

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.09.2017

Delivered on :13.10.2017

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM

and

THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

Criminal Appeal No.80 of 2017

1.Ganesan

2.Vijayan @ Puttusamy ... Appellants/Accused 3 & 4.

vs.

1.The State, by Inspector of Police,

Bungalow Pudur Police Station,

Erode District

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C., against the judgment dated 25.01.2017 made in S.C.No.48 of 2014, on the file of the Sessions Court, Mahalir Neethi Mandram (Mahalir Fast Track Court), Erode.

For appellants : Mr.N.Manoharan

For Respondent : Mr.V.M.R.Rajentran,
Additional Public Prosecutor

JUDGMENT

(Judgment of the Court was delivered by A.SELVAM.J.)

Challenge in this criminal appeal is to the convictions and sentences passed in Sessions Case No.48 of 2014, by the Mahalir Neethi Mandram (Mahalir Fast Track Court), Erode.

2.The epitome of the case of the prosecution is that on 26.11.2012, at about 5.00 p.m., to 6.00 p.m., the accused 1 to 4, on the back side of Kondaiyampalayam Community Hall, have made a conspiracy to murder Andavar @ Chennimalai and his wife Kannayal @ Nallammal, who resided in a palm house. In pursuance of the said conspiracy, on the same day, at about 8.00 p.m., all the accused have trespassed into the house of the deceased. The first accused has attacked both the deceased by using a whinger and due to his overt acts, they passed away. The first accused

has robbed gold jewels and other material objects. After occurrence, one Anand (P.W.1) has given a complaint in Bangalapudur Police Station and the same has been registered in Crime No.439 of 2012. The complaint alleged to have been given by P.W.1 has been marked as Ex.P1.

3. On receipt of Ex.P1, the investigating officer, viz., P.W.21, has taken up investigation and also made arrangements for conducting autopsy on the body of the deceased and accordingly, P.W.6-Dr. Balamurugan has conducted postmortem on the body of the deceased viz., Kannayal @ Nallammal and he found the following external and internal injuries:

"(1) Incised wound above (L) wrist 5 x 1 bone depth. (2) Two incised wounds over right thigh 4 x 1 x 3 cm (3) Incised wound (L) axilla 4 x 1 x bone depth (4) incised wound @ side of chest 3 x 1 (5) Incised wound on back between both scapula 2 x 1 x bone depth (6) Incised wound @ leg 3 x 1 x bone depth (7) Incised wound @ lower abdomen 3 x 2 with intestine seen coming out through the wound.

No fracture on ribs. Heart $\frac{1}{2}$ x $\frac{1}{2}$ cm punctured wound on left ventricle. 500 ml hemo-flowing seen. clotted. Both chambers empty. Lungs: Incised wound (L) lower lobe 1 x 1 cm. Stomach: 600 gm partially digested rice particle seen. Liver Pale 1200 gm - Spleen - Pale 100 gm. Kidney each 180 gm pale. Bladder: empty. No fracture in skull. Brain: 1000 gm Pale."

The postmortem certificate issued by the said Doctor has been marked as Ex.P3.

4. Likewise, the Doctor by name Sivakumar (P.W.7) has conducted autopsy on the body of the deceased viz., Chennimalai and he found the following external and internal injuries:

"(1) Lacerated Injury (Lt) side of Chest 4 x 3 cm x bone depth (2) Lacerated injury (Lt) side of chest 2 x 1 x bone depth (3) Lacerated injury (Lt) side of chest 1 x 1 x bone depth (4) Lacerated Injury (Rt) side of cheek 3 x 2 x opening in to the mouth (5) Lacerated injury (rt) side of chest lateral side 4 x 3 x 8 cm (6) Incised wound above the umbilicus 3 x 2 x omentum is coming out (7) incised wound below the umbilicus 2 x 2 cm x omentum is coming out (8) incised wound (Lt) forearm 3 x 3 x 1 cm (9) Lacerated injury (Rt) chin 3 x 2 x bone depth (10) incised wound below (Rt) ear 2 x 2 x muscle depth (11) Incised wound (Rt) side of X bone

depth. Death would appear 8 to 24 hours prior to autopsy. Tongue: Inside the mouth. Teeth intact. Bleeding from (lt) ear. Thorax:contains 100 ml of blood below (Rt) side. No fracture of ribs. Heart (Rt) Chambers and (lt) chambers empty. Lungs: Pale (Rt) 450 g (Lt) 350 gm. Incised wound 1 x 1 cm (Rt) upper lobe of lung. Hyoid bone: Intact. Stomach-contains 1200 gms of partially digested rice."

The postmortem certificate issued by the said Doctor has been marked as Ex.P5.

5.The investigating officer has continued investigation. During the course of investigation, the 3rd accused, by name, Ganesan, has voluntarily given an extra judicial confession to P.W.19, Village Administrative Officer. On the basis of his confession, the remaining accused have been arrested and recovered all material objects. After completing investigation, the investigating officer has laid a final report on the file of the Judicial Magistrate Court, No.I, Gobichettipalayam and the same has been taken on file in P.R.C.No.16 of 2013.

6.The Judicial Magistrate, No.I, Gobichettipalayam, after considering the fact that the offences alleged to have been committed by all the accused are triable by Sessions Court, has committed the case to the Court of Sessions, Erode Division and the same has been taken on file in Sessions Case No.48 of 2014 and subsequently made over to the trial Court.

7.The trial Court, after hearing arguments of both sides and upon perusing the relevant records, has framed first charge against all the accused under Section 120-B read with Section 302 of the Indian Penal Code; second charge against the accused 2 to 4 under Section 449 of the Indian Penal Code; third charge against the accused 2 to 4 under Section 449 read with Section 34 of the Indian Penal Code; fourth charge against the first accused under Section 302 (2 counts) of the Indian Penal Code; 5th charge against the accused 2 to 4 under Section 302 read with Section 349 (two counts) of the Indian Penal code; 6th charge against the first accused under Section 392 of the Indian Penal code; 7th charge against the accused 2 to 4 under Section 392 read with Section 39 of the Indian Penal Code; 8th charge against the first accused under Section 397 of the Indian Penal code; 9th charge against the accused 2 to 4 under Section 397 read with Section 34 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.

8.On the side of the prosecution, P.Ws.1 to 21 have been examined and Exs.P1 to P.29 and M.Os.1 to 26 have been marked.

9. When the accused have been questioned under Section 313 of the Criminal Procedure Code, 1973 as respects the incriminating materials available in evidence against them, they denied their complicity in the crime. On the side of the accused, D.W.1 has been examined and no material objects have been marked.

10. The trial Court, after hearing arguments of both sides and also upon perusing the relevant evidence available on record, has found all the accused guilty as per Sections mentioned in the charges framed against them and also imposed punishments as mentioned in the judgment. Against the convictions and sentences passed by the trial Court, the present criminal appeal has been preferred, at the instance of the accused 3 and 4, as appellants.

11. The sum and substance of the case of the prosecution is that on 26.11.2012, in between 5.00 p.m. to 6.00 p.m., on the back side of Kondaiyampalayam Community Hall, all the accused have hatched a conspiracy to murder both the deceased for the purpose of looting the material objects marked in the present case. In pursuance of the said conspiracy, the first accused has attacked both the accused by using a whinger and due to his overt acts, both of them have passed away and after such occurrence, the accused have looted the material objects marked on the side of the prosecution.

12. On the basis of available evidence on record, the trial Court has found all the accused guilty under the Sections mentioned in the charges and sentenced them to undergo imprisonments as mentioned in the judgment.

13. The learned counsel appearing for the appellants/accused 3 and 4 have raised the following points:

(1) The specific case of the prosecution is that the occurrence has taken place on 26.11.2012, whereas, the son of the deceased (P.W.4) has been examined very belatedly and only on the basis of his statement, the investigating officer has come to know that some valuables and non-valuables have been stolen.

(2) The prosecution has developed its case only on the basis of an extra judicial confession, alleged to have been given by the third accused, viz., Ganesan, to P.W.19-Village Administrative Officer and the same has been marked as Ex.P14 and further, P.W.19 is totally an unknown person to 3rd accused and therefore, it is highly impossible on the part of the third accused to approach P.W.19, for giving such kind of extra judicial confession and the same is nothing but a concocted one

and the trial Court, without considering the genuineness of Ex.P14- extra judicial confession, has erroneously invited convictions and sentences against the appellants/accused 3 and 4.

(3)The specific evidence given by P.W.21-investigating officer is that statements of all witnesses have been sent to Court only on 10.06.2013. Even though most of the witnesses have been examined immediately after occurrence, no explanation has been given on the side of the prosecution for such delay.

(4)The prosecution has also utilized the services of P.Ws.11 to 13 to the effect that they have seen all the accused prior to occurrence. The evidence given by them cannot be accepted.

(5)No recovery has been made from the 4th accused and further, from the 3rd accused only a torch light has been recovered.

14.To controvert the arguments put forth on the side of the appellants/accused 3 and 4, the learned Additional Public Prosecutor has contended to the effect that in the instant case, on the side of the prosecution, proper recoveries have been made in pursuance of Ex.P14-an extra judicial confession, given by the 3rd accused and further, P.Ws.11 to 13 have seen all the accused in the village prior to occurrence. The trial Court, on the basis of recoveries, coupled with the evidence given by P.Ws.11 to 13, has rightly invited convictions and sentences against all the accused and therefore, the convictions and sentences passed by the trial Court do not require interference.

15.It is an admitted fact that in Ex.P1, no mention has been made with regard to the accused. The prosecution has roped the accused in the present case only on the basis of Ex.P14-an extra judicial confession, alleged to have been given by the 3rd accused. Under the said circumstances, the Court has to meticulously analyse the available evidence on record.

16.As pointed out earlier, the prosecution has developed its case only on the basis of Ex.P14-an extra judicial confession, alleged to have been given by the 3rd accused, viz., Ganesan.

17.It is seen from the evidence given by P.W.4-son of the deceased, that he has been examined very belatedly. If really all the material objects (valuables and non-valuables) have been stolen away by the accused, definitely, on the date of occurrence, P.W.4 would have given a statement to P.W.21-investigating officer. Further, P.W.21 has clearly admitted to the effect that statements of all witnesses have been sent to Court only on 10.06.2013. Therefore, it is needless to say that

P.W.21 has recorded a statement from P.W.4 only after getting Ex.P14, an extra judicial confession, alleged to have been given by the 3rd accused, on 10.12.2012. Therefore, the Court can easily come to a conclusion that in the instant case, the vital material objects have been introduced subsequently so as to point the accused towards crime.

18.It has already been pointed out that Ex.P14-an extra judicial confession has been recorded on 10.12.2012. The occurrence has taken place on 26.11.2012. Further P.W.19 is totally an unknown person to 3rd accused. Since P.W.19 is totally an unknown person to 3rd accused, definitely, he would not have approached P.W.19, for giving such kind of extra judicial confession. Therefore, it goes without saying that Ex.P14 has been utilized only for the purpose of fixing the accused in the present case.

19.The prosecution has examined P.Ws.11 to 13 and their specific evidence is that they have seen all the accused on different dates in different places and that itself cannot be a basis for coming to a conclusion that the accused have involved in the present crime. Further, no supportive evidence is available so as to connect the accused with the crime.

20.As mentioned supra, the statements of all the witnesses have been sent to Court on 10.06.2013 and no explanation has been given on the side of the prosecution. Therefore, it is very clear that P.W.21-investigating officer, after completing investigation, has leisurely sent the statements of all the witnesses to the Court.

21.Further, as rightly pointed out on the side of the appellants/accused 3 and 4, no recovery has been made from 4th accused and further, a torch light has been recovered from the 3rd accused and the same is easily available in open market. Therefore, viewing from any angle, absolutely there is no evidence so as to point out the guilt of the appellants/accused 3 and 4 in the present case.

22.The trial Court, without considering the vital infirmities in the case of the prosecution and also without looking into the fragile and rickety type of evidence available on the side of the prosecution, has erroneously invited convictions and sentences against the appellants/accused. To put it in nutshell, from the place of occurrence, the investigating officer has not collected any evidence so as to connect the appellants/accused 3 and 4 with the crime. Even otherwise, the Court would like to point out that Ex.P.14-an extra judicial confession, alleged to have been given by the 3rd accused, cannot be a sole basis for coming to a conclusion that the present appellants/accused 3 and 4 have

committed the offences as mentioned in the charges.

23. In view of the discussion made earlier, this Court has found acceptable force in the contentions put forth on the side of the appellants/accused 3 and 4, whereas, the contentions put forth on the side of the prosecution is really sans merit and therefore, the present criminal appeal is liable to be allowed.

In fine, this Criminal Appeal is allowed. The convictions and sentences passed against the appellants/accused 3 and 4, by the trial Court in Sessions Case No.48 of 2014, are set aside. The appellants/accused 3 and 4 are acquitted. Fine amounts, if any, paid by them is ordered to be refunded forthwith.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

msk

To :

1. The Judicial Magistrate No I
Gopichettipalayam.
2. The Chief judicial Magistrate
Erode.
3. The Sessions Court,
Mahalir Neethi Mandram (Mahalir Fast Track Court), Erode.
4. The Principal Sessions Court
Erode.
5. The Inspector of Police,
Bungalow Pudur Police Station,
Erode District.
6. The Superintendent of Prison
Central Prison, Coimbatore.
7. The Director General of Police
Chennai 4.
8. The District Collector
Erode.

The Superintendent of Police
Coimbatore

9.The Public Prosecutor,
High Court, Madras

Crl.A.No.80 of 2017

GP(CO)
SP(23/10/2017)



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