

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.08.2019

Delivered on : 21 .08.2019

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH
AND
THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

Criminal Appeal No.606 of 2018
& CrI.M.P.No.16210 of 2018

1.Soundarajan @ Soundar, M/A 31 years,
S/o Subramani,
Thiru V. K. Street, Raja Street,
Ganapathy, Coimbatore.

2.Siva Vishnu @ Vishnu, M/A 31 years,
S/o Sekar,
No.68, Mookambigai Nagar,
3rd Street, Ganapathy,
Coimbatore. Appellants/ Accused

Vs.

The State, represented by
The Inspector of Police(Law & Order),
B-9, Saravanampatti Police Station,
Coimbatore City. ... Respondent/complainant

Criminal Appeal is filed under Section 374(2) of
Criminal Procedure Code as against the judgment passed by
V Additional District and Sessions Court, Coimbatore in
S.C.No.75 of 2015 dated 04.04.2018.

For Appellants : Mr.Padmanabhan, S.C., for
Mr.S.B.Viswanathan

For respondent : Mr.R.Prathap Kumar,
Additional Public Prosecutor

JUDGMENT

M.M.SUNDRESH, J.

Assailing the conviction and sentence rendered by V Additional District and Sessions Court, Coimbatore in S.C.No.75 of 2015, in which, the trial Court convicted the appellants/accused 1 and 2 for the offence punishable under Sections 120-B r/w 302, 364 r/w 120-B, 302 r/w 120-B and 201 r/w 302 IPC while acquitting them for the offence under Section 364 r/w 120-B IPC and each of them sentenced to undergo life imprisonment for the offences under Sections 120-B r/w 302 and 302 r/w 120-B IPC and to pay a fine of Rs.1000/- each, in default to undergo R.I for six months and for the offence under Section 201 r/w 302 IPC to undergo three years R.I., and to pay a fine of Rs.1000/- each, in default to undergo R.I for six months, the present criminal appeal is filed by them.

2. Prosecution version:-

2.1. The appellants and the deceased-Fernandez were friends. A misunderstanding developed between A2 and the deceased while selling Ganja. The first appellant demanded Ganja from the deceased at free of cost. On his refusal, enmity developed between them. The appellants hatched up a criminal conspiracy to kill the deceased. On 02.10.2005 at about 6.00p.m., the appellants took the deceased-Fernandez to the Well and thereafter, stabbed and cut him with Knife and hacksaw blade respectively and caused the death of the deceased-Fernandez. After doing so, the deceased was pushed into the Well.

2.2. P.W.1-Premarani @ Rajathi, who is the mother of the deceased, gave a complaint under Ex.P1 on 12.03.2010 at Saravanampatti Police Station. A case was registered in Crime No.253/2010 by P.W.35-D.Jayakumar, Sub Inspector of Police under Section 174 of the Criminal Procedure Code for man missing and Ex.P35 is the First Information Report dated 12.03.2010. A1 was under incarceration in some other case. P.W.7-Arumugam was also sharing the same jail with A1. A1 has told P.W.7 about the murder committed by him and A2. Both of them came out of jail subsequently. As P.W.7 threatened to disclose the information passed on by A1, he was attacked by A1, resulting in filing of the First Information Report dated 19.12.2013 under Ex.P38 in Crime No.1784 of 2013 for the alleged offences punishable

under Sections 341 and 307 IPC. In the said complaint, P.W.7 has stated that the motive for the occurrence was an apprehension on the part of A1 that P.W.7 would divulge the earlier offence committed by him. Apprehending arrest, the appellants approached P.W.3-Murugesan, who is the District General Secretary of BJP, before whom an extra judicial confession has been given. P.W.3 informed the Police and gave a Report. Thereafter, A1 was arrested. The aforesaid happening was reduced into writing under Ex.P3-Report dated 20.12.2013. Thereafter, A2 was arrested. Pursuant to the confession statements made by the accused under Exs.P5 and P7 respectively, the Well was dug up, as it was closed, in the presence of the Revenue Officials. It was accordingly dug up spanning over a month. Ultimately, M.Os 1 to 3 viz., faded shirt, skull and bone respectively were recovered.

2.3. Under Ex.P16-Alteration Report, the earlier complaint given was altered. The Investigating Officers completed the investigation by duly preparing Ex.P9-Observation Mahazar and Ex.P31-Inquest Report. The Material Objects were also sent for examination and both DNA test and superimposition were sought for. The superimposition would show that the skull was that of the deceased. The DNA test also tallied with that of the deceased and mother of the deceased. After completing the investigation, the charge sheet was laid.

3. The trial Court framed the charges and placed them before the accused. They accordingly denied the charges. During the trial, the prosecution has examined 37 witnesses in toto, while marking Exs.P1 to P54 along with M.Os.1 to 3. On the part of the defence, neither any document was marked nor any witness examined. After framing charges, the appellants were placed with the incriminating materials and questioned under Section 313-A of the Criminal Procedure Code. There was only a mere denial by the appellants.

4. The trial Court, after hearing the prosecution and the defence and after consideration of the material evidence before it, convicted and sentenced the appellants as stated above. Challenging the same, the present criminal appeal has been filed.

5. P.W.1-Premarani @ Rajathi is the mother of the deceased. She is also the author of Ex.P1, which was altered for the offence under Sections 120-B r/w 302, 364

r/w 120-B, 302 r/w 120-B and 201 r/w 302 IPC as stated earlier under Ex.P6-V.A.O., Certificate. Ex.P1 complaint was given on 12.03.2010. At that point of time, she had merely stated about the missing son. She is an illiterate lady. It is her evidence that even on the previous occasion, she visited the police. In her evidence, she has stated that subsequently she was informed by the police to enquire the accused being the friends of the deceased.

6. P.W.3-Murugesan is the one before whom the extra judicial confession was given by A1. He is also the author of Ex.P3-Report. He is one of the witnesses, who saw the recovery made. He has also stated that in his presence material objects were recovered and P.W.34-Tahsildar has also obtained his signature. It is seen that P.W.3 is neither related or interested witness. However, he has stated that he knew the deceased.

7. P.W.4-Paulraj is the witness, who signed the Observation Mahazar under Ex.P4 dated 20.12.2013. P.W.5-Thirukumaran is the Village Administrative Officer, who signed Ex.P7-confession statement of A2. He also speaks about the recoveries made. He further identified A2. P.W.6-Krishnasamy is the neighbour residing nearer to the Well which was closed. He is the witness, who signed Ex.P8-Inquest summon. P.W.7-Arumugam is the one who gave the complaint against A1 under Ex.P38-First Information Report. He had stated that himself and A1 were together in the same prison. It is his further evidence that he was threatened by A1 not to disclose the murder committed by him and A2 and thereafter, attacked him. P.W.8-Velu is the witness, who signed the Observation Mahazar under Ex.P9 dated 14.12.2014. P.W.9 is the witness, who signed Ex.P10 Observation Mahazar dated 12.03.2010. P.W.11-Rajendran has deposed that he saw the accused along with the deceased prior to the occurrence. P.W.12-Thamaraikannan is the witness, who has given evidence that he had seen the accused persons alone after the occurrence. P.W.13-Raghupathi speaks about the transaction between the parties involving sale of Ganja. P.W.14-Rajkumar is the JCB Engine Lorry owner to whom the work of digging the Well was entrusted. Though the work was given on 11.01.2014, the same was completed only on 14.02.2014. He had also stated that a sum of Rs.8,60,000/- was given for the aforesaid work. After completion of the work, the Well was closed on 17.02.2014. P.W.15-Vijay is the JCB Operator working under P.W.14. He also speaks about the date of starting of the work and finishing the same. P.W.16-Vijayakumar is the

witness, who speaks about the missing of the deceased, who was working under him. P.W.19-Amirtharaj is the owner of the Well, which was closed and thereafter dug up, resulting in the recoveries. P.W.22-Yesukannan is the Village Assistant, who was present all along from 11.01.2014 to 14.02.2014, in whose presence, the recoveries were made. P.W.25-Subramani is the Police Officer, who altered the First Information Report under Ex.P16 dated 20.12.2013. P.W.27-Saravanan is the Deputy Director of Regional Forensic Science Laboratory, who recommended the skull and bone for scientific investigation. P.W.28 is the Head Constable who received the Tapal from the Judicial Magistrate No.II, Coimbatore, on 26.02.2014 and handed over the same to the Forensic Science Laboratory on 28.02.2014. Ex.P21 is the requisition letter.

8. P.W.29-Palanisamy, who is the Executive Engineer working in the Public Works Department, gave the estimation for the erstwhile Well to be dug up. P.W.31-Pushparani is the Scientific Officer of the Forensic Science Laboratory. After examination, she gave Ex.P22-Superimposition Report stating that the superimposition of the skull matches with that of the deceased.

9. P.W.32 is Dr.Jeyasingh, who conducted post mortem and issued Ex.P25-post mortem report and Ex.P26-Final opinion. It is his evidence that the investigation would reveal that the deceased sustained injuries, though he further stated that it is possible that the injuries could have been sustained by falling. P.W.33-Thilaga is the Assistant Director of DNA Department, Forensic Science Laboratory, Chennai, who gave Ex.P28-DNA Report dated 23.06.2014 on the basis of the requisition received from the Judicial Magistrate No.II, Coimbatore under Ex.P27 dated 26.02.2014 stating that the femur bone belongs to a male individual and the person to whom the femur bone belongs is the biological son of P.W.1. P.W.34-Murugan is the Tahsildar North, who conducted inquest over the body of the deceased and Ex.P31 is the Inquest Report. He also gave Ex.P24-requisition for Exhumation Report, Ex.P33-Requisition for post-mortem in prescribed format and Ex.P34- Inquest report in the prescribed format. He also deposed about the recovery of material objects. It is his further evidence that the material objects viz., M.Os.2 and 3 were sent for DNA test under Ex.P24-requisition as aforesaid. P.W.35-Jeyakumar is the Police Officer, who registered Ex.P1-complaint corresponding to Ex.P35-printed First

Information Report. P.W.36 is the Investigating Officer, who conducted investigation for the first time after receiving the complaint under Ex.P1. P.W.37 is the subsequent Investigating Officer, who took up the investigation after alteration of the First Information Report. He speaks about the arrest followed by recovery apart from examination of the witnesses.

10. With the above evidence, both oral and documentary, the trial Court rendered conviction and sentence against the appellants.

11. Submissions:

The learned Senior Counsel appearing for the appellants would submit that it is the case of circumstantial evidence. There is a delay in filing the complaint. Though the deceased was missing in the year 2005, it was registered only on 12.03.2010. The motive has not been established especially when we are dealing with the case of circumstantial evidence. The alleged digging up of the Well, followed by recoveries, have not been proved in the manner known to law. The Last Seen Theory as projected by the prosecution, is not believable. The extra judicial confession ought not to have been accepted by the trial Court. It is a very weak piece of evidence. The link to the chain of circumstance, is not available pointing the guilt to the appellants alone. P.W.22 has stated that the place was identified about 40 days prior to the digging of the Well. This contradicts the statement of the other witnesses. The money as stated by P.W.14 for the work done, could not have been given by way of cash and the sanction order for digging the Well has not been marked. A mere simple case of recovery, by itself, cannot be a factor to convict the appellants. Proximity of time between the occurrence and the recovery is a relevant factor. There was no seizure under the cover of mahazar. The learned Magistrate sent the material objects not from his custody, but from the hospital. To buttress his submissions, the following judgments have been relied upon by the learned Senior Counsel appearing for the appellants.

- (i) Balbir Singh and another Vs. State of Punjab (1996 SCC (Criminal) 1158);
- (ii) Jagta Vs. State of Haryana (AIR 1974 SCC 1545); and
- (iii) Kashinath Krishna Jadhav Vs. State of Maharashtra (AIR 1973 SCC 1219).
- (iv) Anjan Kumar Sarma and others Vs. State of Assam (2017) 14 SCC 359);

- (v) Bhaskarrao Vs. State of Maharashtra ((2018) 6 SCC 591);
(vi) Krishnan @ Ramasamy Vs. State of Tamil Nadu ((2014) 12 SCC 279);
(vii) State of Karnataka Vs. Chand Basha ((2016) 1 SCC 501);
(viii) Rambraksh @ Jalim V. State of Chhattisgarh ((2016) 12 SCC 251)
(ix) Navaneethakrishnan Vs. State by Inspector of Police ((2018) 16 SCC 161);
(x) Rishipal Vs. State of Uttarakhand ((2013) 12 SCC 551);
(xi) Prithi Vs. State of Haryana ((2010) 8 SCC 536);
(xii) Anil Kumar Singh Vs. State of Bihar ((2003) 9 SCC 67);
(xiii) Subhash Chand Vs. State of Rajasthan ((2002) 1 SCC 702);
(xiv) Tipparam Prabhakar Vs. State of Andhra Pradesh ((2009) 13 SCC 534);
(xv) Bodhraj @ Bodha and others V. State of Jammu and Kashmir ((2002) 8 SCC 45); and
(xvi) Jaswant Gir V. State of Punjab ((2005) 12 SCC 438).

12. Submissions of the State:

The learned Additional Public Prosecutor appearing for the State would submit that the delay, by itself, cannot be a factor to hold that the entire case of the prosecution is false. The delay has been duly explained. The witnesses have clearly spoken about the motive and the Last Seen Theory had been successfully proved. Recovery under Section 27 of the Indian Evidence Act, 1872, has been rightly accepted by the trial Court, and but for the appellants, nobody else could have lead to the recovery. The scientific evidence corresponds with that of the material objects recovered. The evidence of P.W.3 coupled with P.W.7 would clearly prove the case of the prosecution. In support of his contentions, the learned Additional Public Prosecutor has made reliance upon the judgment of Apex Court in the case of Inspector of Police Vs. John David (Crl. Appeal No.384 of 2002 dated 20.04.2011).

DISCUSSION:

13. Delay:

The deceased-Fernandez was stated to be missing from 02.10.2005 onwards. It is submitted by the learned Senior Counsel appearing for the appellants that the complaint was given only on 02.10.2010 and therefore, the very case of the prosecution cannot be relied upon by considering the said complaint. We may note that the complaint was only for man missing. It was given by a rustic illiterate lady. Merely because, the complaint was not registered earlier despite P.W.1 approaching the police, it cannot be said that it was false. In any case, the complaint itself was for man missing alone. Alteration of offences was made only pursuant to the extra judicial confession made by A1 before P.W.3 and that too, pursuant to the complaint registered at the instance of P.W.7 under Ex.P38. If we peruse Ex.P38, it clearly states the reason behind the alleged attack by A1. It is not as if mere delay itself would be the sole ground to disbelieve the case of the prosecution. At the time of registering the complaint by P.W.35 no cognizable offence was known. After all, the complaint for cognizable offence merely sets a law into motion. It is nobody's case that the delay was deliberate on the part of the prosecution. Thus, we find no force in the submission of the learned Senior Counsel appearing for the appellants in this regard.

14. Motive:

Motive does play an important role in the case of circumstantial evidence. In the case on hand, the witnesses clearly spoke about the motive. P.W.1 did not say that it was the appellants alone, who committed the murder, but only stated though subsequently, that the appellants are to be enquired into. The other witnesses who speak about the motive are independent witnesses. The mere fact that P.W.37, the Investigating Officer deposed that there was no Ganja case against the deceased, would not make the motive as non existence. In any case, motive can never be a sole factor even in a case involving circumstantial evidence. The witnesses, who deposed are neither related nor interested ones. Thus, we find that the prosecution has established the motive as against the appellants.

15. Extra Judicial Confession:

A1 has given statement before P.W.3. P.W.3 has stated that A1 was known to him earlier. There is clear evidence that A1 came to his house voluntarily and made the statement. He is also the author of Ex.P3-Report. We do

not find any reason to disbelieve the evidence of P.W.3. Suffice it is to state that at the time of giving extra judicial confession by A1 to P.W.3, the complaint given by P.W.7 under Ex.P38 had already been registered. The said complaint was given on 19.12.2013 and the statement was given on 20.10.2013. Therefore, the evidence of P.W.3 requires to be proved before this Court, as was rightly done by the trial Court. Thus, we hold that the extra judicial confession given by A1 in favour of P.W.3 in the light of other evidence available, stands proved, though we have no hesitation on the principle of law that when such confession is a weak piece of evidence, it cannot be safe to rely upon it solely in the absence of other material evidence.

16. Digging of the Well and Recovery:

16.1. The learned Senior Counsel appearing for the appellants would submit that the prosecution has not established clearly about the digging of the Well. There is a discrepancy with respect to the date and the actual happening. We do not say so. The witnesses, who spoke about it, are the official witnesses. They include Village Administrative Officer, Village Assistant, Tahsildar, Police and independent witnesses. All these witnesses have clearly stated that the erstwhile Well was dug up in pursuant to the confession made and the said work was in progress from 11.01.2014 to 14.02.2014. The prosecution has also examined the Public Works Department Officer, Owner of the JCB and its Driver, apart from the other witnesses. Estimate was drawn and the work was done in the presence of all the public officials as seen from Ex.P17, which is the well digging work note signed by all of them. Therefore, the evidence let in by the prosecution is concrete and clinching. As stated above, the entire process involved more than a month. The digging was also done in the presence of the present owner. After the work, it was completely closed. Recoveries were also made in the presence of the individual witnesses, Revenue Officials and the Police. Thus, an elaborate exercise was done by the prosecution to establish the guilt. The submission of the learned Senior Counsel with respect to the evidence of P.W.22, who had stated that the place was identified some time ago, being a statement, cannot be a factor to nullify the evidence tendered by number of witnesses as aforesaid including P.W.22. His evidence has to be seen as a whole. In fact, his evidence was also to the effect that digging was done and the material objects recovered.

16.2. Recovery has been made under Section 27 of the Indian Evidence Act through the material objects. This recovery would not have been done, but for the statements made by the appellants. We are concerned with the knowledge and information leading to recovery. No one knew about the existence of M.Os.1 to 3 from the erstwhile Well. We must keep in mind the Well which was in existence at the relevant point of time was subsequently closed. There is no dispute on this fact. Therefore, but for the appellants, the recoveries would not have been possible. The non-recovery of the knife and hacksaw blade, would not be fatal to the case of the prosecution, as there are ample evidence pointing out the guilt of the appellants alone. Hence, we have no hesitation in holding that the recovery made is a vital link to the case of the prosecution, which has been correctly taken note of by the trial Court.

17. Last Seen Theory:

The learned Senior Counsel would submit that the evidence of P.Ws.11 and 12 cannot be believed, as they did not know the address of the deceased and the accused and so also, apparels worn by the accused. P.Ws.11 and 12 are the independent witnesses. They have no axe to grind against the appellants, though the Last Seen Theory by itself, would not be sufficient to fix the guilt on the part of the accused, it has to be seen along with the other evidence available. It is a part of the circumstances to be considered by the Court. It is no doubt true that time would be a factor between the occurrence and the last seen. However, such an issue does not arise in this case. It is nobody's case that the deceased was seen thereafter. On the contrary, P.W.12 has stated that he saw the appellants alone at about 6.30p.m., on 02.10.2005 near the place of occurrence. We may note that P.W.11 has stated that he has seen the appellants and deceased quarreling at about 6.00p.m on that day. Therefore, the evidence of P.Ws.11 and 12 read together would be sufficient to prove the Last Seen Theory.

18. Scientific Evidence:

P.W.31 is the Scientific Officer, who deposed that the super-imposition of the skull clearly matches with that of the deceased. From the evidence of P.W.31, it is clear that the skull belongs to the deceased. Though the evidence of an expert is only an opinion to enable the Court to come to the correct conclusion, this evidence, which requires to be accepted, lends credence to the case of the prosecution. Therefore, the evidence of P.W.31

coupled with Ex.P22 would certainly strengthen the case of the prosecution. Similarly, P.W.33, the Assistant Director of DNA Department has deposed that DNA of the deceased, which was taken from M.Os.2 and 3, matches with that of P.W.1 mother. Therefore, the abovesaid evidence coupled with P.Ws.27 to 29 would be a factor to be considered in favour of the prosecution. We also do not find anything contrary in the evidence of P.W.32-Post Mortem Doctor. Though he had stated that injury could have been sustained by falling or hitting against a wall, it could also be possible by the usage of knife and hacksaw blade. We also do not find any procedural lapse on the part of the learned Magistrate in sending the Material Objects to the experts from the Hospital. They were presumed to be under the Court's custody. It is also not the defence case that what was examined, was not the material objects.

19. We do not wish to go into the judgments relied upon by the learned Senior Counsel and the learned Additional Public Prosecutor, as we find that there is no difficulty in appreciating the principle of law laid down thereunder. On facts, we find that the trial Court has correctly considered the materials available, both oral and documentary, to come to this conclusion. Thus, we do not find any reason to interfere with the conviction and sentence rendered by the trial Court in S.C.No.75 of 2015 on 04.04.2018. Accordingly, the conviction and sentence imposed on the appellants are confirmed and the above criminal appeal stands dismissed. Consequently, connected miscellaneous petition is also dismissed.

20. We place on record the detailed meticulous submission and detailed preparation on the part of the learned Senior Counsel, who appeared for the appellants and the learned Additional Public Prosecutor appearing for the State.

सत्यमेव जयते

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1.The Inspector of Police(Law & Order),
B-9, Saravanampatti Police Station,
Coimbatore City.

2.The Additional Public Prosecutor,
High Court, Chennai.

3.The Superintendent,
Central Prison, Coimbatore

4.The V Additional District and Sessions Judge, Coimbatore

5.The Principal District and Sessions Judge, Coimbatore

6.The Judicial Magistrate No.II, Coimbatore

7. The Section Officer,
Criminal Section,
High Court, Madras

+1cc to Mr.S.B.Viswanathan , Advocate SR.No. 70987
Criminal Appeal No.606 of
2018

A.SK(23/09/2019)



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