

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2018

CORAM:

THE HONOURABLE MR. JUSTICE C.T. SELVAM

AND

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

Criminal Appeal No.763 of 2017

Ezhilarasan : Appellant/Accused-1

Vs.

State: Represented by
Inspector of Police
Taluka Police Station,
Thiruvannamalai.
Cr.No.644 of 2008

: Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to call for the records and to set aside the judgment and sentence dated 06.11.2017 made in S.C.No.134 of 2010 on the file of District and Sessions Judge, Thiruvannamalai.

For Appellant : Mr. Aruna Elango

**For Respondent : Mr.V. Arul
Additional Public Prosecutor**

JUDGMENT

[Judgment of the Court was delivered by **N. SATHISH KUMAR, J.,**]

The appeal is preferred against the conviction of the appellant under Section 120(B), 302, 394, r/w 397, 201 I.P.C. and sentenced him to undergo life imprisonment and to pay a fine of Rs.1,500/- in default to undergo two years rigorous imprisonment for the offence under Section 302 I.P.C.; to undergo life imprisonment for the offence under Section 394 r/w 397 I.P.C. and to undergo seven years rigorous imprisonment and to pay a fine of Rs.1,000/- in default to undergo two years rigorous imprisonment for the offence under Section 201 I.P.C., by the learned District Sessions Judge, Thiruvannamalai, in S.C.No.134 of 2010 dated 06.11.2017. The sentences were ordered to run concurrently and the detention period of the appellant was ordered to set off u/s.428 of Cr.P.C.

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2. The charge sheet was laid down by the prosecution against the appellant for the above crimes along with one juvenile. The appellant was tried for the above offences separately, as the case against the juvenile was split up and

pending before the Juvenile Justice Board.

3.The brief facts of the prosecution is as follows:

3.(a) The deceased one Avinash aged about 19 years was a friend of the accused and Juvenile Gunasekaran. All of them have studied in a tutorial college. The deceased used to wear chain and used to have cash in hand. On 23.09.2008 at midnight, the accused along with juvenile hit the deceased with stone and stabbed him and had thrown the body into the well. The deceased, originally was a native of Karnataka State. He came to Thiruvannamalai only to join in a tutorial college. P.W.8 Sumathi is the mother of the deceased Avinash. As the deceased had not contacted P.W.8 for more than 2 days, she came to Thiruvannamalai and enquired in the college and the students about his whereabouts. Thereafter, she gave a complaint to the police. In the meanwhile, P.W.1, Village Administrative Officer of Savalpoondi Village, on hearing the news about dead body, aged about 35 years floating in the well, he went to the police station and lodged Ex.P.1 report to the Sub-Inspector of Police. Based on which, F.I.R. was registered under Section 174 Cr.P.C. First

Information Report was marked as Ex.P.23.

3.(b) P.W.16 Inspector of Police, took-up the investigation and went to the place of occurrence on 27.09.2008 at 10.30 p.m. and prepared observation Mahazar Ex.P.2 in the presence of P.W.1 and also seized the Material Objects under Ex.P.3 Mahazar, examined P.W.1 and others, recorded their statements and also drawn Rough Sketch Ex.P.16 and conducted inquest over the dead body of the deceased and prepared Inquest Report Ex.P.17. Thereafter, the dead body was sent for Post Mortem and P.W.16 altered the crime under section 302 I.P.C. under Alteration Report Ex.P.18. In the meanwhile, on 08.10.2008 the accused and the juvenile Gunasekaran appeared before the P.W.1 Village Administrative Officer and confessed the crime and the same was reduced into writing by him. The Confession Statement is Ex.P.4. Thereafter, P.W.1 handed over the accused to the police along with his Special Report Ex.P.19. Thereafter, P.W.16 further altered the crime from 302 I.P.C. to 302, 394, 201 I.P.C. under Ex.P.20 Alteration Report. P.W.16 arrested the accused on 8.10.2008 in the presence of P.W.1 and others and recorded his confession. In pursuant to the same, he seized M.O.1 knife,

M.O.2 Pant, M.O.3 T-shirt, under Seizure Mahazar Ex.P.6. The admitted portion of the confession statement of the accused is Ex.P.5. Thereafter, he has also seized M.O.4 Chain under Ex.P.7 Mahazar from the shop of P.W.5. Further, P.W.16 also seized M.O.5 Cell phone from the shop of P.W.7 under Mahazar Ex.P.8. He sent the above Material Objects to the Court under Form-95 after recording the statement of witnesses. Again on 9.10.2008, he seized clothes, bag and shoes of the deceased under Mahazar Ex.P.21 from the accused.

3.(c) P.W.3 Javith, also studied with the deceased and the accused in the tutorial college. On 22.08.2008, the accused and one Gunasekaran were talking about some gold jewels and on seeing P.W.3, they stopped the conversation. Thereafter, Avinash did not come for the examination. P.W.4 Karuppayi, grandmother of the accused pledged a gold chain weighing 14 grams in the Pawn Shop belongs to P.W.5 and received Rs.3,000/- from him. After a week, police came and seized the above material objects.

3.(d) P.W.6 Medical Officer attached to the Government Hospital, Thiruvannamalai, conducted autopsy over the dead

body and found the following:

External Examination:

Body of a male; lying on its back, body bloated; foul smell emanates from body; abdomen distended; moving maggots seen over the face, neck, chest and back; peeling of cuticle present, loosen of scalp hair, present Eyelids disclosed, nose deformed; teeth complete; fracture of (l) 1st incisor; no discharge from ear, nose, mouth, ex. genitalia swollen; extremities free;

Injuries:

- (1) Fractured skull bore involving the frontal bone of skull with a opening of 6 x 4 cm with bone fragments inside skull cavity; pasty Brain substance exudes out of the skull cavity. The fracture extends down through medial border of (L) orbit till to be middle of upper jaw;*
- (2) A linear fracture extends from above opening towards (l) temporal bore to a distance of about 6 cm*
- (3) Contusion 3x2cm (L) side chest with blood clots*
- (4) Cut wound is seen extending from (l)lateral to (R) lateral of length 10 cm, with varying breadth and depth at the upper border of thyroid cartilage. Breadth and depth at (L) Lateral ranges 1 cm x skin deep at the (L) of thyroid*

catilage, an elliptical wound of length 6 c.m., breadth 4cm and depth 6 cm, regular margins; at (R) lateral end breadth x depth ranges 1 x 1/2 cm no tailing was apparent; injuries to vessels could not be made out due to decomposition.

(5) Lineal contusion of 3 x 1 cm seen on both wrists.

Internal Examination:

Abdomen opened with hissy noise; heart chambers empty; soft; both lungs dark and shrunken; hyoid; Larynx glottis mucoso dark; no vegetation seen; stomach empty; liver soft flabby with blisters and honeycomb appearance; GB empty; spleen shrunken; Both kidneys soft shrunken; intestine contain gas.

Open of Skull:

Skull injury as noted above; membranes not made out;

Brain:

pasty liquified and exudes out of foramen opening.

P.W.6 issued Post-Mortem Certificate Ex.P.9 and also opined that the deceased appear to have died of shock due to multiple injuries and death would have occurred 2 – 4 days prior to autopsy.

3.(e) P.W.9 photographer took the photograph of the dead body. The photographs are marked as M.O.6 series. P.W.10 was the Tahsildar at the relevant point of time. On 23.09.2008, he recorded the confession statement of the accused in Ex.P.10, who surrendered before him, at the request of the Inspector of Police, Thiruvannamalai Taluk Police station. P.W.11 examined the Viscera and issued Ex.P.13 Report. P.W.14 Deputy Director of Forensic Science Laboratory conducted Skull-Photo Superimposition Test and issued Report Ex.P.12, stating that the skull could not be reconstituted and it was unsuitable for skull-photo superimposition test. P.W.13 is a Scientific Officer of Forensic Science Department. She issued Ex.P.14 Diatom test report. P.W.14 is also a Scientific Officer of Forensic Department, examined the Material Objects and issued Ex.P.15 Biological Report. P.W.17 Sub-Inspector of Police, Thiruvannamalai Taluk Police Station, registered the F.I.R. Ex.P.23 under Section 174 Cr.P.C. in Cr.No.644 of 2003. P.W.18 is a Mahazar Witness, who attested the Seizure. His signatures in the Seizure Mahazars are Ex.P.24 and Ex.P.25. Likewise, P.W.19 also attested the Seizure Mahazars. His signatures in the Mahazars are marked as

Ex.Ps.26, P.27 and P.29. P.W.20 Inspector of Police completed the investigation and filed final report against the accused under Section 120(B), 302, 394 r/w 397 and 201 I.P.C.

4. The accused was put on trial. In order to establish the case, the prosecution examined P.Ws.1 to 20; marked Exs.P.1 to P.30 and M.Os.1 to 7. After the examination of prosecution witnesses the accused was questioned under Section 313 Cr.P.C. with regard to the incriminating circumstances for which he denied the complicity. No witness was examined on the side of accused. He has not marked any document on his side. The Trial Court, after analyzing the evidence on record, convicted and handed down the sentences on the appellant/accused as stated above.

5. The learned counsel for the Appellant has submitted that absolutely there is no legal evidence whatsoever to bring home the guilt of the accused. The dead body of the deceased has not been identified not only by his mother but also by his other relatives. Admittedly, a 35 years old man's dead body was recovered as per the evidence of P.W.1, Ex.P.9 Post Mortem

Report and Visera Report etc., whereas the deceased Avinash is said to be only 19 years. This fact was not at all taken into consideration by the trial Court and the trial court on its own inference came to the conclusion that the age of the deceased has been purposely altered in the F.I.R. by the accused. Such inference of the learned trial court is without any basis. In the absence of any evidence as to who has corrected the age, the learned trial court ought not have drawn inference against the accused. Absolutely, there is no evidence available on record to show that the accused has given extra judicial confession to P.W.1. P.W.1 in his cross examination has categorically admitted that he has not reduced the confession into writing. Ex.P.10 relied upon by the Investigating Officer is not admissible in evidence as the alleged confession was recorded in the presence of police officer as per the evidence of P.W.10 Tahsildar. All these facts have not at all been considered by the trial Court. The trial court only on mere inference and surmises, found the accused guilty for the grave charges. Hence, he prayed that the appellant may be acquitted from all charges.

6. The learned Additional Public Prosecutor has fairly

conceded that all the circumstances relied upon by the prosecution have not been proved beyond any doubt. However, submitted that the learned trial Court considered the recovery of the above M.O.4 Chain and M.O.5 Nokia Cell Phone from the accused along with his extra judicial confession given before the P.W.1 and Ex.P.10 confession given before P.W.10, convicted the appellant/accused.

7.Point for consideration:

In the light of the above submissions, now the point for consideration in this appeal is, "whether the prosecution has established the charges framed against the accused beyond all reasonable doubts?"

Point:

8. The entire case of the prosecution is rest upon the circumstantial evidence. When the prosecution relied upon the circumstantial evidence in support of the conviction, all the circumstances relied upon by the prosecution must be fully established and the chain of evidence furnished by the prosecution are to be proved beyond reasonable doubts and such

proved circumstances should form a complete chain without any break, pointing unerringly to the guilt of the accused. This is the standard of proof required to prove the guilt of the person on the circumstantial evidence. It is the case of the prosecution that the deceased Avinash, aged about 19 years, who came to Thiruvannamalai to join a tutorial college. The accused and deceased were friends in Senthil Tutorial College, where they have studied for their 10th standard examination. The Juvenile Gunasekaran was also a friend to both the deceased and accused. In order to steal the Cell phone and Chain from the deceased, the accused and juvenile, conspired to do away the deceased.

9. On 23.09.2008, in pursuance to the above conspiracy they took the deceased near the well situated near the Shanmuga College, Kizh Anaikarai in the evening. Thereafter, on the same day in order to rob a chain, cell phone and cash, they had done away the deceased and tied hands and legs of the deceased and thrown the body of the deceased into the well, belongs to one Subramani and decamped with the cell phone, chain M.Os.4 and 5 etc., used by the deceased besides cash. Though, the prosecution has examined as many as 20 witnesses and exhibited

30 documents, 6 material objects, on a perusal of the evidence adduced on the side of the prosecution, we are not able to find any piece of evidence to show that in fact the deceased Avinash was studying in the Senthil Tutorial College at the relevant point of time, along with the accused. Though P.W.3 one Javith in his evidence has stated that all of them were studying in the Senthil Tutorial College, his evidence does not show that how long they were in the above college. Though in his evidence, he has stated that the accused and Gunasekaran (juvenile) had a conversation about the jewells, his evidence does not prove any of the fact such as deceased was last seen in the company of the accused at the relevant point of time. Though P.W.3, deceased, accused and juvenile Gunasekaran were all studying together in the Senthil Tutorial College, his evidence is totally silent about how long they were friends and how long they studied in the college. Whereas the evidence of P.W.8 mother of the deceased Avinash, clearly shows that only a week prior to his death her son came to Thiruvannamalai, as he had not contacted her for the last two days, she immediately rushed to Thiruvannamalai and gave a complaint to the police about missing of her son. But the above complaint has also neither seen the light of the day nor

investigated by the investigating officer.

10. Be that as it may, the law was set in motion on the basis of the Ex.P.1 F.I.R. given by P.W.1 Village Administrative officer. As per Ex.P.1, on hearing the floating of a dead body in the well, the V.A.O. found a body aged about 35 years in the well and immediately lodged a complaint with the police. As a result, F.I.R. came to be filed and investigation commenced. P.W.1 in his evidence has specifically stated that the dead body was about 35 years of age and in his presence police also recovered material objects including the footwear of the woman near the place of occurrence. Though his evidence further shows that as if the accused appeared before him on 08.10.2008 and gave Ex.P.4. Extra Judicial Confession, Ex.P.4 when carefully seen, the same is nothing but just like 161 statement recorded in a normal paper used by the police. P.W.1 in his examination also clearly spoken about the fact that from the point of time when Ex.P.1 was given, he was all along with the police during investigation and his cross examination also shows that he never obtained any written confession from the accused. Similarly, as per his evidence M.Os Cell phone and cash were not produced by the

accused, when he surrendered before him. When the evidence of a person who is said to have recorded extra judicial confession is itself doubtful, it is unsafe to rely upon such evidence, particularly in a grave offence.

11. It is further to be noted that P.W.1's evidence, with regard to the seizure of material objects also show that apart from men footwear, women slippers were also found in the place of occurrence. This aspect has not been explained by the prosecution. Therefore, we are of the view that Ex.P.4 Extra Judicial Confession cannot be given any importance, particularly, when there is a doubt in recording of the alleged confession. Hence, we are not in a position to accept Ex.P.4.

12. The prosecution also relied upon Ex.P.10 so called confession statement given by the accused before the Tahsildar. On scanning the evidence of P.W.10, who said to have recorded the confession statement of the accused Ex.P.10, we have no hesitation to reject the Ex.P.10 straightaway as it hit by Section 24 of the Indian Evidence Act. The evidence of P.W.10 clearly shows that in fact the accused was produced by the police before

him at the time of confession. Hence Ex.P.10 cannot be given much importance in the court of law. Further P.W.10 also categorically admitted that Ex.P.10 has not written by the accused. All these facts make it clear that the so called Ex.P.10 is unreliable and inadmissible in law. Therefore, the alleged confession relied upon by the prosecution under Ex.P.4 and Ex.P.10 are not at all relevant to prove the charges brought by the prosecution as against the accused.

13. It is further to be noted that the trial court has given undue importance to some correction with regard to the age appeared in Ex.P.1 complaint and Ex.P.23 F.I.R. and formed its own inference that the age of the deceased has been purposely corrected to suit the convenience of the accused. In the absence of any evidence, who had made such corrections, the trial court's inference towards accused is without any basis. The trial court in fact has to search for the legal evidence to base the conviction of the accused. The trial court has inferred certain facts on its own without any materials. Finding the guilty of a person in a grave crime based on such inferences cannot be sustained in the court of law. It is to be noted that though the age of the deceased has

been corrected in the F.I.R., it is to be noted that the medical officer who conducted the autopsy and noted down the injuries also found that the age of the deceased is about 35 years and the Scientific Officers of Forensic Science Department are also examined the visera of the 35 years old man. All these facts clearly show that the trial court has not appreciated the evidence properly.

14. It is further to be noted that the prosecution has not at all established the identity of the deceased in this case. Even though they sent the skull for superimposition test, as per the evidence of the Scientific Officer of Forensic Science Department, the skull sent by the prosecution is also unsuitable for comparison and the prosecution has not even made any attempt to send P.W.8, mother of the deceased for D.N.A.Test, for the reason best known to them. P.W.16 Investigating Officer, who conducted major portion of the investigation in his evidence has categorically admitted that he has not produced P.W.8 for D.N.A. examination. It is curious to note that P.W.8 is the mother of the deceased, even she has not seen the dead body after her visit to Thiruvannamalai. The dead body, after the post-mortem has

been buried. No attempts were made by the Investigating Officer to identify the body through D.N.A. test with that of the mother of the deceased Avinash. The photographs relied upon by the prosecution M.O.6 series shows that the body was beyond recognition and has bloated. P.W.6 the doctor who conducted the Post-Mortem, in his evidence, also admitted that the dead body was beyond recognition, it could not be identified in a decomposed state and he has opined that the deceased appear to have died due to multiple injuries and death would have occurred 2 - 4 days prior to post mortem, which was conducted on 28.09.2008. Though the date of death can not be certain, the evidence of P.W.6 shows that the deceased would have died 2 to 4 days prior i.e., approximately on 24.09.2008. But, as per the prosecution, death took place on 22.09.2008. These facts create serious doubts about the identity of the dead body itself.

15. Another circumstance, relied upon by the prosecution is that the deceased was using Cell Phone M.O.5 and M.O.4 chain. Though the prosecution has said to have allegedly seized the cell phone from the accused which is also highly doubtful. Though the cell phone was recovered in the presence of P.W.1 who stood as

Mahazar witness, he has not spoken about the cell phone and its number etc., P.W.8, the mother of the deceased also not able to say the number of the cell phone of her son. P.W.16 the Investigating officer in his cross examination also stated that he has not done any investigation to find out the make of the cell phone and in whose name the cell phone was originally purchased. No attempt whatsoever made by the Investigating Officer even at least to find out the number of calls made or received through the number of the cell phone M.O.5 at the relevant point of time to establish atleast some link in a circumstantial evidence. Therefore, merely because some recovery allegedly made from the accused persons, when the other witnesses who have not supported the recovery, such recovery cannot be a linking evidence in a grave crime. In respect of the recovery of M.O.4 chain, it is the contention of the prosecution that the accused after taking the chain from the deceased, gave it to his grand mother P.W.4. Karuppayi, who in turn pledged the same with P.W.5 one Durai Krishnakanth on 30.09.2008 for a sum of Rs.3,000/-. In this regard P.W.4 grand mother of the accused turned hostile and other evidences have not supported the prosecution case. Though the prosecution has

relied upon P.W.5 evidence, P.W.5 though deposed that one Karuppayi pledged 14 grams chain for a sum of Rs.3,000/- on 30.09.2008, he never spoken about the identity of the said Karuppayi and the prosecution also not able to establish the same. Though P.W.5 in his evidence stated that he issued a receipt to Karuppayi at the time of pledge, no attempt whatsoever made by the prosecution to produce the counterfoil or receipts and other relevant materials like Ledger and Licence of the shop etc., In the absence of the documentary evidence from P.W.5, the said recovery is also highly doubtful. It is further to be noted that no evidence whatsoever available on record to show that the deceased was wearing such chain and having cell phone. Nobody have seen that the above Material Objects were with the deceased at the relevant point of time. Though P.W.8 in her evidence has identified M.O.4 in the police station, it is not her evidence that the deceased was regularly wearing the chain M.O.4. Therefore, mere production of M.O.4 itself is not sufficient to bring home the guilt of the accused in a grave crime.

16. P.W.11 Deputy Director of the Forensic science Laboratory evidence shows that he received the visera of 35

years old man for examination and he has examined the visera and issued report Ex.P.13. The prosecution has established that the dead body was having injuries on head and other parts of the body, absolutely there is no vital link available on record to connect the accused. The circumstances relied upon by the prosecution create serious doubt about the entire prosecution case as against the accused. The so called material objects from the place of occurrence were sent to the court only on 29.09.2008. Similarly Exs.P.6, P7 and P8 seizure mahazars prepared by the investigating officer based on the alleged confession given by the accused when seen, there are lot of interlineation and corrections in the Mahazars and the same have been sent to the Court only on 10.10.2008, though the seizures were effected on 8.10.2008. This delay also give raise a serious doubt about the very investigation itself. Form 95 available in record shows that the so called M.Os have not been produced before the Court at the first instance. Though form-95 sent to the court for the first instance on 8.12.2008, the properties has not been sent to the Court. Only on 31.12.2008 Form 95 has been resubmitted to the Court. All these facts clearly show that the investigation has not been conducted properly in this case. If

really M.Os are seized as per the version of the prosecution, there was no reason as to why those M.Os were not sent to the Court immediately at the first instance. These aspects coupled with the evidence of P.W.1 that in his presence no Material object was seized, creates serious doubt about the entire prosecution.

17. As discussed above, the prosecution has failed to establish the identity of the dead body, and the mother of the deceased has not even seen the dead body of her son; no superimposition test also not establishes the identity of the dead body. D.N.A. Test has also not been carried out. P.W.6 doctor evidence clearly shows that the face of the deceased was beyond recognition. In view of all these facts we have no other option except to hold that the prosecution has failed to bring home the guilt of the accused beyond reasonable doubt. When the prosecution case is entirely based upon the circumstantial evidence, to have a conviction, all the circumstances relied upon by the prosecution must be fully established and the chain of evidence furnished by the prosecution are to be proved beyond reasonable doubts and such proved circumstances should form a complete chain without any break, pointing unerringly to the guilt

of the accused. Only the above ingredients when established by the prosecution, the prosecution case based on the circumstantial evidence would succeed in the court of law. Every chain of circumstances has to be proved without any break. If any link is failed in the chain of circumstances, the prosecution cannot succeed in proving the guilt of the accused. These are all well settled principles as far as the circumstantial evidence is concerned. But the trial Court has not adhered to the rule of evidence and simply imposed the sentence of life imprisonment in two counts and imposed other convictions on mere inferences. Such approach in deciding the sessions cases is highly deprecated. Hence, we have no other option except to hold that the prosecution has failed to bring home the guilt of the accused beyond all reasonable doubts. In view of the same, the appeal is liable to be allowed. The point is answered accordingly.

18. In fine, the Criminal Appeal is allowed acquitting the appellant of the charges framed against him and the appellant is set at liberty forthwith if his custody is no longer required in any other case. The disposal of the material objects shall be in accordance with the directions of the trial Court. The bail bond

executed by the appellant shall stand cancelled forthwith. The fine amount, if any, paid by the appellant shall be refunded to him.

[C.T.S.,J.] [N.S.K.,J.]

24.01.2018

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To

1. The District Sessions Judge, Thiruvannamalai.
2. The Public Prosecutor, High Court, Madras.
3. The Inspector of Police, Taluka Police Station, Thiruvannamalai.



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**C.T. SELVAM,J.
AND
N. SATHISH KUMAR,J.**

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**Judgment in:
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