

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.10.2017

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HON'BLE MR.JUSTICE N.SESHASAYEE

Criminal Appeal No.216 of 2017
and CrI.M.P.No.6454 of 2017

Sakthivel,
S/o.Manickam,
Acharahalli,
Papparapatty,
Dharmapuri District. ... Appellant/Accused
No.3

Vs.

State by
The Inspector of Police,
Papparapatty Police Station,
Dharmapuri District.
(Crime No.262 of 2015) ...
Respondent/Complainant

Prayer: Appeal filed under Section 374(2) of the Code of Criminal Procedure against the judgment dated 06.02.2017 made in S.C.No.16/2016 passed by the learned Additional District and Sessions Judge, Dharmapuri, Dharmapuri District.

For Appellant : Mr.R.John Sathyan
for Mr.M.R.Jothimanian

For Respondent : Mr.R.Ravichandran
Government Advocate (CrI.Side)

J U D G M E N T

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

The present appeal is filed by A-3, namely Sakthivel, Son of Manickam, challenging the impugned judgment dated 06.02.2017, passed by the learned Additional District and Sessions Judge, Dharmapuri, Dharmapuri District. There are totally three accused and they stood tried and convicted by the trial Court as

follows:

Charged and tried under Section	Accused	Conviction and Sentence passed by the Trial Court	Acquitted by the Trial Court
1 st Charge - Section 120-B r/w.302 I.P.C.	A1 to A3	A1 and A2 were convicted for the offence under Section 120-B r/w. 302 I.P.C. and sentenced to undergo life imprisonment and also to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for 10 months.	A3 was acquitted for the offence under Section 120-B r/w.302 I.P.C.
2 nd Charge - Section 302 I.P.C.	A1 and A3	A1 and A3 were convicted for the offence under Section 302 I.P.C. and sentenced to undergo life imprisonment and also to pay fine of Rs.1,000/- in default to undergo rigorous imprisonment for 10 months	-----
3 rd Charge - Section 302 r/w. 109 I.P.C.	A2	-----	A2 was acquitted for the offence under Section 302 r/w. 109 I.P.C.

The Trial Court, in respect of the accused A-1 and A-2 had ordered the sentence of imprisonment for the proved charges to run concurrently and also granted set-off under Section 428 of the Criminal Procedure Code [CrPC]. It is brought to the knowledge of this Court that A-1 and A-2 so far not preferred

any appeal and the State did not prefer any appeal against acquittal of the appellant/A-3 in respect of Charge No.1 for the offence under Section 120-B r/w.302 I.P.C.

2. Facts leading to the filing of this appeal by the appellant/A-3, briefly narrated, are as follows:

2.1. A-2, namely Brindha is the wife of the deceased/Madaiyan and A-1 namely Suresh, S/o.Manoharan said to be her paramour and the appellant/A-3 is the friend of A-1. The case of the prosecution is that A-2 had illicit intimacy with A-1 and her husband, namely the deceased Madaiyan, on becoming aware of the same, administered warnings and advised her to mend her ways and in spite of it, the said relationship continued. A-1, who was having illicit intimacy with A-2, hatched a conspiracy with A-2 and A-3 to do away with the life of Madaiyan/husband of A-2.

2.2. On 24.07.2015, A-1 to A-2 were there in a house leased to them and A-1 told A-2 to do away with the life of her husband and A-2 also told A-1 that only if her husband dies, they can live merrily and happily and therefore, asked A-1 to finish off her husband. Accordingly, at about 4.00 p.m. on 24.07.2015, A-1 went to Papparapatty village in his two wheeler vehicle YAMAHA YBR bearing Reg.No.TN 29 AF 6314, marked as M.O.11 and from there, he has contacted the appellant/A-3 through phone and told him to finish Madaiyan/husband of A-2. A-1 also contacted Madaiyan/husband of A-2 through phone and asked him to come for consuming liquor. Accordingly, Madaiyan came in his TVS 50 motorcycle bearing Reg.No.TN29 C 1020, marked as M.O.10 to the land in Thattarapatty Village S.No.324/5 at about 8.00 p.m. on 24.07.2015. A-1, A-3 as well as Madaiyan/husband of A-2 consumed liquor and when Madaiyan was under the influence of alcohol/intoxication, A-3 by using M.O.1-Thread Rope, strangulated the deceased and when he resisted, A-1 also strangulated him and A-1 took M.O.2- Stone and put him on his head and Madaiyan died on account of asphyxia due to strangulation and head injuries.

2.3. PW1, at the relevant point of time, was the Village Administrative Officer (VAO) of Onnappagoundan Village and at about 6.30 a.m. on 25.07.2015, she received a telephonic information from his menial/assistant namely Mullaikarasan as to the body of a male found lying in the land in Thattarapatty Village S.No.324/5. PW1 immediately proceeded and reached the spot at about 7.00 a.m. and she saw the body with a rope tied on the neck as well as grievous injuries on the head and nearby, a blood stained stone- M.O.2 was also found. PW1 made enquiry with the local people and she came to know that the deceased was Madaiyan, Son of Raman and she immediately proceeded to Papparapatty Police Station and lodged a written compliant- Ex.P1 to the Sub-Inspector of Police, who registered a case in

Crime No.262 of 2015 for the offence under Section 302 I.P.C. The F.I.R was marked as Ex.P10.

2.4. PW13- Station House Officer of the Papparapatty Police Station, on receipt of the F.I.R./Ex.P10 in Crime No.262 of 2015 registered by the Sub-Inspector of Police, Papparapatty Police Station, namely Mr.Kamalanathan, went to the scene of occurrence/crime and reached the spot around 10.a.m. on 25.07.2015 and in the presence of PW9 and one Sivam, he prepared the Observation Mahazar/Ex.P5 and also Rough Sketch/Ex.P11 respectively. PW13 made a request under Ex.P13 for conducting postmortem on the body of the deceased Madaiyan.

2.5. PW11, on receipt of the body of the deceased along with the requisition at 1.45 p.m. on 25.07.2015 through PW15, commenced the postmortem at about 2.15 p.m. on 25.07.2015 and noted Rigor-Mortis present all over the body and also noted the following features:

"Bluish discoloration of finger nails.

External injuries:

An oblique, asymmetrical, incomplete, continuous, reddish brown coloured ligature abrasion measuring 31 x 2 - 0.5 cm reddish brown abrasion seen on front and sides of neck. The upper margin of the ligature abrasion was 5 cm from right mastoid, 5 cm from the chin and 3 cm from the left mastoid. The lower margin of the ligature abrasion was 6 cm above the supra sternal notch.

Reddish brown abrasions seen on the following regions:

- 1) 10 x 2 cm, 5 x 2.5 cm on left cheek.
- 2) 14 x 7 cm on right side of face.
- 3) 7 x 3 cm behind right ear.
- 4) 2 x 1 cm, 1 x 1 cm on front of right side of upper part of neck.
- 5) 12 x 4 cm on front of right side of lower part of neck.
- 6) 2 x 1 cm on right clavicle.
- 7) 3 x 1.5 cm on left side of lower lip.
- 8) 1 x 1 cm on right temple.
- 9) 2 x 1 cm, 2 x 1 cm, 1 x 1 cm, 1 x 1 cm on right side of forehead.
- 10) 1 x 0.5 cm x 0.5 cm irregular laceration on left upper lip.
- 11) 1 x 0.5 cm x bone deep irregular laceration on right side of upper lip.
- 12) 4 cm x full thickness irregular laceration on lower part of right ear.

Dissection of Thorax and Abdomen:

Rib cage was intact.

Heart was normal in size; chambers contained fluid blood. Valves, great vessels and coronaries were normal.

Lungs were normal in size, cut section: normal.

Stomach contained 100 ml of brown colored fluid with fruity odour, mucosa was normal.

Liver, Spleen and Kidneys were normal in size, cut section: normal.

Urinary bladder was empty. Pelvic bone was intact.

Dissection of Head and Neck:

Scalp: 9 x 9 cm x scalp deep reddish contusion seen on the right Temporal region. Right Temporal muscle was contused. 5 x 5 cm x scalp deep reddish contusion seen on the left Occipital region.

Vault and Duramater were intact.

Brain was normal in size. Sub Dural Hemorrhage and Sub Arachnoid Hemorrhage seen all over the brain surface. Cut Section: Multiple petechial hemorrhage seen all over the brain lobes, pale.

Base: 8 cm fissured fracture involving left Anterior Cranial Fossa.

6 cm fissured fracture involving right Middle Cranial Fossa.

Right side of the mandible bone was fractured with surrounding tissue contusion.

5 x 3 cm, 4 x 3 cm x muscle deep dark red contusions seen on right side of neck.

4 x 3 cm x muscle deep dark red contusion seen on left side of neck.

Hyoid bone: Greater horns were fractured on both sides with surrounding tissue contusion.

Thyroid cartilage : Superior horn was fractured on the right side with surrounding tissue contusion.

Spinal column was intact.

Viscera preserved for chemical analysis. Control blood preserved in sterile gauze."

PW11 preserved the viscera for chemical analysis and issued the Postmortem Certificate marked as Ex.P9 opining that "the deceased would appear to have died of asphyxia due to ligature strangulation with evidence of fatal head injury and the death would have occurred 12 to 24 hours prior to the autopsy".

2.6. PW13 continued with the investigation from the scene of occurrence/crime in the presence of PW9 and another and recovered M.O.1- Thread Rope, M.O.2- Blood Stained Stone, M.O.3 - Quarter Bottles (2 Nos.) and M.O.4- Chappals at about 13.10 hours on 25.07.2015 and sent the same under Form-95 to the Jurisdictional Magistrate. PW13, on coming to know about the role played by the accused during investigation, searched for them and on receipt of

information from PW4/VAO of Papparapatty Village, namely Thiru.Sankar that A-1 and A-3 had surrendered in his office, went to the office of PW4 and obtained the report prepared by PW4 under Ex.P3 and the Extra-Judicial Confession given by A-1 under Ex.P20 as well as the Extra-Judicial Confession given by the appellant/A-3 under Ex.P2 and effected their arrest.

2.7. A-1/Suresh, after arrest, voluntarily came forward to give confession statement and it was recovered in the presence of PW4/VAO and his menial. The admissible portion of the confession statement given by A-1 was marked as Ex.P22 and similarly, the appellant/A-3, after his arrest, also came forward to give confession statement in the presence of PW4 and another and the admissible portion of his confession statement was marked as Ex.P14 and as per the admissible portion of the confession statement given by A-3, PW13 recovered M.O.8 - ITY Cell phone of the deceased/ Madaiyan under Mahazar-Ex.P15.

2.8. PW13 also summoned the services of a photographer and took photographs, marked as M.O.13 series and the memory card of the camera which was used for taking photographs was marked as M.O.9 series. PW13, on coming to know that A-2 was in her house, effected her arrest and sent all the accused for judicial custody. A-2 was inclined to give confession statement and under Ex.P27, PW13 submitted a requisition to the Jurisdictional Magistrate for recording statements under Section 164 CrPC and based on the proceedings of the Chief Judicial Magistrate, Dhamapuri under Ex.P28, PW15- Judicial Magistrate, Palacode has recorded the statement of A-2 under Ex.P29. PW13 also made a requisition for subjecting the seized material objects for chemical and biological examination and the Biology and Serology Reports were marked as Exs.P17 to Ex.P19 respectively.

2.9. PW13, on transfer, has handed over the investigation to PW14, his successor. PW14 continued with the investigation and recorded the statements of A-2, PW10- Head Constable who took the body of the deceased for postmortem, PW12 - Sub-Inspector of Police who registered the F.I.R. PW14, after getting legal opinion, has filed a Final Report against the accused on 20.11.2015 on the file of the Court of Judicial Magistrate, Pennagaram for the offence under Section 120-B r/w. 302 I.P.C.

2.10. The Court of District Munsif cum Judicial Magistrate, Pennagaram/ Committal Court, on filing of the charge sheet, took it on file in P.R.C.No.37 of 2015 and summoned the accused and on their appearance, furnished copies of the documents under Section 207 CrPC. The Committal Court, having found that the case is exclusively triable by the Court of Sessions, committed the same under Section 209 CrPC to the Principal District and Sessions Court, Dharmapuri and the said Court made over the case to the

Additional District and Sessions Judge, Dharmapuri in S.C.No.16 of 2016.

2.11. The Trial Court had issued summons to the accused and on their appearance, framed charges against A-1 to A-3 for the offence under Section 120-B r/w. 302 I.P.C, A-1 and A-3 for the offence under Section 302 I.P.C and against A-2 for the offence under Section 302 r/w. 109 I.P.C. All the accused including the appellant pleaded guilty to the charges framed against them.

2.12. The prosecution, in order to sustain their case, examined PWs.1 to 15, marked Exs.P1 to P29 and also marked M.Os.1 to 13. All the accused were questioned under Section 313(1)(b) CrPC with regard to incriminating circumstances made out against them in the evidence rendered by the prosecution and they denied it as false and alternatively they prayed for leniency on the ground of family circumstances. On behalf of the accused, no witness was examined and no document was marked.

2.13. The Trial Court, on consideration and appreciation of oral and documentary evidence and other materials, convicted and sentenced all the accused as stated above and the present appeal is preferred by A-3/Sakthivel alone.

3. Mr.R.John Sathyan, learned counsel assisted by Mr.M.R.Jothimanian, learned counsel appearing for the appellant made the following submissions:

(i) The case of the prosecution rests upon circumstantial evidence and the prosecution has relied upon three circumstances to connect the appellant/ A-3 with the commission of offence of murder.

(a) Last seen together of A-1 and A-3 in the company of the deceased Madaiyan, spoken to by PW2 and PW3.

(b) Extra-Judicial Confession given by the appellant/A-3 under Ex.P2 to PW4/VAO.

(c) Recovery of Cellphone/M.O.8 on the basis of the admissible portion of the confession statement given by the appellant/A-3, marked as Ex.P14 to PW13/Investigating Officer.

(ii) Though to some extent the prosecution was able to prove that A-1 and A-3 were last seen together in the office of the deceased/Madaiyan at about 8.00 p.m. on 24.07.2015, the other circumstances projected by the prosecution to connect the appellant/A-3 with regard to commission of the offence of murder have not been proved at all.

(iii) The prosecution placed heavy reliance upon Extra-Judicial Confession said to have been given by A-3 under Ex.P2 to PW4 and pointed out that it is a well settled legal

position that Extra-Judicial Confession is a weak piece of evidence unless it is corroborated by material particulars through credible evidence and also invited the attention of this Court to the testimony of PW4/VAO, in whose presence Extra Judicial Confession was given, based on which he prepared Ex.P3/Report and given to PW13/Investigating Officer.

- (iv) Admittedly PW14 is a total stranger to A-3 and he do not know the identification of the appellant/A-3 and there is no need or necessity on the part of A-3 to go to the office of PW4 and give statement incriminating himself and it is not even the case of the prosecution that the appellant/A-3 had given confession to PW4 fearing torture and third degree treatment on the part of police official and as such, there is no necessity for A-3 to approach PW4 and give such confession incriminating himself.
- (v) The learned counsel appearing for the appellant has also invited the attention of this Court to Ex.P2- Extra-Judicial Confession statement given by A-3 to PW4 and Ex.P14-Admissible portion of the confession statement given by A-3 to PW13/Investigating Officer and would submit that in Ex.P2, the official seal of PW4/VAO found place and whereas in Ex.P14, though it was prepared in the office of PW4, no official designation seal found place and would further add that as per the admissible portion of the confession statement of A-3 marked as Ex.P14, M.O.8-Cell phone was recovered under Seizure Mahazar/Ex.P15 and though it is the case of the prosecution that A-1 asked the deceased Madaiyan to come to the particular spot through phone, no investigation as to the call records was done by the Investigation Officers and drawn the attention of this Court to the testimonies of PWs.13 and 14/Investigating Officers.
- (vi) Even according to PW13/Investigating Officer, all the accused were fixed even on the date of commencement of the investigation on 24.07.2015 and since the case of the prosecution rests upon circumstantial evidence, they have utilized the services of PW4/VAO to strengthen their case, but unfortunately there are lot of infirmities in the evidence rendered by PW4 coupled with the documentary evidence marked through him.
- (vii) Since the case of the prosecution rests upon circumstantial evidence, it is the bounden duty of the prosecution to prove the charges by chain of circumstances with the role played by the accused for guilty of the offence of murder, but they have miserably failed to do so and in any event, the Trial Court ought to have awarded

benefit of doubt to A-3/appellant and therefore, prays for setting aside the conviction and sentence passed by the Trial Court as against A-3 by allowing this appeal.

4. Per contra, Mr.R.Ravichandran, learned Government Advocate (Crl.Side) appearing for the respondent/State would submit that the prosecution has proved it's case through the testimonies of PWs.2 and 3, who had seen A-1 and A-3 in the company of the deceased coupled with the Extra-Judicial Confession given by A-3 under Ex.P2 to PW4, based on which he prepared the Report/Ex.P3 as well as the Extra-Judicial Confession given by A-1 under Ex.P20 to PW4 coupled with the recovery of M.O.8 under Mahazar/Ex.P15. It is the submission of the learned Government Advocate (Crl.Side) that though Extra-Judicial Confession is a weak piece of evidence, the prosecution, through the testimonies of PWs.2 to 4 coupled with the documentary evidence and recovery of material objects, has proved the guilt on the part of the appellant/A-3 beyond reasonable doubt and the Trial Court, on a thorough consideration and appreciation of oral and documentary evidence, had rightly reached the conclusion to convict the appellant/A-3 and therefore, the well considered judgment rendered by the Trial Court may not be interfered with. The learned Government Advocate (Crl.Side), in support of his submissions, relied upon the decision in Munna Kumar Upadhyay alias Munna Upadhyaya v. State of Andhra Pradesh [(2012) 6 SCC 174].

5. This Court paid it's anxious consideration and best attention to the submission made by the learned counsel appearing for the appellant and the learned Government Advocate (Crl.Side) appearing for the State and perused the oral and documentary evidence and also the original records.

6. The following issues arises for consideration:

1. Whether the prosecution is able to prove the chain of circumstances unassailably to connect the appellant for the commission of offence of murder of Madaiyan- husband of A-2, beyond reasonable doubt?
2. Whether the conviction recorded and the sentence awarded by the Trial Court is sustainable?

Issue No.1

7. The case of the prosecution rests upon circumstantial evidence. The following three circumstances have been projected by the prosecution to connect the appellant for the commission of the offence for which he was convicted:

- (1) Last Seen Theory spoken to by PWs.2 and 3

(2) Extra Judicial Confession given by the appellant/A-3 under Ex.P2 to PW4/VAO.

(3) Recovery of M.O.8/Mobile phone under Mahazar-Ex.P15 as per the admissible portion of the confession statement given by A-3, marked as Ex.P14.

8. In Padala Veera Reddy v. State of Andhra Pradesh and Others [AIR 1990 SC 79], the Hon'ble Supreme Court of India, after taking into consideration its earlier decisions, has laid down the following tests when a case rests upon circumstantial evidence:

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

9. In State of Uttar Pradesh v. Ashok Kumar Srivastava [1992 CrI.L.J. 1104], the Hon'ble Supreme Court of India has pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was further pointed out in the said decision that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

10. This Court, keeping in mind the settled legal proposition as regards proof required and the burden on the part of the prosecution to prove the guilt on the part of the accused in a case of circumstantial evidence, has evaluated the oral and documentary evidence.

11. The motive projected by the prosecution is that A-1 and A-2 had illicit intimacy and they have decided to do away with the life of the husband of A-2, namely Madaiyan and at the instigation of A-2, A-1 called for the services of his friend, namely A-3, who in-turn contacted the deceased/Madaiyan over phone and asked him to come to the land in Thattarapatty Village S.No.324/5 at about 8.00 p.m. on 24.07.2017 for consuming liquor and when the deceased was under the influence of alcohol, A-3

strangled the neck of the deceased by using a Thread Rope -M. O.1 and A-1 put M.O.2 - Stone on his head and consequent upon strangulation and head injury, the deceased died. The case was registered by PW12- Kamalanathan, Sub-Inspector of Police of Papparapatty Police Station on the basis of the complaint given by PW1 and admittedly PW1 is not an eye-witness.

12. The prosecution heavily placed reliance upon the testimonies of PWs.2 and 3, who, according to the prosecution, had seen the deceased with the company of A-1 and A-3. PW2 in the chief examination would depose that he knows A-1 and A-3 and at about one year prior to the date of giving evidence, he along with PW2 were going via Madayahalli Kaliyamman Temple and PW2 was having a lighted torch and they saw the deceased Madaiyan, A-1 and A-3 sitting beneath a tree exchanging heated words and started attacking each other and however, PWs.2 and 3 did not intervene and they saw M.O.1- TVS two-wheeler nearby that place. On the next day he became aware of the death of Madaiyan and two days thereafter, he was examined by the police. In the cross-examination PW2 would depose that at the time of examination by police, he did not state anything about wordy altercation and though he went near the body, he did not state anything and denied the suggestion that since he was related to Madaiyan, he is deposing falsely.

13. The evidence of PW3 is in consonance with the evidence of PW2 and in the cross examination, PW3 would state that the deceased Madaiyan is his senior father/uncle and on 25.07.2015, he went to the spot where the body of the deceased/Madaiyan was found and when the police examined, he has spoken about seeing of the deceased and the wordy altercation and it was recorded by police and denied the suggestion that he is deposing falsely. It is to be pointed out at this juncture that nothing useful was elicited in favour of A-3 with regard to the fact of the deceased last seen together with the company of A-1 and A-3. However, it is brought to the knowledge of this Court that PWs.2 and 3 were examined on 27.07.2015 and their statements along with the Charge Sheet was submitted before the Committal Court on 01.12.2015. It is also the submission of the learned counsel appearing for the appellant/A-3 that the statements of PWs.2 and 3 recorded by the PW13/Investigating Officer are the crucial piece of evidence and without delay, it should have been dispatched to the Jurisdictional Magistrate and admittedly, it was not done so and those statements were submitted before the Committal Court on 01.12.2015, though it was recorded on 27.07.2015.

14. A Division Bench of this Court in the decision in Karunakaran Jabamani Nadar In re. [1974 L.W. (Cr1.) 190 (DB)] has laid down the following proposition:

"15... We are therefore of the opinion that it is imperative that the following documents should be despatched immediately, without any delay by the investigating officers to the Sub Magistrate. The Station-House Officer should record the time of the actual despatch of the various documents in the various registers, particularly, the statement recorded under S.154 of the Code of Criminal Procedure. On receipt of the said documents, the Magistrate should initial the same, noting therein the time and date of the receipt of those documents. This would provide the only judicial safeguard against subsequent fabrication of such documents in grave crimes. Therefore, as the Manual of Instructions for the Guidance of Magistrates in the Madras State does not contain any instructions to the Magistrates in this regard, we suggest that the same may be brought up to date by incorporating in it the circulars which had been issued from time to time for the guidance of the Magistrates. The following are documents of special importance which, in our opinion, should be despatched by the investigating officers without any delay to the Magistrates, and they should bear the initials of the Magistrate with reference to both the time and date of their receipt.

1. The original report or complaint under S.154 of the Code of Criminal Procedure.
2. The printed form of the first information report prepared on the basis of the said report or complaint.
3. Inquest reports and statements of witnesses recorded during the inquest.
4. Memo sent by the Station House Officers to doctors for treating the injured victims who die in the hospital subsequently and the history of the case treatment.
5. Memo sent by the doctor to the police when a person with injuries is brought to the hospital, or the death memo sent by the doctor to the police on the death of the person admitted into the hospital with injuries.
6. Observation mahazars and mahazars for the recovery of material objects, search lists and the statements given by the accused admissible under S.27 of the Evidence Act, etc., prepared in the course of the investigation.
7. The statements of witnesses recorded under S.161 (3) of the Code of Criminal Procedure.
8. Form No.91 accompanied by material objects."

Though the statements of PWs.2 and 3 had reached the Court belatedly along with the Final Report, the fact remains that

with regard to belated dispatch, it is open to the Investigating Officer to explain reasons for the same and however, on behalf of the accused, no specific question has been put to the Investigating Officer as to the reasons for belated dispatch. As already pointed out, nothing useful was elicited in favour of the appellant/A-3 as to their non-presence at the time of commission of the alleged offences and therefore, this Court is of the view that the prosecution was able to prove that A-1 and A-3 were seen together with the company of the deceased/Madaiyan at the relevant point of time.

15. The prosecution placed heavy reliance upon the Extra-Judicial Confession given by the appellant/A-3 under Ex.P2 to PW4/VAO, based on which he has prepared the Report/Ex.P3 and submitted to PW13/Investigating officer and immediately, A-3 was arrested and he voluntarily came forward to give confession statement and as per the admissible portion of the confession statement given by A-3 to PW13 under Ex.P14, M.O.8-Cell phone was recovered under Mahazar/Ex.P15. PW4 was the Village Administrative Officer of Papparapatty Village at the relevant point of time and as per his chief examination, he was present in his office along with his menial at about 11.00 a.m. on 26.07.2015 and at that time, A-1 and A-3 came to his office and told him that they have committed the murder and they wanted to surrender and A-1 initially gave his statement and it was recorded by PW4 in his own handwriting wherein he has stated about the motive. PW4, after recording the statements of A-1 and A-3, informed PW13, who came to the office of PW4 and on his arrival, Ex.P2 and Ex.P20- Extra Judicial Confession Statements of A-3 and A-1 respectively have been given to PW4 and immediately he has also submitted his report/Ex.P3 and immediately both of them were arrested and they voluntarily came forward to give their confession statements and those statements were recorded in the presence of PW4 and his menial.

16. It is to be pointed out at this juncture that according to the prosecution, on the basis of the admissible portion of the confession statement given by A-3, marked as Ex.P14, M.O.8-Mobile Phone was recovered, but in the chief examination, PW4 has not spoken about the recovery of M.O.8. In the cross examination, PW4 would depose that he was also informed about the information given by PW1 as to the lodging of the complaint and would admit that he do not know the accused and later on only, he came to know about them. PW4 would further admit that at the time of recording Extra-Judicial Confession, he did not obtain the signature of his menial Ravi and Ex.P20 was prepared by him and he did not prepare Ex.P3 and it was prepared by his menial Selvam and he did not state the said fact to PW13/Investigating Officer. PW4 further admitted in the cross examination that Ex.P2 and Ex.P20 have not been prepared by him. Insofar as the confession statements recorded under Section 27

of the Evidence Act is concerned, PW4 would admit that his menial did not sign and the said confession statements were prepared in his office by using computer and he did not put his official sign.

17. The prosecution did not examine PW4's menial Ravi as well as Selvam, who were present and one of them namely Selvam had prepared the Extra-Judicial Confession statement/Ex.P2 given by A-3. A perusal of the original records would disclose that in Ex.P2, PW13 made an endorsement "submitted" and beneath that PW13 has subscribed his signature with official seal. Ex.P14 is the admissible portion of the confession statement given by A-3 under Section 27 of the Evidence Act. It is to be pointed out at this juncture that Ex.P2 as well as Ex.P14 were prepared in the office of PW4/VAO and in Ex.P2, the official seal was found and whereas in Ex.P14, apart from the signature of PW4, no seal was put. This Court has already pointed out that PW4, in the chief examination, did not state anything about the confession statement given by A-3 under Section 27 of the Evidence Act, the admissible portion of which marked as Ex.P14. It is to be pointed out at this juncture that nothing has been spoken about by PW4 as to the preparation of Seizure Mahazar/Ex.P15 for recovery of M.O.8 and therefore, in the considered opinion of the Court, the recovery of M.O.8 cannot be believed.

18. It is also to be pointed out at this juncture that PW13, in his cross examination, would depose that during the course of investigation, he has investigated as to the conversation had by the deceased and he found that the deceased was talking to his parents and also keeping call records and the parents were examined as PWs.6 and 7, but PWs.6 and 7 spoken nothing about the conversation by his son through phone. PW14, in his cross examination would depose that the mobile phone used by the appellant was also recovered, but he did not investigate as to the service provider of the said mobile phone. It is the specific case of the prosecution that A-1 asked the deceased over phone to come to the spot and after consuming liquor, there was some wordy altercation and murder was committed and however, no evidence is forthcoming as to the call made by A-1 to the deceased and though PW13 has done the investigation, it is his evidence that the deceased was having conversation only with his parents and not with anybody else. That apart, the recovery of M.O.8/Mobile Phone under Mahazar/Ex.P15 itself is doubtful and this Court has already recorded reasons in the earlier paragraphs and therefore, the recovery of M.O.8/Mobile Phone cannot be believed at all.

19. The prosecution placed heavy reliance upon the Extra-Judicial Confession of the appellant/-A3 under Ex.P2 recorded by PW4 and in this regard, the learned Government Advocate (Crl.Side) appearing for the State relied upon the decision in

Munna Kumar Upadhyay alias Munna Upadhyaya v. State of Andhra Pradesh [(2012) 6 SCC 174]. In the said judgment, the Hon'ble Supreme Court of India has extracted the ratio laid down in its earlier decisions and in para 63 observed as follows:

"63. Extra-Judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the Court should find out whether there are other cogent circumstances on record to support it. [Ref. Sk.Yusuf v. State of W.B. [(2011) 11 SCC 741] and Pancho v. State of Haryana [(2011) 10 SCC 165]."

It is well settled that extra-judicial confession can be the basis of conviction, provided it passes the test of credibility and unless and until it inspires the confidence of the Court with other cogent circumstances, it cannot be the basis to record conviction.

20. This Court is of the view that Extra-Judicial confession recorded by PW4 cannot be believed for the reason that admittedly, even as per his own admission, he is an utter stranger to A-1 and A-3 and prior to recording of the extra-judicial confession statements, he did not know them at all. It is not even the case of the prosecution that fearing torture and third degree treatment at the hands of police, A-1 and A-3 approached PW4 and gave the Extra-Judicial Confession Statements and even for the sake of arguments that the Extra-Judicial Confession statements can be accepted, this Court is of the view that it does not inspire confidence and there are no cogent and corroborative material available as to the voluntary nature of such Extra-Judicial Confession.

21. Though the prosecution has projected three circumstances, namely (1) Last Seen Theory, (2) Extra-Judicial Confession statements said to have been given by A-1 and A-3 to PW4/VAO and (3) Recovery of M.O.8-Mobile Phone under Seizure Mahazar/Ex.P15, it miserably failed to prove two circumstances, namely Extra-Judicial Confession as well as the recovery of M.O.8-Mobile Phone.

22. A Division Bench of this Court in the decision in Rathinavel v. State rep. by Inspector of Police, Tiruchengode [1996 (1) MWN (Cr.) 324], has laid down the proposition that the arrest, confession and consequent recoveries at the instance of the accused alone, in the absence of any evidence aliunde, rather grossly sufficient and inadequate to come to the

conclusion that the accused and he alone was responsible for committing the murders.

23. In the considered opinion of the Court, the prosecution has failed to prove the circumstances pointing the guilty on the part of the appellant and there are no cogent chain of circumstances and therefore, benefit of doubt enure in favour of the appellant.

24. Hence, Issue No.1 is answered in negative, in favour of the appellant/A-3.

Issue No.2

25. In view of the reasons assigned above, the conviction recorded and the sentence awarded by the Trial Court is unsustainable. Hence, issue No.2 is also answered in negative in favour of the appellant/A-3.

26. In the result, this Criminal Appeal is allowed and the conviction recorded and sentence imposed on the appellant/A-3 under Section 302 I.P.C., vide impugned judgment dated 06.02.2017 made in S.C.No.16 of 2016 passed by the learned Additional District and Sessions Judge, Dharmapuri, Dharmapuri District is set aside and the appellant/A-3 is acquitted of the charge framed against him. Fine amount, paid if any, is directed to be refunded to the appellant. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS VIII)

/true copy/

Sub Asst. Registrar

jvm

To

- 1.The Principal District and Sessions Judge,
Dharmapuri, Dharmapuri District.
- 2.The Additional District and Sessions Judge,
Dharmapuri, Dharmapuri District.
- 3.The District Munsif cum Judicial Magistrate,
Pennagaram, Dharmapuri District.
- 4.The Chief Judicial Magistrate,
Dharmapuri District.

5.The Superintendent of Prison, Central Prison, Vellore.

6.The Inspector of Police,
Papparapatty Police Station,
Dharmapuri District. (Crime No.262 of 2015).

7.The Director General of Police, Mylapore, Chennai-600 004.

8.The District Collector, Dharmapuri District.

9.The Public Prosecutor, High Court, Madras.

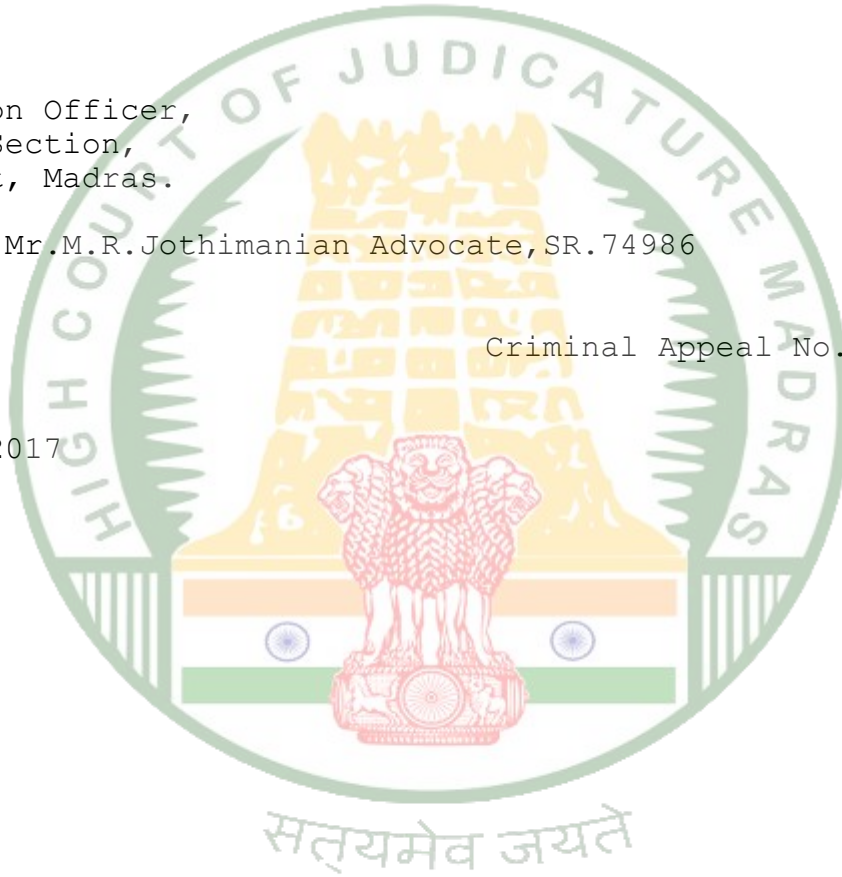
Copy to

The Section Officer,
Criminal Section,
High Court, Madras.

+ 1 cc to Mr.M.R.Jothimanian Advocate,SR.74986

Criminal Appeal No.216 of 2017

GJ(CO)
NR 13/10/2017



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