

Bail Slip

The Appellant/Petitioner/Accused periyasamey S/O Ramu aged about 40 years was directed to be released on bail as per the order of this Court dated:30/11/2017 in CRL.MP.No.12797 of 2017 in CRL.A.No.626 of 2017 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON 06.02.2019	JUDGMENT PRONOUNCED ON 07.02.2019
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CORAM:

THE HONOURABLE MR.JUSTICE C.T.SELVAM

AND

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.No.626 of 2017

Periyasamy

...Appellant/Accused

Vs

State by the Inspector of Police
Mel Chengam Police Station, Tiruvannamalai

...Respondent/Complainant

Prayer:- This Criminal Appeal is filed, under section 374(2) Cr.P.C to set aside the conviction of the appellant by Judgment dated:06/09/2016 in SC.No.112 of 2009, by the learned Sessions Judge, Tiruvannamalai District by allowing the appeal.

For Appellant : Mr.N.Naveenkumar

For Respondent : Mr.R.M.Mohammed Riyaz, APP

JUDGEMENT

(Judgement of the Court was made by A.D.JAGADISH CHANDIRA)

This Criminal Appeal is filed, against the judgement of conviction and sentence, dated 06.09.2016, made in SC.No.112 of 2009, on the file of the Sessions Judge, Tiruvannamalai, holding

the appellant/accused guilty and convicting and sentencing him for the offence under Section 302 of IPC to undergo life imprisonment and to pay a fine of Rs.5,000/-, in default to undergo six months Rigorous Imprisonment.

2. The case of the Prosecution is as follows:-

a. Due to previous enmity, on 16.11.2007 at about 3.30 p.m., while the deceased Arockiasamy was grazing his goats at Raghu's land, the appellant/accused had assaulted the deceased with a stone on his head and face and caused severe bleeding injuries and ran away from the place of occurrence. One Rajammal, who was also grazing cattle nearby, had found the deceased lying down tieh bleeding injuries, fighting for his life and that she had called the PW.1 Asirvatham and Azhagesan, Kannan and they have taken the deceased for treatment and he succumbed to the injuries at about 4:30 PM on the way to the hospital on the same day. PW.1, who is the elder brother of the deceased, gave the complaint, Ex.P1 to the Melchengam Police Station. On receipt of Ex.P1, PW.9, Sub Inspector of Police, registered a case in Cr.No.134 of 2007 under Section 302 of IPC and prepared a First Information Report under Ex.P7 and sent the case papers to the concerned Magistrate's Court and Higher Officials.

b. PW.10, the Inspector of Police, Mel Chengam, took up the case for investigation and after completion of the investigation, he laid a final report against the appellant/accused for offences under section 302 IPC before the learned Judicial Magistrate, Chengam, who after perusal of the case records, took cognizance of the offence and issued summons to the appellant/accused for appearance and after complying with the formalities under section 207 Cr.PC, finding that the case has to be tried by a Court of Sessions, committed the case to the Sessions Court, Tiruvannamalai.

3. The case was taken on file in SC.No.112 of 2009, by the learned Sessions Judge, Tiruvannamalai and necessary charges were framed. In order to bring home the charges against the accused, the prosecution examined as many as ten witnesses as PW.1 to PW.10 and also marked Exs.P1 to P9 and MO.1. On completion of the evidence on the side of the Prosecution, the accused was questioned under Section 313 of Cr.PC as to the incriminating circumstances found in the evidence of prosecution witnesses and the accused has come with the version of total denial and stated that he has been falsely implicated in this case and sought for trial.

4. The Trial Court, after hearing the arguments advanced on either side and also looking into the materials available on record, found the accused/appellant guilty and awarded punishments as referred to above, which is challenged in

this Criminal Appeal.

5. This court heard the submissions of the learned counsel on either side.

6. The learned counsel for the appellant/accused would submit that the entire case of the prosecution is based circumstantial evidence resting on Extra Judicial confession and suspicion regarding previous enmity and that the Prosecution has not been able to prove the charges levelled against the Appellant beyond all reasonable doubts, by letting in cogent and convincing evidence and that the entire case of the Prosecution is cooked up, with full of discrepancies, infirmities, embellishments and self-contradictory statements and that the Trial Court, without proper appreciation of evidence, had convicted the Appellant/ accused and hence, sought for setting aside the impugned judgement of conviction and sentence and for acquittal of the Appellant/accused.

7. The learned counsel would submit that PW.1 is a hearsay witness, who had stated that PW.4, on the date of occurrence, had run towards him, crying and stating that somebody had assaulted his younger brother Arockiasamy and that he was lying down, with bleeding injuries. Hearing that, he along with PW.4 had rushed to the scene of occurrence and had found his younger brother lying down with bleeding injuries and thereafter, the neighbouring land owners had also rushed there and seeing his younger brother battling for life had taken a cot from one Azhagesan's house and taken him to his house and had asked Azhagesan to bring a doctor and the doctor who had come there refused to treat saying that the condition of the deceased was critical and had asked them to take him to the Hospital. Thereafter, they had carried the deceased in the cot to the hospital and that he died on the way to the hospital. He had further stated that there was a quarrel between his brother on the appellant/accused 15 days prior to the occurrence and due to which there was enmity.

8. The learned counsel would further submit that none of the witnesses have spoken about having seen the appellant/accused, assaulting the deceased and he would further submit that the case of the prosecution rests on suspicion regarding the alleged motive that 15 days prior to the occurrence, the deceased had seen the Appellant/ accused in a compromising position with one Mani, wife of Azhagesan and there had been a quarrel between them and the appellant/accused had challenged to do away with the deceased and that the deceased had informed it to PW.1 and further the appellant/accused is alleged to have given extra judicial confession to the Respondent, in the presence of PW.6, a Village

Administrative Officer after arrest on 18.11.2007 leading to the recovery of a stone, weighing 14.5 kg. Other than that the above circumstances projected by the prosecution there is absolutely there is no legal material to show that the appellant/accused assaulted the deceased and caused his death. Admittedly, PW1, PW2 and PW3 are related to each other and that they are close relatives to the deceased and further, their evidence are self contradictory in nature with regard to having seen the appellant/accused near the place of occurrence. Though the above witnesses speak about one Azhagesan accompanying them when they carried the deceased in a cot to the Hospital, the said Azhagesan had not been examined as the witness. Non-examination of the said Azhagesan creates a doubt on the prosecution case. Further, the witnesses have deposed that doctor was brought to the village and that he had examined the deceased and he had refused to treat the deceased stating that his condition was critical and he had advised the witnesses to take the deceased to a Hospital for further treatment. Non-examination of these two independent witnesses creates a doubt on the prosecution case. He would further submit that the nature of injuries found on the deceased could not have been caused by the stone, weighing 14.5. kg and that PW.7, the Doctor who conducted the post-mortem has stated that the injuries could have been caused by a heavy weapon. He would further submit that the manner in which the confession is said to have been recorded creates a doubt in the case of the Prosecution. The detailed confession statement running to four pages had been recorded by the Respondent Police in the presence of the Village Administrative Officer after arrest inferring that the investigation has been conducted in a biased manner to fix the accused in this case.

9. The learned counsel for the appellant/accused would further submit that the trial judge failed to take into consideration the extraordinary delay in the registration of the F.I.R and the delay in the FIR reaching court which assumes much significance in this case. As per the prosecution the alleged occurrence is stated to have taken place at 3.30 p.m., on 16.11.2007 whereas the complaint had been given to the police station on the next day that is on 17.11.2007 at 11.00 a.m which is nearly after 20 hours. It is the clear-cut evidence of PW1 in his cross-examination that the written complaint was lodged on 4 PM on the same day of the occurrence to the respondent police. Further, PW.1 had stated that when PW.4 had informed him about his brother lying with bleeding injuries no one else was with them and that he along with PW.4 rushed to the spot, which was one furlong away and that he has not deposed anything about the presence of PW.2 and PW.3, thereby falsifying the evidence of PW.2 and PW.3 that they have seen the appellant/accused coming in the opposite direction. Further, PW.1 had deposed that the other witnesses are not aware of the enmity between the deceased

and the Appellant/ accused. The huge contradiction between the evidences of PW.1 to PW.4 is fatal to the prosecution case. Further PW3 had also deposed that the information was given to the police at 4.30 p.m., on 16.11.2007 and police came to the spot on the same day at 8.00 p.m. and taken body of the deceased to Chengam. Whereas, the F.I.R Ex.P7 has been registered only on 17.11.2007 and sent to the Court on the next day 18.11.2007. Further it is the categorical evidence of PW.3 that the written complaint was given by the son of the deceased, whereas strangely the son of the deceased has not been examined by the prosecution. He would further submit that all the statements recorded from the witnesses u/s 161 Cr.P.c have been sent to the court much belatedly on 19.11.2007 and 29.11.2007, creating a doubt that all the documents have been prepared to suit the case of the prosecution. He would further submit that the alleged motive regarding previous enmity has not been proved by the prosecution and that even assuming that the motive is proved it cannot take the place of proof. He would further submit that the trial court erred in convicting the appellant/accused on presumptions and assumptions. He would further submit that criminal cases cannot be decided on the basis of hypothesis and that however grave the motive may be it may not take the place of proof and it is an important aspect which is to be kept in mind and it is for the prosecution to prove the guilt of the appellant/accused beyond all reasonable doubt and that in this case since the prosecution has failed to prove the case beyond reasonable doubt the judgment of the trial court has to be set aside.

10. With regard to the reliability of the extra judicial confession said to have been given by the Appellant/ accused, after arrest, in the presence of the Village Administrative Officer, the learned counsel for the Appellant/ accused would submit that the circumstances regarding the extra judicial confession are suspicious and thereby it cannot be believed and he would rely on the decisions of the Honourable Supreme Court reported in 2019 SCC Online SC 90 (Chakkarai @ Chakaravarthi Vs. State by Inspector of Police), following the decision reported in 2002 6 SCC 498 (Thangavelu Vs. State of Tamil Nadu). Wherein the Hon'ble Supreme Court in a case with similar set of facts had disbelieved the Extra Judicial Confession and had acquitted the accused.

11. Per Contra, the learned Additional Public Prosecutor would submit that though it is a case of circumstantial evidence based on extra judicial confession and suspicion regarding previous enmity PW2 and PW3 have seen the appellant/accused coming in the opposite direction from the scene of occurrence and that when they have gone to the place of occurrence they had seen the deceased lying down with bleeding injuries. Further, the extra judicial confession had been

recorded in the presence of PW.6 and Village Administrative Officer leading to recovery of M.O.1 the stone by which the appellant/accused committed the offence And that the trial court having believed the evidence let in by the prosecution has rightly convicted the appellant/accused.

12. In this regard the learned counsel for the appellant/accused would submit that there are contradictions in the evidence of the witnesses regarding the recovery of M.O.1 make the recovery and confession highly doubtful.

13. We have given our careful and anxious consideration to the rival contentions put forward by the learned counsel on either side and thoroughly and consciously scanned through the entire evidence available on record and also perused the impugned judgement of conviction and sentence.

14. Admittedly, it is a case of circumstantial evidence resting on the alleged extra judicial confession and suspicion regarding previous enmity between the appellant/accused and the deceased due to a quarrel which ensued 15 days prior to the occurrence.

15. The Hon'ble Apex Court as well as our Court by plethora of decisions enumerated the factors to be taken into account in adjudicating cases of circumstantial evidence Viz.,

1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3. the circumstances should be of a conclusive nature and tendency;

4. they should exclude every possible hypothesis except the one to be proved; and

5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

16. Based on the above factors what is to be seen now whether the prosecution has proved its case beyond reasonable doubt and whether the trial Court is right in convicting the appellant/accused based on the evidence so let in by the prosecution regarding extra judicial confession and suspicion regarding enmity.

17. The principles for deciding whether the extra judicial can be relied and acted upon based on confession of the accused have been enumerated in various decisions as hereunder:-

(i) The extra judicial confession is a weak evidence

by itself. It has to be examined by the court with greater and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other Prosecution evidence.

(v) For an extra judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

18. Further if the facts and circumstances surrounding the making of the confession appears to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession. One important question, in regard to which the Court has to be satisfied with is, whether when the accused made the confession he was a free man or his movements were controlled by the police, either by themselves or through some other agency employed by them for the purpose of securing such a confession.

19. While noticing the facts and the evidence let in in this case, none of the witnesses have stated that they have seen the occurrence and that the appellant/accused assaulted the deceased whereas they have only seen the deceased lying with bleeding injuries battling for his life. The circumstances against the appellant/accused is that there was a previous enmity between the appellant/accused and the deceased and that PW.2 and PW.3 have stated that they had seen the appellant/accused going in the opposite direction from the scene of occurrence. Whereas the evidence of PW.1 is totally contrary to the evidence of PW.2 and PW.3 on this aspect. PW.1 had stated that on the information by PW.4, he along with PW.4 rushed to the scene of occurrence and that nobody else accompanied them and only after sometime the neighbouring land owners came there. Further, PW.1 has not spoken about the presence of PW.2 and PW.3, thereby making the evidence of PW.2 and PW.3 regarding their presence at the scene of occurrence and having seen the appellant/accused at the place of occurrence doubtful. Apart from PW.2 and PW.3 no one has spoken about having seen the appellant/accused near the scene of occurrence.

20. With regard to the next circumstance in respect of motive and previous enmity between the appellant/accused and the deceased, the prosecution has not let in any evidence to prove the alleged motive. Yet another circumstance against the appellant/accused is that he is stated have given extra judicial confession after arrest in the presence of PW.6 the Village Administrative Officer. The extra judicial confession stated to have been given while in custody is highly unbelievable.

21. In (Chakkarai @ Chakaravarthi Vs. State by Inspector of Police) reported in 2009 SCC Online SC 90 cited by the counsel for the Appellant, the Hon'ble Apex Court in a case with similar set of facts regarding Extra Judicial Confession had following the decisions reported in 2002 6 SCC 498 (Thangavelu Vs. State of Tamil Nadu), disbelieved the extra judicial confession and had acquitted the appellant/accused.

22. Further, in this case admittedly there had been great delay in registering the F.I.R, the F.I.R reaching the Court and that there is also long delay in the statements recorded from the witnesses under Section 161 Cr.P.C reaching the concerned Magistrate's Court thereby casting grave suspicion on the case of the prosecution. It is clear that the documents have been created to suit the case of the prosecution.

23. In the case of circumstantial evidence, when two views are possible, one pointing to the guilt of the accused and the other his innocence the accused is indeed entitled to have the benefit of one which is favourable to him. Though, the materials on record holds some suspicious towards the appellant/accused the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicious, howsoever grave, cannot substitute proof. We find no difficulty to hold that the prosecution, in the case on hand, had failed to meet the same.

24. In the light of the decisions, which are applicable to the facts of the case on hand, as stated above and in view of the discussions and reasons and on an overall analysis of the evidence placed on record, having regard to the probabilities of the case, this Court is of the considered view that the prosecution has not established the guilt of the Appellant/accused beyond all reasonable doubt and consequently, we are unable to sustain the conviction of the Appellant/accused and thereby, he is entitled to be acquitted.

25. In the result, this Criminal Appeal is allowed. The impugned judgment of conviction and sentence, dated 06.09.2016, made in SC.No.112 of 2009, on the file of the Sessions Judge, Tiruvannamalai, is set aside. The Appellant is acquitted of all the charges levelled against him. The bail bond, if any, executed by the Appellant, shall stand cancelled. The fine amount, if any, paid by the appellant is ordered to be refunded to him.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

- 1.The Sessions Judge, Tiruvannamalai
- 2.The Inspector Police,
Mel Chengam Police Station,
Tiruvannamalai.
- 3.The Public Prosecutor, High Court, Madras
- 4.The Judicial Magistrate,
Chengam, Tiruvannamalai.
- 5.The Chief Judicial Magistrate,
Tiruvannamalai(for information)
- 6.The Superintendent,
Central Prison, Vellore.

Copy to
The Section Officer,
Criminal Section,
High Court, Madras. सत्यमेव जयते

+2cc to Mr.K.Anandharaja, Advocate, S.R.No.10460

CrI.A.No.626 of 2017

VBA(CO)
GSP(20/02/2019)

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