

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30-11-2010

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

AND

THE HONOURABLE MR.JUSTICE C.S.KARNAN

CRL.A.Nos.592 and 636 of 2010

Chandru @ Chandrasekaran .. Appellant in
CA 592/2010

Siva @ Sivaprakash .. Appellant in
CA 636/2010

vs

1.The State rep. By
Deputy Superintendent of Police
CB CID, Chennai .. Respondent in
CA 592/2010 &
1st Respondent
in CA 636/2010

2.Ponsekar .. 2nd Respondent
in CA 636/2010

Criminal appeals preferred under Sec.374(1) of the Code of Criminal Procedure against the judgment of the Additional District and Sessions Judge, Fast Track Court No.V, Chennai, made in S.C.No.237 of 2009 dated 24.9.2010.

For Appellants : Mr.V.Kathirvelu, S.C for
Mr.V.Raghavachari
in CA 592/2010

Mr.V.Kathirvelu
Senior Counsel
for Mr.R.Chithiraputhiran
in CA 636/2010

For Respondents : Mr.V.R.Balasubramanian
Additional Public
Prosecutor
for Respondent in
CA 592/2010 &
1st Respondent
in CA 636/2010

Mr.M.Balasubramanian
for de-facto complainant

COMMON JUDGMENT

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

This judgment shall govern these two appeals in C.A.Nos.592 and 636 of 2010.

2.Both these appeals challenge a judgment of the Additional Sessions Division, Fast Track Court No.V, Chennai, made in S.C.No.237 of 2009 whereby the accused/appellants stood charged, tried and found guilty as follows:

ACCUSED	CHARGES	FINDING	PUNISHMENT
A-1 & A-2	120B IPC	Guilty	7 years RI along with a fine of Rs.2000/- and default sentence
A-2	302 IPC	Guilty	Life imprisonment along with a fine of Rs.10000/- and default sentence
A-1	302 r/w 120B IPC	Guilty	Life imprisonment along with a fine of Rs.10000/- and default sentence

3.Short facts necessary for the disposal of these appeals can be stated as follows:

(a) P.W.1, the de-facto complainant, was carrying on his business and residing at Madras. P.W.5, the owner of Nila Sea Foods, is the father of the deceased Arun Prabhu and also the brother-in-law of P.W.1. The second sister of P.W.1 was given in marriage to P.W.5. Arun Prabhu had stayed with P.W.1 on a few occasions in the past. Both the accused/appellants were known to P.W.1. A-1 had also stayed with him at Chennai and Tuticorin. Arun Prabhu joined Madras Christian College School. After completing his plus two course, he joined Sathyabama Engineering College. Since he did not study properly, he was admitted in B.Com. Course in a college at Tuticorin.

(b) On 29.10.2004, Arun Prabhu started at Tuticorin. Siddharth, a friend of the deceased, joined him at Tuticorin. At Virudhunagar, another friend Mathesh also joined him. When they were on their way to Madras, A-1 joined at Madurai. A-2 a friend of A-1, and also a second year student of Chidambaram Medical College also accompanied them, and they were all travelling in a car. The Car met with a mechanical defect. A-1 and A-2 went to Mylapore for repairing the car.

(c) At about 7.00 P.M. on 30.10.2004 one Mr.Jeyaraj, the Manager of Nila Sea Foods, owned by P.W.5, contacted P.W.1 over phone and informed him that Arun Prabhu and his friend Siddharth were coming to Madras, and they would be staying with him that night. On receiving the information, P.W.1 called Arun Prabhu in his mobile phone, and the deceased replied that he was dressing his hair in a saloon, and he would be coming to his house that night. But, he did not come to his house.

(d) P.W.3 is the owner of Meena Guest House, Chennai. Both the accused/appellants along with Arun Prabhu came to the lodge at about

9.30 P.M. on that day, and they were allotted Room No.203, a triple bed room. P.W.4 was the room boy allotted to the room. At that time, P.W.4 took all of them to room No.203 situated in the second floor, and at about 9.30 P.M., Venki @ Venkatesh came to the room on the request of A-1 and A-2, and he stayed in that room for half an hour. At that time, A-1 and A-2 were in possession of the drug, needle and the syringe. They asked Venki @ Venkatesh to inject the drug to Arun Prabhu, and accordingly, Venki injected 4 ml of Tidiyesic drug above the left wrist. After injecting 4 ml to Arun Prabhu, Venki used 2 ml drug by injecting himself. After injection, Arun Prabhu was laid down on the bed, and he was feeling drowsy. Venki told A-1 and A-2 that after he woke up, he should be given tiffin. After getting Rs.50 from A-1, Venki left the room.

(e) On 31.10.2004 at about 6.00 A.M., A-1 and A-2 called Venki by phone to come to the guest house immediately. When Venki reached the guest house, he saw the dead body of Arun Prabhu and also noticed another injection mark in the left elbow joint upper part. P.W.2, the Branch Manager of the Nila Sea Foods, Madras, on receipt of the information by A-1 through phone that Arun Prabhu was in an unconscious state in a lodge at Triplicane, informed P.W.1 about the same. P.W.1 ascertained that the information was given by A-1. Thereafter, A-1 asked P.W.2 to come immediately. Again A-1 called P.W.2 to come immediately, and at that time, he informed P.W.2 that Arun Prabhu is dead. As per the information, P.Ws.1 and 2 went to Triplicane Ellies Road in an auto and reached the place. A-1 who was standing there, took both of them to Meena Guest House Room No.203. When they made entry, they found the dead body of Arun Prabhu. On seeing this, P.W.1 who is his maternal uncle, cried. P.W.1 enquired A-1 and A-2 who were standing nearby. He came to know that A-2 was a medical college student at Chidambaram and also a friend of A-1. When P.W.1 shouted at them, Venki enquired about P.W.1. When P.W.1 informed him that he was the maternal uncle of the deceased, he narrated the entire incident which took place on the previous night.

(f) On information, the Sub Inspector of Police, Triplicane Police Station, one Mr.Murali Sundaram, came to the lodge with four Constables. The Inspector of Police of the said Circle arrived within a short span of time. The Sub Inspector of Police went outside with the accused and returned after 10 minutes. All of them were taken to the police station. They got the signature of P.W.1 in two white papers. On the strength of Ex.P1, the report, a case in Crime No.1150/2004 under Sec.174 of Cr.P.C. was registered. Ex.P12 is the printed FIR, which was sent to the Court. The Sub Inspector of Police, Murali Sundaram, took up investigation, went to the scene of occurrence and prepared an observation mahazar, Ex.P13 and also a rough sketch, Ex.P14. He conducted inquest on the dead body of Arun Prabhu in the presence of witnesses and panchayatdars and prepared Ex.P15, the inquest report. Then the dead body was sent to the Government Hospital along with a requisition for the purpose of postmortem.

(g) On 1.11.2004, P.W.6, the Doctor, attached to the Government Royapettah Hospital, Chennai, conducted autopsy on the dead body of Arun Prabhu. Two injection mark injuries were seen on the front of left elbow joint and front of middle of left forearm respectively. Except that, no external injury or internal injury was seen in the body. Ex.P5 is the postmortem certificate issued by him. The viscera was preserved and sent to the Forensic Sciences Department for

getting the opinion of the chemical analyst.

(h) P.W.9, the Scientific Assistant, attached to the Forensic Sciences Department, on analysis of the viscera, found that in the liver 1300 micro grams of Buprenorphine, a narcotic drug, and Celin was detected, and in the brain, 405 micro grams Buprenorphine was detected, and in the blood, 248 micro grams percent (w/v) of buprenorphine was detected. The viscera report is marked as Ex.P6.

(i) On a requisition received from the Deputy Commissioner, Triplicane, by P.W.11, Dr.Baskaran, attached to the Government Royapettah Hospital, after analysis of the viscera, the final opinion was sought for on the basis of the chemical report, and also a questionnaire was annexed to the letter from P.W.11. The final opinion was given in Ex.P10 wherein the Doctor has opined that if a person injected himself, he could do it only for 4 ml, and after 4 ml, he could not inject, and upto 18 mg which is equivalent to 40 ml, the body can withstand, and if the dosage exceeds, it would poison the blood, and in such case, there is possibility of the resultant death.

(j) Pending the investigation, the said Venki @ Venkatesh was arrested on 8.12.2004. The accused Venki @ Venkatesh produced a syringe, the brandy bottle lid, Tidijesic empty ampoule, unused Tidijesic ampule, tablets numbering two, nokia colour cellphone which were all seized in the presence of two witnesses. He was sent for judicial remand. The case was altered to Sec.304 of IPC. The altered report was also sent to the Court. The statements of the witnesses were recorded. A-1 and A-2 were also examined, and their statements were recorded.

(k) Not satisfied with the investigation by the police officials attached to D1 Triplicane Police Station, P.W.1 filed CrI.O.P.No.3682 of 2005 for transfer of investigation. This Court made an order on 28.2.2005, transferring the investigation to the CB CID. Accordingly, the CB CID which took up the investigation, filed the charge sheet as against Venki @ Venkatesh on 23.1.2008. After it was taken, Venki @ Venkatesh died. Then the case was closed. At that juncture, P.W.1 filed a private complaint alleging the above factual position apart from stating that A-1 had a close contact with P.W.10 Reshmi; that thereafter, she was introduced by A-1 to the deceased; that there were exchange of telephonic calls and also SMS between them; that aggrieved over the same, A-1 suspected whether the deceased and Reshmi became closer; that A-1 who could not tolerate the close relationship of the deceased with his girl friend Reshmi, hatched up a conspiracy with A-2, schemed to murder the deceased and collected more quantity of drug on the date of occurrence; that Venki @ Venkatesh was used as a tool in order to escape from the guilt of murder; that initially Venki injected a small quantity of drug and left the place; that after that, the accused injected him in the upper part left elbow in larger quantity and caused his death, and thus A-1 and A-2 have committed the murder of the deceased pursuant to the conspiracy hatched up by them and they are punishable under Sec.302 of IPC. The said private complaint was filed by the de-facto complainant.

(l) After recording her sworn statement, examining P.Ws.1 to 7 and marking Exs.P1 to P14, the XIII Metropolitan Magistrate had found that there were sufficient grounds for proceeding with the case against the accused under Sec.302 of IPC and hence taken the private complaint on file, and after serving the copies of documents under

Sec.207 of Cr.P.C, committed the case to the file of the Principal Sessions Division, Chennai, on 24.8.2009, since it is exclusively triable by the Court of Sessions. Accordingly, the case was taken on file in S.C.No.237/2009 and the case was made over to the file of Fast Track Court No.IV for disposal according to law. Pursuant to the orders of this Court in Crl.O.P.No.5712/2010 dated 19.4.2010, the case was made over to the Fast Track Court No.V. After following the procedural formalities, the above charges were framed against the appellants.

4.In order to establish the charges, the prosecution examined 12 witnesses and also relied on 15 exhibits. But no material objects were marked. On completion of the evidence on the side of the prosecution, the accused were questioned under Sec.313 of Cr.P.C., as to the incriminating circumstances found in the evidence of the prosecution witnesses, which they flatly denied as false. After the evidence on the side of the prosecution was over, on the side of the defence, four witnesses were examined and four exhibits were marked. The trial Court heard the arguments advanced on either side, and took the view that the prosecution has proved the case beyond reasonable doubt, and hence found them guilty as per the charges and awarded the above punishment. Hence these appeals at the instance of the appellants.

5.Advancing arguments on behalf of the appellant in C.A.No.592 of 2010, the learned Counsel Mr.V.Raghavachari would submit that in the instant case, the private complaint filed by P.W.1, should not have been taken on file in view of the final report filed by the respondent police based on Ex.P11, complaint, and Ex.P12, FIR, as against one Venki @ Venkatesh for the offence under Sec.304(ii) IPC; that without even disclosing as to how the investigating agency was in error, entertaining the private complaint and further convicting the appellant/A-2 are without any basis and legally unfounded; that it is pertinent to note that the appellant was shown as one of the witnesses under Ex.D4; that in such circumstances, terming him as an accused in the private complaint merely because he was staying along with the deceased on the date of occurrence, is erroneous; that the allegations found in the private complaint, Ex.P1, is an exaggerated version of P.W.1 and also an after thought, and thus it should not have been entertained; that when the fact remains that the final report filed by the respondent police, is not struck down, proceeding with the trial based on the private complaint, is erroneous; that even as per the final report filed by the respondent police, the said Venki is shown as an accused; that since he died, the case was closed as abated; that taking advantage of the same, the private complaint was filed alleging that Venki had informed P.W.1 as regards the alleged incident, and presuming that a murder had taken place which would indicate that the case is a false one; that the allegation that Venki had informed P.W.1 on 31.10.2004, that the appellant and A-1 had killed the deceased was introduced only after the death of Venki and not before in any of the petitions before any Court or in any of the representations before the police; that Exs.D1 to D4 would go to show that the deceased was a drug addict and his friend Venki was a drug peddler; that only out of over dosage by Venki, the deceased Arun Prabhu died; that even according to the evidence of P.W.1, on 31.10.2004 itself, the appellant and A-1 were enquired by the police;

that these aspects were not at all considered by the trial Court; that it is also to be noted that none had spoken about the appellant as one involved in the offence; that even according to P.W.1, after the injection was made by Venki to the deceased, he was conscious, and the report of the postmortem Doctor also speaks of rigor mortis having been set in; that this would clearly be indicative of the fact that the cause of death is not on account of the one as put forth by the prosecution; that it is pertinent to note that the said Venki was very well known to the deceased; that there is a clear proof that the deceased was conscious when Venki administered the drug, and there is no evidence to show that thereafter, he was conscious and moved about; that under the circumstances, the charge of murder framed against the appellant, is wholly without substance; that apart from that, there is absolutely no evidence to show that there was enmity between A-1 and the deceased because of P.W.10; that from the polygraph and brain mapping reports and also narco analysis report, it could be seen that Venki had committed the act of injecting over dosage to the deceased; that merely because the appellant is a medical college student and he was in the same room along with A-1, it cannot be stated that there was a conspiracy; that in fact, the appellant was never informed of any trip from Chidambaram to Madras by the deceased or A-1; that there was no proof of communication between A-1 and A-2 of any device or plan earlier; that the appellant and the deceased met only at 9.30 P.M. On 30.10.2004, and before that, from the morning onwards, the deceased was injecting drug along with Venki; that in such a situation, the trial Court has erroneously concluded that the appellant went there and committed the crime; that it is settled law that in a case of circumstantial evidence, there should be chain of circumstances without break; but in the instant case, there is no link at all; that when the case of the complainant against the appellant itself is against the investigation and the final report filed by the respondent police, it should have been rejected; that under the circumstances, the prosecution has miserably failed to prove its case, and hence the judgment of the trial Court has got to be set aside and the appellant/A-2 be acquitted by this Court.

6.The learned Senior Counsel appearing for the appellant in C.A.No.636 of 2010 Mr.V.Kathirvelu would submit that first of all, the investigation done by P.W.12 and D.W.4 has got to be considered in this case; that it is pertinent to note that D1 Triplicane Police Station had registered the case and filed the charge sheet as against one Venki @ Venkatesh for an offence under Sec.304(ii) IPC; that thereafter, on a petition filed by the complainant, the investigation was transferred to CB CID, and CB CID also filed the charge sheet against the same accused Venki @ Venkatesh; that under the circumstances, without challenging the investigation, the complainant filed the private complaint; that in the case on hand, two sets of evidence are available one through the private complaint that the appellant and A-2 were responsible for the death of Arun Prabhu and the other through the evidence of P.W.12 and D.W.4 pointing to the guilt of the accused Venki @ Venkatesh; that as regards the conspiracy theory put forth by the prosecution, absolutely there is no evidence available; that apart from that, though the prosecution attempted to adduce evidence with regard to motive part through P.W.10, it failed to prove the same; that in the instant case,

everything is only hearsay evidence; that according to P.W.1, he heard the news through one Jeyaraj about the arrival of the deceased and also the serious condition of the deceased on the date of occurrence; but the said Jeyaraj has not been examined; that the non-examination of Jeyaraj was fatal to the prosecution case; that P.W.1 has deposed that Venki has admitted before him that he injected in one place, but injection mark is available in two places; that to prove this fact, Venki is no more; that even according to P.W.2, he heard the news from the cell phone of the deceased which was made by Siva; that P.Ws.3 and 4, the owner of the lodge and the room boy respectively, were only strangers to the accused; that there was no identification parade conducted; that there were no records produced by the prosecution showing that the accused stayed along with the deceased in the triple bed room of that lodge; that under the circumstances, the evidence of P.Ws.3 and 4 was not useful to the prosecution case; that apart from that, the evidence of P.Ws.1 and 2 is highly doubtful; that P.W.5, the father of the deceased, introduced a new version; that his evidence was only on assumption that the accused have caused the death of the deceased; that the postmortem Doctor has stated during the course of investigation that he found only one injection mark in the left hand of the deceased; but on the contrary he has mentioned in the postmortem certificate that he found two injection marks in the left hand; and that under the circumstances, the appellant/A-1 is entitled for acquittal in the hands of this Court.

7.The Court heard the learned Additional Public Prosecutor for the State Mr.V.R.Balasubramanian and also the learned Counsel for the de-facto complainant Mr.M.Balasubramanian on all the above contentions.

8.The arguments advanced on either side, are considered, and the entire materials are perused.

9.It is not in controversy that pursuant to the registration of a case in Crime No.1150/2004 under Sec.174 of Cr.P.C. by D.W.3, the Sub Inspector of Police, attached to D1 Triplicane Police Station, and following the inquest made and the preparation of Ex.P15, the inquest report, the dead body of Arun Prabhu was subjected to postmortem by P.W.6, the Doctor, serving in the Government Royapettah Hospital, on 1.11.2004. After the conduct of the autopsy, he gave Ex.P5, the postmortem certificate, and the viscera was sent for chemical analysis. P.W.9, the Scientific Assistant, attached to the Forensic Sciences Department, on analysis, gave a report under Ex.P6 to the effect that in the liver 1300 micro grams of Buprenorphine, a narcotic drug, and celin was detected, and 405 micro grams Buprenorphine was detected in the brain, and in the blood, celin and 248 micro grams of Buprenorphine was detected. P.W.11, who was working at the Government Royapettah Hospital, was examined by the prosecution since the Doctor who conducted the postmortem, retired. A questionnaire was sent calling for his opinion pursuant to which he sent a reply under Ex.P9. In his final opinion, he has categorically stated that Buprenorphine was a poisonous drug, and due to that, Arun Prabhu appeared to have died. He further added in his report that if a person had injected himself, he could do only for 4 ml, and after 4 ml, he could not inject, and upto 18 mg which is equivalent to 40 ml,

the body could withstand, and if the dosage exceeds, it would poison the blood, and in such a case, there was possibility of resultant death. By the above narrated evidence, the prosecution has proved that the death of Arun Prabhu was due to the injection of the poisonous substance exceeding the above said dosage.

10. The appellants stood charged that pursuant to the conspiracy hatched up by them, they caused the death of one Arun Prabhu by administering Tidijesic drug in high dosage. The complainant came with the specific motive that A-1 was doing his course along with P.W.10 Reshmi; that they fell in love with each other; that after the introduction of Reshmi to the deceased Arun Prabhu by A-1, they became closer to each other; that A-1 on coming to know about the same, could not tolerate and hence, hatched a conspiracy with A-2 to do away with Arun Prabhu. The contention put forth by the learned Counsel for the appellants is that though the prosecution attributed the said motive, it did not have any evidence pointing to the same, and since the case rests on the circumstantial evidence, the prosecution must prove the motive by adducing necessary and acceptable evidence. Before the trial Court, the said Reshmi was examined as P.W.10. According to her, it was A-1 who introduced her to Arun Prabhu, and she used to converse with him more than 15 minutes everyday through the cellphone, and there was exchange of SMS between them. A-1 has also admitted that he has not only introduced the deceased to Reshmi, but also he knew that they were conversing with each other through the cellphone and also exchanging SMS. Quite natural that when Reshmi was very close to A-1, the fact that she moved close to the deceased should have raised a suspicion in the mind of A-1 that Reshmi would avoid him by her friendship with the deceased Arun Prabhu. It is pertinent to point out that when Reshmi asked A-1 why he did not attend the examination, through phone, A-1 after giving some evasive answer, further added that Arun Prabhu died in a motor accident. This information was not only misleading and suppression of the true facts, but also it was intended to put P.W.10 on notice as to the death of Arun Prabhu and inform her that her relationship with Arun Prabhu came to an end. By the above evidence, the prosecution has sufficiently and undoubtedly proved the motive attributed to A-1.

11. True it is that the prosecution in order to prove the act of the accused/appellants did not have direct evidence. It rested its case exclusively on the circumstantial evidence. It is not that this Court is unmindful of the caution made by the settled principles of law and also the rulings of the Supreme Court, that in a given case where the prosecution rested its case exclusively on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances pointing to the guilt of the accused and also to the hypothesis that except the accused, no one could have committed the offence. In the instant case, the following circumstances which stood proved, are noticed by the Court.

12. The deceased Arun Prabhu was the son of P.W.5 and the sister's son of P.W.1. Arun Prabhu after finishing his XII Standard, obtained a seat at Sathyabama Engineering College, and after he discontinued his studies, he got B.Com. seat in another college where

also he was irregular. From the evidence of his close relative examined as D.W.2, it would be quite clear that he had association with the persons of his age who were lacking in social conduct and indulging in pleasure seeking activities. On 29.10.2004, he started from his native place, and he took Siddharth from Tirunelveli, and on his way, A-1 joined him at Madurai. All of them proceeded to Chennai via Chidambaram where they took A-2, and two of their other friends also joined them, and all of them reached Madras. The occurrence has taken place in Room No.203 of Meena Guest House, Triplicane, on the night of 30.10.2004. P.W.3, the owner of the lodge, has categorically deposed that a triple bed room was allotted in the name of A-1 and the deceased. P.W.4, the room boy, took A-1, A-2 and also the deceased to Room No.203. Both A-1 and A-2 at the time of the questioning by the trial Court under Sec.313 of Cr.P.C., as to the incriminating circumstances found in the evidence of the prosecution witnesses against them, have categorically admitted that both of them along with the deceased were staying in Room No.203; that Venki @ Venkatesh came to the room at about 10.00 P.M.; that he was staying there for sometime; that during that interval, Venki injected the narcotic drug to Arun Prabhu; that he also injected himself; that A-1 paid Rs.50/- to Venki; that Venki left the place; and that he came in the next morning at about 6.00 A.M. The above admission made by A-1 and A-2 along with the evidence of P.Ws.3 and 4 stood as a good proof for the fact that on the night of 30.10.2004, A-1 and A-2 stayed with the deceased Arun Prabhu throughout the night. When A-1 and A-2 were the only persons staying with the deceased Arun Prabhu on the night of 30.10.2004 during which Arun Prabhu died, it is for A-1 and A-2 to explain how the death of Arun Prabhu was caused. As narrated above, the prosecution put forth clinching evidence pointing to the fact that the death of Arun Prabhu was caused by the administration of the narcotic drug. When such an explanation was called for, the accused attempted to give a false explanation before the trial Court. Now, the learned Counsel for the appellants attempted to put forth a feeble and unacceptable explanation before this Court. The postmortem certificate, Ex.P5, clearly indicates that there were two injection marks found on the body i.e., one on the front of the left elbow joint and the other on the middle of the left forearm. A-1 and A-2 have stated that Venki administered the drug by injecting him only once. Both of them have categorically denied that there were no two injection marks. This explanation tendered by them before the trial Court was contrary to the contents of the postmortem certificate. It is pertinent to point out that while it was admitted by both the appellants/accused that Venki injected the deceased only once and left the place and during that night hours except these two accused, no one entered or stayed in the room, then it could be easily inferred that the second injection mark could not have been made by anybody else, except these two accused/appellants. It is not the case of the appellants that Arun Prabhu injected himself any more drug.

13.While the cause of death of Arun Prabhu was due to the administration of the poisonous drug, A-1 has given different versions. A-1 informed to P.W.10 that Arun Prabhu died in an incident while he has informed to P.W.7 that he died due to heart attack. The suppression of the real cause of death would not only reflect on the conduct of the accused, but also suppression of the

true state of affairs. Well settled it is that when a case rests on the circumstantial evidence and in the link of circumstances, one or two of the circumstances are well within the knowledge of the accused, it is for the accused to explain the said circumstances and in the absence of any explanation by the accused or the suppression of circumstances or the accused coming with a false explanation, the Court can take the existence of that circumstance which would act against the accused. In the instant case, the above narration of events would clearly indicate that in the chain of circumstances, the accused/appellants have not only suppressed the circumstances, but also have come with the false explanation as to the circumstances. Hence the above circumstance would clearly speak of their involvement in the commission of the crime in clear terms.

14. Pointing to the evidence of D.W.2, the learned Counsel appearing for the appellants would urge that Arun Prabhu was already a liquor addict and thus the blood has already become poisonous; that even the administration of the minimum quantity of the poisonous drug would cause death; and that the same has occurred in the instant case. This contention cannot be countenanced for the reason that in the instant case, it could be seen from the available evidence that after Venki administered the drug by injecting him once, Arun Prabhu became unconscious. According to the evidence of P.W.11, who obtained the final opinion from the Doctor who conducted postmortem, a person can inject himself, and he could do so only for 4 ml, and after 4 ml, he could not inject, and upto 18 mg which is equivalent to 40 ml, the body can withstand, and if the dosage exceeded, it would poison the blood, and in such a case, there is possibility of the resultant death. It is pertinent to point out that Arun Prabhu started from his native place on 29.10.2004 and accompanied his friends, and A-1 joined him at Madurai; that A-2 also joined them at Chidambaram; that all of them reached Madras on 30.10.2004; that Arun Prabhu accompanied A-1 and A-2 to the lodging house and booked a room; that he was staying over there, and thus he was fully conscious and active till the drug was administered for the first time by Venki @ Venkatesh on that day. Apart from the above, since the death was caused due to the administration of over dosage of the poisonous drug and the same was also found as per the medical reports placed before the trial Court, it was also not possible for Arun Prabhu to inject the same since from the evidence of the medical person, it would be quite clear that a person cannot inject himself exceeding 4 ml. It is pertinent to point out that Venki who first administered the said drug by injecting Arun Prabhu, has administered only 4 ml, and he became unconscious; but Venki administered himself only 2 ml and left the place.

15. As could be seen from the available materials, the prosecution had no direct evidence wherefrom it could prove the conspiracy alleged to have been hatched up by A-1 and A-2 for the crime. It is well settled principle of law that in a given case where the prosecution could not prove the theory of conspiracy by direct evidence, it can place the necessary circumstance and prove the same wherefrom the conspiracy could be inferred i.e., the conspiracy though direct evidence is absent, is inferable from the proved circumstances. In the instant case, A-1 has joined the deceased at Madurai, and it was he who took the deceased to

Chidambaram. It is pertinent to point out that A-2 was only the friend of A-1 and not of the deceased. During the relevant time, A-2 was doing the medical course at Chidambaram. While five persons travelled to Madras in a Car and reached, A-1, A-2 and the deceased alone stayed in the lodge. The other two did not accompany the three. At this juncture, it is pertinent to note that A-1 had no explanation to offer why he took Arun Prabhu and also A-2 a medical student, to Chennai on the relevant date. Venki, a drug addict, was also a friend of both the deceased and A-1. Though it was contended that Venki was called to the room by the deceased, the admission made by A-1 that it was he who paid Rs.50/- to Venki would clearly be indicative of the fact that it was A-1 who invited Venki to the room. Admittedly, after Venki administered the poisonous drug by injecting Arun Prabhu once, he left the place at about 11.00 P.M. and came only in the morning of 31.10.2010, when he found the dead body. The postmortem certificate would clearly indicate that there were two injection marks. Both the accused/appellants at the time of questioning by the Court, have denied the existence of the second injection mark which was contrary to the contents of the postmortem certificate, and thus they made an attempt to suppress the same. The plea taken by A-2 that though he was very well available inside the room, he was witnessing TV and he did not know what happened inside the room cannot but be false. It can be well stated that it was a feeble explanation attempted by A-2 in order to wriggle out of the criminal liability. From the above, it would quite clear that A-1 who had sufficient motive against the deceased, and A-2, a medical student during the relevant time, and also a friend of A-1, have hatched a conspiracy to do away with Arun Prabhu, and in order to make it appear as if he died out of the administration of drug by injection made by Venki, they have enacted a drama that Arun Prabhu died after Venki left the place. The above proved circumstances would be clearly indicative of the fact that without an agreement between A-1 and A-2 to commit the crime in the above fashion, the crime could not have been committed. That apart, the manner of commission of the crime would clearly indicate the conspiracy.

16. Insofar as the investigation conducted by D.W.3, the Sub Inspector of Police, attached to D1 Triplicane Police Station, in Crime No.1150/2004, it was not only perfunctory, but also unsatisfactory and what is not expected of a responsible Police Officer. He has deposed that on information from the lodge owner, he went to the lodging house at about 9.45 P.M., which was thoroughly false from the available evidence. A-1 and A-2 have categorically admitted that the Sub Inspector of Police along with four Constables came to the lodge in the morning hours; that they were taken outside and enquired; and that after some time, they came to the room. According to P.W.1, two signatures were obtained in two white papers. According to D.W.3, the Sub Inspector of Police, a report was given by P.W.1, on the strength of which a case was registered in Crime No.1150/2004 under Sec.174 of Cr.P.C. A reading of the alleged report would make it explicit that it is as bald as it could be. That apart, the printed FIR in Crime No.1150/2004 did not disclose that a copy of the same was served upon P.W.1. While it was an admitted fact that A-1, A-2 and Venki were all present in the room, nobody was taken to the police station or enquired. Admittedly, A-1 and A-2 were enquired only on 7.11.2004. In a given case like this, while

the accused persons were also present at the place of occurrence, why they were let at large for a period of seven days remained unknown. This Court is of the considered opinion that it was not only a lethargic attitude on the part of the police officer, but also he did not want to book the real culprits or take action against them for the reasons best known to him. Apart from that, the non-examination of A-1 and A-2 by D.W.3, the Sub Inspector of Police, attached to Triplicane PS, for a period of one week and allowing them to abscond for that period would naturally cast a serious doubt on their conduct.

17. Under the aforesaid circumstances, the complainant moved this Court by filing a petition in CrI.O.P.No.3682 of 2005, and after being satisfied with the circumstances, this Court ordered transfer of the investigation from D1 Triplicane Police Station to the CB CID. After the transfer of investigation, though the CB CID took up investigation, continued the same and filed the charge sheet as against Venki, it is also not free from defects and infirmities. The CB CID took up investigation pursuant to the order of the Court dated 28.2.2005, and it filed the final report on 23.1.2008. Since Venki died, it came to be closed on 11.8.2008, and thus it is quite evident that the investigation was in the hands of CB CID for nearly a period of three years. It is a matter of surprise to note that CB CID took up the investigation only in the line of the earlier investigation and filed the charge sheet as against Venki without taking notice of number of circumstances pointing to the involvement of the accused/appellants. According to D.W.4, the Inspector of Police, attached to the CB CID, Ex.D4, final report, was filed against Venki alone stating that it was he who injected the fatal dose. This allegation found in the final report, was not supported by any evidence, but exclusively based on the scientific report. The reading of the charge sheet filed by the CB CID, would clearly indicate that the accused/appellants and Venki submitted themselves for the polygraph and brain mapping test. In the brain mapping report, it is mentioned that Venki @ Venkatesh was involved in the occurrence, and hence D.W.4 took the view that Venki @ Venkatesh was suppressing the truth though he was involved, and A-1 and A-2 were not involved in the occurrence. It is pertinent to point out that the report on the basis of the above test, cannot be a conclusive proof, and on the basis of the same, an investigation cannot be completed while there were sufficient materials pointing to the involvement of the other accused.

18. The evidence of D.W.4 would clearly indicate that P.W.5, the father of the deceased, brought to his notice that A-1 and A-2 were involved in the case, but he did not do so. While the material records which were available at the time of the investigation by the CB CID, were to the effect that A-1 and A-2 were the only two persons in the company of the deceased throughout that night after Venki left administering the drug once; and that there were two injection marks in the body as could be seen from the postmortem certificate, D.W.4 has not proceeded with the investigation in the proper line and added A-1 and A-2 in the final report. Thus it would be quite clear that even the CB CID to whom the investigation was entrusted on transfer, did not investigate the case properly without analysing the circumstances and the available materials pointing to the guilt of the accused, but filed the report on the basis of the analyst's

report which was not a conclusive proof. Though CrI.O.P.No.25457/2006 was filed by the de-facto complainant seeking intervention of CBI, this Court has dismissed the petition. The contention put forth by the learned Counsel for the appellants that for a period of three years, P.Ws.1 and 5 and all other interested persons were silent, and only after the final report was filed by the CB CID, they have invented a motive and have come with a false story to rope in the innocent A-1 and A-2/appellants cannot be countenanced. By filing CrI.O.P.No.3682 of 2005, the complainant sought the transfer of the investigation from D1 Triplicane PS to CB CID. The same was ordered by this Court on 28.2.2005. Thereafter, the CB CID took up investigation and proceeded with the same. Though many a request was made by the complainant as to the involvement of A-1 and A-2, the officials of CB CID did not heed to the request; but on the contrary, they filed a final report against Venki under Sec.304(ii) IPC on 23.1.2008. The same was closed on 11.8.2008, on the death of Venki. It is pertinent to point out that the private complaint was filed by P.W.1 before the Metropolitan Magistrate on 11.8.2008, and the same was taken on file on 24.8.2009, and after examining number of witnesses and recording a finding that there was a prima facie case against the appellants, which required the necessary proceedings at the hands of the Sessions Court, the same was committed to the Court of Session, and it was taken on file as S.C.No.237/2009. Thus it would be quite clear that from the said period of three years, since the investigation was in the hands of the CB CID, the complainant brought to the notice of the CB CID officials as to the involvement of A-1 and A-2, and when it was not considered, he filed CrI.O.P.No.25457/2006 on the file of this Court, and the same was dismissed in the month of February 2008. Under such circumstances, the proper way for ventilating the grievance of the complainant was to file a private complaint as he did in the instant case, and seek his remedy in the eye of law. This Court is unable to notice any legal impediment in that regard.

19. Before the trial Court, A-1 and A-2 stood charged under Sec.120B of IPC while A-1 was charged under Sec.302 r/w 120B IPC and A-2 was charged under Sec.302 IPC. On trial, the learned trial Judge found A-1 and A-2 guilty under Sec.120B IPC and awarded the punishment, and A-1 was found guilty under Sec.302 r/w 120B IPC, while A-2 was found guilty under Sec.302 of IPC and awarded the punishment. Insofar as the conviction of A-1 and A-2 under Sec.120B of IPC, since this Court is of the considered opinion that the prosecution has proved the conspiracy theory which could be inferred from the proved circumstance, the judgment of the trial Court has got to be affirmed. As regards A-2 who stood charged of murder, he has been rightly found guilty by the trial Judge under Sec.302 IPC, and the punishment awarded to him has got to be affirmed.

20. A contention was raised by the learned Senior Counsel for A-1 that A-1 was not independently charged under Sec.302 IPC, but he was charged under Sec.302 r/w 120B IPC. When A-1 and A-2 were charged under Sec.120B of IPC, and A-2 was charged under Sec.302 IPC, A-1 should have also been charged under Sec.302 of IPC simplicitor, but erroneously, so far as A-1 was concerned, he stood charged under Sec.302 r/w 120B IPC. The penal provision under Sec.120B has been added erroneously in this charge. At this juncture, it would be more

apt and appropriate to reproduce Sec.464(1) of Cr.P.C. as follows:

"464.Effect of omission to frame, or absence of, or error in, charge:- (1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby."

21.The very reading of the above provision would make it clear that the sentence awarded by the Court of competent jurisdiction, shall not be deemed invalid merely on the ground that there was an error, omission or irregularity in the charge, unless there was a failure of justice has in fact been occasioned thereby. In the instant case, it is true that there was an error committed by the trial Court in adding 120B along with Sec.302 of IPC in the second charge as against A-1. But, sufficient evidence as narrated above, for the commission of the crime of murder is available as against A-1, and this Court is unable to see any failure of justice that was occasioned thereby. It is not a fit case, in the considered opinion of this Court, on that ground, to set aside the judgment and ask for a re-trial. Hence A-1 is found guilty under Sec.302 of IPC instead of Sec.302 r/w 120B IPC. The above view of this Court is fortified by the judgment of the Apex Court reported in (2001) 7 SCC 679 (STATE OF M.P. V. BHOORAJI) wherein it has been held as follows:

"8..... A de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial. This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation.

12. Section 465 of the Code falls within Chapter XXXV under the caption "Irregular Proceedings".....

13. Thus the entire purport of the provisions subsumed in Chapter XXXV is to save the proceedings linked with such erroneous steps, unless the error is of such a nature that it had occasioned a failure of justice.....

15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity."

22. For the reasons stated above, it can be well stated that the prosecution has proved by sufficient evidence as to the hatching up of conspiracy by A-1 and A-2, and following the same, they have caused the death of Arun Prabhu on the night hours of 30.10.2004, in the lodging house by administering over dose of poisonous drug. In the circumstances, the act of both the accused/appellants has got to be termed only as murder as defined under the Code and thus the trial Judge was perfectly correct in finding the appellants guilty and awarded the punishment as referred to above, and the judgment of the trial Court has got to be affirmed.

23. In the result, both these criminal appeals are dismissed confirming the judgment of the trial Court.

Sd/
Assistant Registrar

/True Copy/

Sub Assistant Registrar

nsv

To:

1. The Additional District
and Sessions Judge
FTC No.V, Chennai.

2. The Deputy Superintendent of Police
CB CID, Chennai

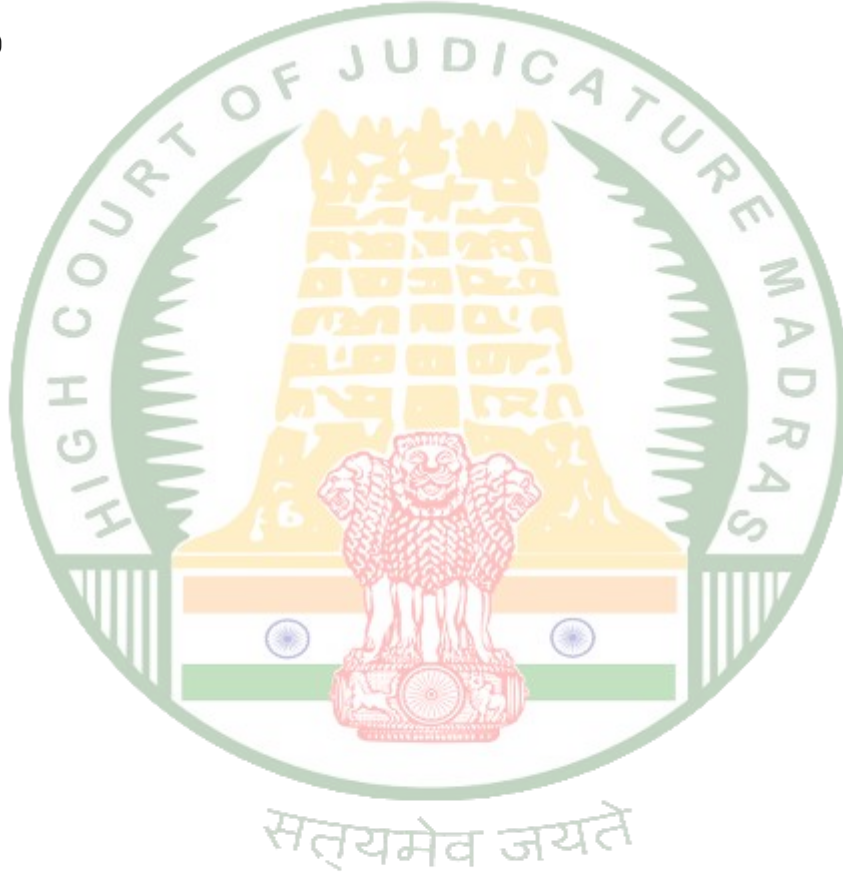
3. The Public Prosecutor
High Court, Madras.

4. The District Collector, Chennai.
5. The Director General of Police, Mylapore, Chennai-04
6. The Superintendent, Central Prison, Puzhal, Chennai

+ One CC to Mr.V.Raghavachari, Advocate CCSR 85026
+ One CC to Chithiraputhiran, Advocate CCSR 85521

CRL.A.Nos.592 and
636 of 2010

MBS (CO)
PKS
11/12/2010



WEB COPY