
Cr.No.698/2015 ... Respondent/Complainant

Prayer:- Criminal Appeal filed under Section 374 Cr.P.C.,
against the conviction and sentence passed by the Principal
Sessions Court, Namakkal, in S.C.No.120/2016 dated 04.03.2017.

For Appellant : Mr.A.Padmanaban

For Respondent : Mr.P.Govindarajan,
Additional Public Prosecutor

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JUDGEMENT

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

The appellant, the sole accused in S.C.No.120 of 2011 on the file of the learned Principle Sessions Judge, Namakkal, has come with this Criminal Appeal challenging his conviction and sentence for offence under section 302 I.P.C. The Trial Court has sentenced him to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for 9 months.

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

The deceased in this case was one Mr.Sivaji. He was residing at Veesanam Village in Namakkal District. P.W.1 is the wife of the deceased. The accused is their son. The deceased was working in a workshop at Namakkal, as a Night Watchman. The accused was then a Bachelor. He was working as a lorry Driver. The accused wanted to purchase a lorry, for which, he wanted money from his father. The deceased refused. It is stated that the accused got wild and decided to do away with the deceased. This is stated to be the motive for the occurrence.

3.It is further alleged that on 27.09.2015, when the deceased was alone at his house, the accused came to the house and asked about the proposal to purchase the lorry. When the deceased declined, the accused wanted him atleast to sell the land and to give money. Since, the deceased refused to do so, the accused, cut the deceased with bill hook on the neck and other parts of the body. Then, the accused fled away from the scene of occurrence.

4.According to the case of the prosecution, the occurrence was witnessed by one Ms.Baby (P.W-10) and one Ms.Manimegalai (P.W.4). The deceased was taken to the General Hospital, Namakkal and then, to the Mohan Kumaramangalam Medical College and Hospital, Salem, for further treatment. However, he succumbed to the injuries at 11.00 pm on the same day. In respect of the said occurrence, on a complaint made by PW.1, the present case was registered by the then Sub Inspector of Police (P.W.15) in Crime No.698/2015.

5.Thereafter, the investigation was taken over by P.W.16, the then Inspector of Police. He proceeded to the place of occurrence, prepared an observation mahazar, a rough sketch and recovered the blood stained earth, sample earth and also recovered the material objects in the presence of witnesses. He held inquest on the body of the deceased and forwarded the same for post mortem.

6.P.W.7 - Dr.Gokularaman, conducted autopsy on the body of the deceased and found the following injuries:-

"1.A cut injury seen on the lower aspect of right side of the neck measuring 15cmx3cmxBone deep, extending from 3 cm

below the right ear along the lower aspect of the neck upto the centre of back of the neck, posterior margin 15cm from the occipital protuberance exposing underlying cut muscles and cervical Vertebra with extroversion of blood.

2.A sutured wound seen on the back of right cheek with 5 sutures. A cut injury measuring 7cmx2cmxMuscle deep see merging with the previous wound.

3.Another injury seen measuring 8cmsx2cmxBone deep on the back of Right cheek along the lower aspect the right ear lobe merging with the previous injury exposing underlying cut muscles and cervical vertebra with extravagation of blood

4.A sutured wound over the back of right shoulder 12cm, 95 sutures/ OR of sutures cut injury seen exposing underlying cut muscles with extravagation of blood.

5.Another cut injury 1cm below the previous wound measuring 6cmx1cmxmuscled deep.

6.A stab injury see on the outer aspect of the right side of chest measuring 2cmx1cmxCavity deep.

7.A sutured wound seen back of left side chest 10 sutures with 15cm Long O/R sutures cut injury see exposing underlying cut muscles with extravagation of blood.

8.3cm inner and above another cut injury seen measuring 1cm muscle deep.

9.A Sutured wound back of left side shoulder measuring 15cm with 9 sutures O/R of sutures cut injury seen exposing underlying cut muscles.

10.A Sutured wound see on the lower and other aspect of the left fore arm 2cm with 1 suture O/R suture cut injury seen exposing underlying cut muscles.

11. A cut injury seen over just below

the thumb on the back of right han measuring 7cmx2cmxBone deep exposing cut muscles and bones.

12.A cut injury seen on the outer aspect of the right wrist measuring 5cmx1cmxbone deep exposing underlying cut muscles and bones.

13.A sutured wound over the left side occipital region measuring 10CM with 6 sutures O/R Sutures cut injury seen exposing underlying vault bones."

Ex.P.11 is the Post mortem certificate. He opined that the death was due to shock hemorrhage due to multiple injuries found on the body of the deceased. He has further opined that the said injury would have been caused by a weapon like M.O.3 - Bill hook.

7.On 28.09.2015, at 3.30 pm P.W.16 arrested the accused. On such arrest, the accused made a disclosure statement in which, he disclosed the place where he had hidden a blood stained pant; a blood stained shirt and a blood stained bill hook. In pursuance of the same, the accused took the Police and witnesses to the place of hide out and produced the blood stained pant; blood stained shirt and the blood stained bill hook, M.Os.1 to 3 respectively. P.W.16 recovered the same and forwarded the accused to Court for judicial remand and also handed over the material objects to Court.

8.Since, P.W.16 was transferred to some other Police Station, the case was taken up for further investigation by his successor P.W.17, the then Inspector of Police. P.W.17 recorded the statement from the Doctor who conducted post mortem and also recorded statements from other witnesses. On completing investigation, he laid charge sheet against the accused.

9.Based on the above materials, the trial Court framed a lone charge under Section 302 I.P.C. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 17 witnesses were examined and 24 documents were exhibited besides 5 Material Objects were marked.

10.Out of the said witnesses, P.W.1, the wife of the deceased has turned hostile and she has not stated anything incriminating against the accused. She has further stated that frequently accused was demanding money from the deceased. P.Ws.2 & 3 are the neighbours of the deceased. They have also turned hostile and they have not stated anything against the accused.

P.W.4 who was supposed to speak about the occurrence has turned hostile and he has not supported the case of the prosecution in any manner. P.W.5, the then Village Administrative Officer has spoken about the preparation of the Observation Mahazar and rough sketch and the recovery of material objects from the place of occurrence. He has further stated about the arrest of the accused, the confession made by him and the consequential recovery of M.O.1-pant, M.O.2-shirt from his possession. He has further stated about the recovery of M.O.3 - Bil hook from the possession of the accused. P.W.6 has not stated anything incriminating. P.W.7 - Dr.Gokularamanan, has spoken about the Post Mortem conducted and his final opinion regarding the cause of death of the deceased. According to him, he conducted autopsy on the body of the deceased on 28.09.2015 at 2.30 pm and found a number of cut injuries on the body. He opined that the death of the deceased was due to shock of hemorrhage due to multiple injuries. P.W.8 - Dr.Devadoss, attached to the Government Hospital, Namakkal, has spoken about the treatment given by him to the deceased at the said hospital. According to him, at 4.45 pm on 27.09.2015 the deceased was brought to the hospital for treatment. At that time, the deceased was conscious. He told him that he was assaulted by a known person at 4.00 pm on 27.09.2015. He found four lacerated wounds on the deceased. P.W.9, the Assistant Director, Forensic Science Laboratory, Salem, has deposed about the chemical examination conducted on the material objects. According to him, there were human blood strains on all the material objects. P.Ws.10, 11 and 12, the neighbours of the deceased, have turned hostile and they have not support the case of the prosecution in any manner. P.W.13 - a Police Constable has stated that he took the dead body and handed over the same to the Doctor for Post Mortem. P.W.14 has stated that he handed over the material objects at the Forensic Science Laboratory as directed by the Jurisdictional Magistrate. P.W.15, Sub Inspector has spoken about the registration of the case on the complaint of P.W.1. P.Ws.16 and 17 have spoken about the investigation done and the final report filed in this case.

11.When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. However, he did not choose to examine any witness nor did he mark any document on his side. His defence was a total denial.

12.Having considered all the above materials, the trial Court convicted the appellant/accused as stated in the first paragraph of this judgment. Challenging the same, the appellant is before this Court with this Criminal Appeal.

13.We have heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the State

and we have also perused the records carefully.

14.Mr.A.Padmanaban, learned counsel for the appellant would submit that this is a case where absolutely there is no evidence to prove the charge against the accused. He would further submit that however, the trial Court has convicted the accused solely based on the recovery of M.Os.1 to 3 on the confession made by him. The learned counsel would further submit that the statement of the accused to the Investigating Officer is not admissible in evidence because, the relevancy between M.Os.1 to 3 with the crime has not been established. He would further submit that the trial Court convicted the accused merely on surmise.

15.The learned Additional Public Prosecutor would submit that ofcourse the eye witnesses to the occurrence and the other material witnesses have turned hostile. But, the trial Court has convicted the accused solely based on the motive and the fact that M.Os.1 to 3 were recovered from the possession of the accused on the disclosure statement made by him to the Investigating Officer. Hence, according to him, the conviction and sentence imposed by the trial Court on the appellant does not require any interference at the hands of this Court.

16.We have considered the above submissions.

17.As we have already narrated, the eye witnesses to the occurrence viz., P.Ws.4 & 10, have not spoken about the occurrence. These eye witnesses and the other material witnesses have turned hostile. There is no evidence against the accused at all. P.W.1, the mother of the accused has spoken only about the demands made by the accused to the deceased for money to purchase lorry. Except this, there is no evidence against the accused.

18.However, the trial Court has convicted the accused based on the recoveries of M.Os.1 to 3 from out of the disclosure statement made by the accused to the Investigating Officer. Assuming that the accused has made such a disclosure statement, the same would not be admissible in evidence as provided under Section 27 of the Indian Evidence Act. It is not the discovery of every fact that makes the statement admissible but, it is only the discovery of a relevant fact which makes the statement admissible in evidence under Section 27 of the Indian Evidence Act. In other words, the nexus between the discovered facts and the crime should be established by the prosecution. In this case, it has not been so established by the prosecution. Therefore, mere recovery of M.Os.1 to 3 would not make the statement of the accused admissible in evidence under Section 27 of the Indian Evidence Act. Further, mere recovery of these

material objects viz., M.Os.1 to 3 would not clinchingly go to prove the guilt of the the accused. Thus, we find justification in the submission made by the learned counsel for the appellant that the accused has been convicted on mere surmise, though, there is no evidence.

19. Article 21 of the Constitution of India, guarantees that life and liberty of an individual cannot be deprived of without following the procedure established by law. The Courts of law, cannot afford to convict the accused on mere surmises and conjectures. Suspicion, however strong it may be, cannot take the place of proof. In this case, the prosecution has not even succeeded in creating a very strong suspicion against these accused. At any rate, we hold that the conviction and sentence imposed on the appellant are not sustainable and hence, the same is liable to be set aside.

20. During the hearing of the appeal, The learned Additional Public Prosecutor appearing for the State however brought to our notice an order passed by a learned Single Judge of this Court in Contempt Petition No.1638 of 2016 dated 26.10.2016 wherein, the learned Single Judge has issued a direction to the Registry in the following terms:-

"8. This court makes it very clear that henceforth, anticipatory bail application should be in the form of an affidavit/petition duly signed by the petitioner/petitioners concerned in all pages. If the anticipatory bail application is filed in petition format, the Advocate on record should sign in all the pages of the petition and if the anticipatory bail petition is filed in the affidavit format, the person who is attesting the affidavit shall sign in all the pages. In either case, the name of the Advocate/Attesting Person should be written in capital letters, mentioning his place of qualification, Enrollment Number and Cell Phone Number".

Referring to the same, the learned Additional Public Prosecutor appearing for the State submitted that in respect of the petitions filed under Section 389 Cr.P.C., also a Form could be prescribed and it may be examined as to Whether an affidavit should also be filed in support of the petitioner as it is done in Civil Miscellaneous Petitions.

21. The learned counsel for the appellant submitted that along with this Criminal Appeal, the petitioner has filed a Miscellaneous Petition seeking suspension of sentence. The

learned counsel for the appellant submitted that there is no "Form" prescribed for such a petition, either in the Code of Criminal Procedure or, in the Criminal Rules of Practice. He further submitted that an affidavit need be filed along with the same.

22.Mr.V.Gopinath, learned Senior Counsel assisted the Court as Amicus Curiae. He would submit that the Criminal Procedure Code prescribes no Form for these matters though, the Criminal Procedure Code prescribes Form for seeking other purposes such as, memorandum of appeal, petition seeking transfer of case, etc.

23.We have considered the above submissions.

24.Plainly speaking, neither in the Criminal Procedure Code nor in the Criminal Rules of Practice, there is any Form prescribed for a petition seeking bail, anticipatory bail or bail by suspending the sentence pending a Criminal Appeal.

25.As rightly pointed out by the learned Senior Counsel, under Section 382 Cr.P.C., the Criminal Procedure Code has prescribed that every appeal shall be made in the Form of petition in writing. Even Section 382 Cr.P.C., does not prescribe that such petition should be accompanied by any affidavit. If we look into Section 407(3) Cr.P.C., every petition seeking transfer, in a criminal case from one Court to another Court shall except when the applicant is the Advocate General of the State, be supported by an affidavit or affirmation.

26.Had it been the intention of the legislature that a petition filed seeking anticipatory bail under Section 438 Cr.P.C., should be accompanied by an affidavit, as it has been prescribed under Section 407 Cr.P.C, the Code of Criminal Procedure would have prescribed for filing an affidavit in support of the petition seeking anticipatory bail. The very fact that no such prescription is found in Section 438 Cr.P.C., would go to show that it is the intention of the legislature that it is suffice if mere petition is filed seeking anticipatory bail and there is no need to file any affidavit. Similarly, no affidavit need be filed in support of a petition seeking suspension of sentence pending criminal appeal or a petition seeking bail.

27.Apart from that, under Section 227 of the Constitution of India, the High Court has got power of superintendence over all Courts and in exercise of the said power, the High Court is empowered to make and issue general Rules and prescribe forms

for regulating the practice and proceedings of such Courts. Thus, prescribing form for anticipatory bail or for any other purpose and regarding the practice and proceedings of such Courts by issuing rules falls within the administrative domain of the High Court under Article 227 of the Constitution of India. Similarly, under Section 483 Cr.P.C., the High court exercises similar power to prescribe the form or to issue any Rule on the administrative side. It is in exercise of the power conferred under these two provisions, the Criminal Rules of Practice and Circular orders have been issued by the High Court. If at all, any such Form is to be prescribed and Rule should be made, to the effect that a petition seeking anticipatory bail or bail or suspension of sentence, is to be supported by an affidavit of the party concerned, the High Court would have made such rule and prescribed the Form for the same in the Rules of Practice. The very fact that the High Court has not done so, would go to show that it is not necessary that the party seeking anticipatory bail or bail or suspension of sentence needs to file any affidavit in support of the petition nor to file the petition in a particular Form.

28.The term "High Court" as employed in Article 227 of the Constitution of India and Section 483 Cr.P.C., would denote the entire body of the Judges of the High Court. In other words, it is for the House of all the Judges of the High Court to take a decision whether a Rule should be made to the effect that an affidavit should be filed in support of the petition filed seeking anticipatory bail, bail or suspension of sentence.

29.On the judicial side, in our considered view, with great respect, we wish to state that such Rule or Prescription of a Form cannot be made. In such view of the matter, we are constrained to overrule the direction issued by the learned Single Judge in paragraph No.8 in Contempt Petition No.1368 of 2016 dated 26.10.2016. सत्यमेव जयते

30.In the instant case, in view of the overruling of paragraph No.8 of the said order, in our considered view, the petition filed by the appellant for suspension of sentence without an affidavit is maintainable. However, since the appeal itself is disposed of, we close the Criminal Miscellaneous Petition as no further orders are required in the same.

31.In the result, the Criminal Appeal is allowed and the

conviction and sentence imposed on the appellant/accused by the learned Principal Sessions Judge, Namakkal, in S.C.No.120 of 2017 by judgment dated 04.03.2017 are hereby set aside. The appellant/accused is acquitted from the lone charge 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/accused, shall be refunded to him. Bail bond, if any, shall stand discharged.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

jbm

To

1. The Principal Sessions Judge,
Namakkal.
2. The Judicial Magistrate No-1,
Namakkal.
3. do thro
The Chief Judicial Magistrate,
Namakkal.
4. The Inspector of Police,
Namakkal Police Station,
Namakkal District.
5. The Director General of Police,
Mylapore, Chennai-4.
6. The Superintendent,
Central Prison,
Coimbatore.

7. The District Collector,
Namakkal.

8. The Public Prosecutor,
High Court, Chennai.

+1cc to Mr.A.Padmanaban, Advocate, S.R.No.22423/17

Cr1.A.No.198 of 2017

BR (CO)
CS/23/05/17



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