

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 18.09.2017

CORAM

THE HON'BLE Mr.JUSTICE A.SELVAM
and
THE HON'BLE Mr.JUSTICE P.KALAIYARASAN

Criminal Appeal No.388 of 2017

Muthusamy

... Appellant

Vs.

1.Jagan @ Jaganadhan

2.Viswanathan

3.Thangavelu

4. State represented by
The Inspector of Police,
Namagiripettai Police Station
[Cr.No.124/2014]

... Respondent

Criminal Appeal filed under Section 374 of Cr.P.C., against the judgment dated 06/09/2016 passed in S.C.No.25/2013 by the learned Additional District Sessions Judge, Namakkal, acquitting respondents 1 to 3 under Sec.364 and 302 of Indian Penal Code and to set aside the order of acquittal and convict the respondents 1 to 3.

For Appellant : Mr.K.V.Sridharan

For Respondents : Mr.N.Manokaran for R1

No appearance for R2 and R3

Mr.V.M.R.Rajentren,
Additional Public Prosecutor for R4.

J U D G M E N T

[Order of the Court was made by A.SELVAM, J.]

The order of acquittal dated 06.09.2016 passed in Sessions Case No.25 of 2013 by the Additional District and Sessions Court, Namakkal, are being challenged in the present Criminal Appeal.

2.The case of the prosecution is that the accused 2 and 3 are the friends of the first accused. The deceased Gunasekaran is the son of one Muthusamy. The said Muthusamy, at the time of occurrence, has resided in the field of one Thoppapatiyar. At the time of occurrence, the deceased has resided in a nearby field. The deceased has received money by way of debt from the first accused and as a guarantee, he executed a Power of Attorney Deed. On the strength of it, the first accused has sold land of the deceased to his father by name Ganesan. Due to that, an animosity has been in existence between the deceased and first accused. Father of the deceased has given a complaint against the first accused in Anti-Land Grabbing Special Wing, Namakkal. Further, a civil case has also been instituted in Original Suit No.74 of 2011. The first accused, with the connivance of accused 2 and 3, has decided to murder the deceased. With the said intention, on 19.05.2012, at about 09.30pm, the second accused has taken the deceased on his motorcycle bearing Registration No.TN28-Q-7194 from Namagiripettai

Primary Health Centre. The accused 1 and 3 have followed them by using another motorcycle. The second accused has dropped the deceased near his house. On the next day, at about 01.00 am, while the deceased has been sleeping on a cot, the accused 1 and 3 have attacked the deceased by using deadly weapon. Likewise, the second accused by using a cudgel and thereby caused fatal injuries and due to their overtacts, he passed away. After occurrence, the father of the deceased by name Muthusamy, has given a complaint and the same has been registered in Cr.No.400 of 2012. The complaint given by the said Muthusamy has been marked as Ex.P1.

3. On receipt of Ex.P1, the Investigating Officer, who is PW15, has taken up investigation, examined connected witnesses and also made arrangements to conduct autopsy on the body of the dead body and accordingly Dr.Gokularamanan (PW13) has conducted postmortem and he found the following external and internal injuries:

1. *A cut injury seen on the right side of forehead M, 9cms x 2 cms x Bone Deep.*
2. *A cut injury seen just below let eyebrow M, 8 cms x 2 cms x bone deep.*
3. *A cut injury seen below the right side of the lower lip M, 3 cms x 5 cms x 1 cm.*
4. *A cut injury seen below the chin M, 5 cms x 1 cm x bone deep with underlying cut fractures of the body of Mandible.*
5. *A cut injury on the left Axilla M, 13 cms x 3 cms x muscle deep with an abrasion below M, 15 cms x 12 cms.*

6. *Swelling & Deformity seen over left mid arm, O/D communitied fracture of underlying left humerus with surrounding soft tissue contusion.*
7. *Abrasion seen over the inner aspect of right arbola M, 6 cms x 5 cms.*
8. *Multiple scratch abrasions seen over the upper aspect of right side of chest over an area of 15 cms x 8 cms.*
9. *Abrasion seen over the outer and upper aspect of right arm M, 8 cms x 5 cms.*
10. *Just below the previous would multiple abrasions seen over an area M, 10 cms x 6 cms.*
11. *Abrasion seen on the front of lower aspect of left leg M, 5 cms x 3 cms.*
12. *A cut injury seen on the upper aspect of centre of occiput M, 4 cms x 1.5 cms x 0.5cm.*

The postmortem certificate has been marked as Ex.P27. The Investigating Officer has continued investigation and after his transfer, a successor in office (PW16) has completed investigation and laid a final report on the file of the Judicial Magistrate Court, Rasipuram and the same has been taken on file in PRC.No.27 of 2012.

4. The Judicial Magistrate, Rasipuram, after considering the fact that the offences alleged to have been committed by the accused are triable by the Sessions Court, has committed the case to the Court of Sessions, Namakkal division and the same has been taken on file in Sessions Case No.25 of 2013 and subsequently made over to the trial Court.

5. The trial Court, after hearing arguments of both sides and upon perusing the relevant records, has framed two charges against the accused under Sections 364 and 302 of the Indian Penal Code and the same have been read over and explained to them. The accused have denied the charges and claimed to be tried.

6. On the side of the prosecution, P.Ws 1 to 16 have been examined and Exs.P1 to P37 and M.Os.1 to 12 have been marked.

7. When the accused have been questioned under Section 313 of the Code of Criminal Procedure, 1973 as respects the incriminating materials available in evidence against them, they denied their complicity in the crime. On the side of the accused, Exs.D1 to D9 have been marked and no oral evidence has been adduced on the side of the accused.

8. The trial Court, after hearing arguments of both sides and upon perusing the material evidence available on record, has found that the prosecution has failed to establish the guilt of the accused punishable under Sections 364 and 302 of the Indian Penal Code and ultimately acquitted the accused under Section 235 (1) of the Code of Criminal Procedure. Against the order of acquittal, the present criminal appeal has been preferred, at the instance of the defacto complainant, viz., father of the deceased.

9. The sum and substance of the case of the prosecution is that the deceased has received money from the first accused and as a guarantee, he executed a Power of Attorney Deed. On the strength of it, the first accused has executed a sale deed in favour of his father in respect of the land belongs to the deceased and due to that, an animosity has been in existence between them and both criminal and civil proceedings have become emerged. With an intention to murder the deceased, the first accused has sought the assistance of his friends viz., Accused 2 and 3. Under such circumstances, on 19.05.2012, at about 09.30 pm, the second accused has taken the deceased by using his motorcycle from Primary Health Centre, Namagiripettai and subsequently dropped him near his house. Next day, at about 01.00pm, the accused 1 and 3 have attacked the deceased by using deadly weapons and second accused has attacked him by using a cudgel and due to their overtacts, the deceased has passed away.

10. The entire case of the prosecution is based upon circumstantial evidence. Since the entire case is based upon circumstantial evidence, there should not be any missing link in the evidence given on the side of the prosecution so as to point out the guilt of all the accused.

11. The learned counsel appearing for the appellant has raised the following points so as to set aside the order of acquittal passed by the trial Court:

i) In the instant case, both PWs 5 and 6 have given consistent

evidence to the effect that on the previous day of the occurrence, both of them have seen the deceased and the second accused and their further evidence is that the remaining accused have followed them. But the trial Court have not properly appreciated the evidence given by them;

ii) The second accused has voluntarily approached the Village Administrative Officer (PW4) and given an extra-judicial confession and the same has been marked as Ex.P7, wherein he has clinchingly admitted the role played by him and also the role alleged to have been played by the remaining accused. The trial Court has failed to give proper appreciation to Ex.P7;

iii) On the basis of Ex.P7, some material objects have been recovered and the trial Court has not at all considered the process of recovery.

12. Learned counsel appearing for the first respondent has sparingly contended to the effect that in the instant case, the evidence given by Pws 5 and 6 is nothing but rickety and the same cannot be believed in and the trial Court has rightly rejected their evidence and further, the specific evidence given by PW4, Village Administrative Officer is that only on the basis of his report alleged to have been given on 24.05.2012, a case has been registered, whereas actually Ex.P1 has been registered on 20.05.2012 and virtually no believable/trustworthy evidence is available on the side of the prosecution and the trial Court, after analysing all the evidences available on the side of the prosecution, has rightly found that the prosecution has failed

to establish the guilt of the accused and therefore, the order of acquittal passed by the trial Court does not require any interference.

13. The learned Additional Public Prosecutor has contended to the effect that on the side of the prosecution replete evidence have been adduced, but the trial Court has failed to appreciate it properly and therefore, the order of acquittal passed by the trial Court is liable to be set aside.

14. As pointed out earlier, the entire case of the prosecution is based upon circumstantial evidence and therefore on the side of the prosecution, a clinching evidence is required and further, there should not be any missing link in pointing out the guilt of the accused in respect of the offences alleged to have been committed by them.

15. The prosecution has set the law in motion only on the basis of Ex.P1. Ex.P1 is very much silent with regard to the acts alleged to have been committed by all the accused. The prosecution has developed its case only on the basis of following grounds.

16. The first and foremost ground is that Pws 5 and 6 have seen the deceased along with the second accused and they have also seen the remaining accused and their further evidence is that the deceased has travelled on a motorcycle driven by the second accused.

17. At this juncture, the Court has to meticulously analyse the evidence given by Pws 5 and 6. In fact, during the course of cross-examination, both of them consistently stated to the effect that they have been examined by the Inspector of Police and recorded their statements, but for the reasons best known to the prosecution, the statements alleged to have been given by them before the Inspector of Police are not before the Court. Therefore, the prosecution has suppressed the material documents. Since the prosecution has suppressed the material documents, it is needless to say that the evidence given by Pws 5 and 6 is nothing but nebulous and further it is seen from the records that both of them are related to the deceased as well as PW1. Since the statements alleged to have been given by them to the Inspector of Police are not before the Court, this Court is of the view that the evidence given by Pws 5 and 6 is liable to be eschewed.

18. The second ground on which the prosecution has strengthened its case is extra-judicial confession alleged to have been given by the second accused to PW4, Village Administrative Officer.

19. The specific case of the prosecution is that the second accused has voluntarily approached PW4 and given an extra-judicial confession, which has been marked as Ex.P7. But the specific evidence given by PW4 is that only after receipt of his report, a case has been registered. But the documents

have proved otherwise. It is seen from the records that Ex.P1 has been registered on 20.05.2012, whereas Ex.P7 has come into existence on 24.05.2012. Therefore, it goes without saying that the role of PW4 has been subsequently procured by the Investigating Agency.

20. Even assuming without conceding that the second accused has given an extra-judicial confession (Ex.P7), it is an acknowledged principle of law that an extra-judicial confession is nothing but a weak piece of evidence. On the basis of extra-judicial confession alone, conviction and sentence cannot be invited. But, in the instant case, the evidence given by PW4 itself has falsified Ex.P7. Therefore, Ex.P7 is nothing but a waste paper and the same cannot be a basis for coming to a conclusion that all the accused have committed the offence mentioned in the charges. Therefore, the second ground put forth on the side of the appellant is sans merit.

21. The third ground put forth on the side of the appellant is that on the basis of Ex.P7, some material objects have been recovered, but the trial Court has failed to consider the same.

22. It is true that on the basis of Ex.P7, some material objects have been recovered.

23. It is an everlasting principle of law that on the basis of a mere

recovery of certain material objects, conviction and sentence cannot be invited and some more material evidence is required. In the instant case, except recovery of few material objects for the purpose of encrusting the case of the prosecution, no piece of evidence is available. Therefore, viewing from any angle, the third contention put forth on the side of the appellant also goes out without merit.

24. Before parting with this case, the Court would like to sum up the vital infirmities found in the case of the prosecution:

- i) The prosecution has failed to establish the circumstance under which the occurrence has taken place;
- ii) No clinching evidence is available on the side of the prosecution so as to point out the guilt of the accused;
- iii) The alleged extra-judicial confession (Ex.P7) is nothing but a concocted document even on the basis of evidence given by PW4.
- iv) The alleged recovery of some material objects is not all sufficient to point out the guilt of the accused.

25. The trial Court, after considering the vital infirmities and also lack of evidence on the side of the prosecution, has rightly found that the prosecution has failed to establish the guilt of the accused punishable under Sections 364 and 302 of the Indian Penal Code.

26. In view of the forgoing elucidation of both factual and legal aspects, this Court has not found any acceptable force in the contention put

forth on the side of the appellant and altogether, the criminal appeal deserves to be dismissed.

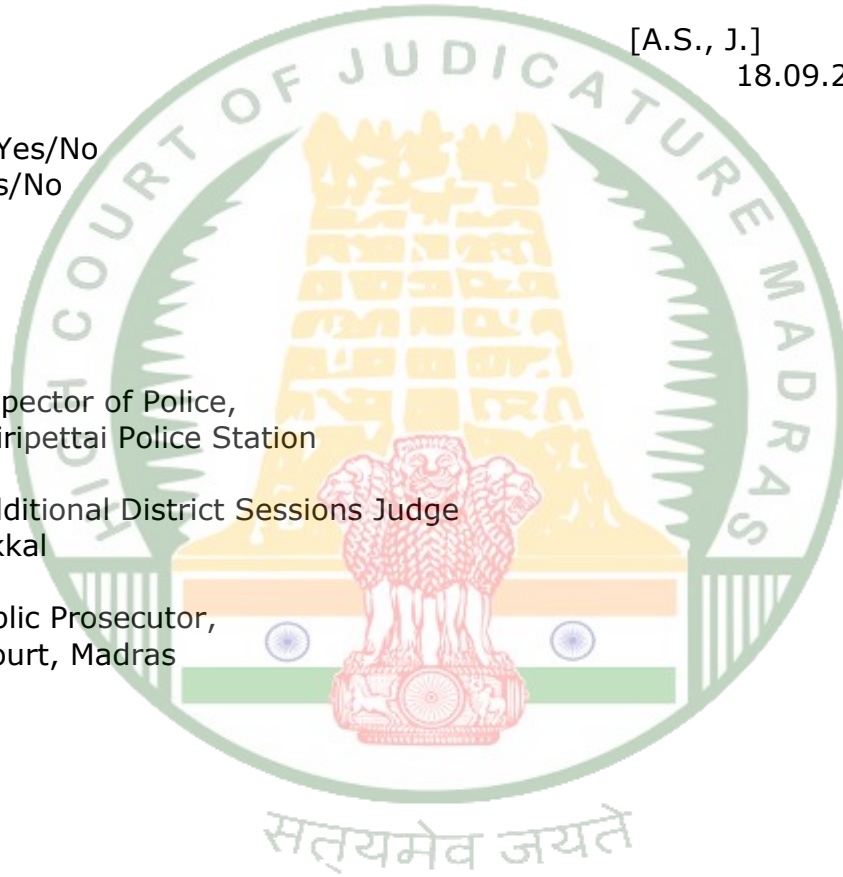
26. In fine, this criminal appeal is dismissed.

[A.S., J.] [P.K., J.]
18.09.2017

Internet:Yes/No
Index:Yes/No
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To

- 1.The Inspector of Police,
Namagiripettai Police Station
2. The Additional District Sessions Judge
Namakkal
- 3.The Public Prosecutor,
High Court, Madras



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A.SELVAM, J.
and
P.KALAIYARASAN, J.

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