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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 15.04.2019

PRONOUNCED ON : 20.09.2019

CORAM:

**THE HONOURABLE MR.JUSTICE P.N.PRAKASH
and
THE HONOURABLE MR.JUSTICE B.PUGALENDHI**

CrI.A.(MD)Nos.290 of 2017 & 167 of 2019

Jebaraj ... Appellant in CrI.A(MD)No.290/17/A1

Muniasamy ... Appellant in CrI.A(MD)No.167/19/A2

Vs.

State rep. by
The Inspector of Police,
Arumuganeri Police Station,
Arumuganeri,
Thoothukudi District.
Crime No.340 of 2010

... Respondent in both appeals

COMMON PRAYER: Appeals filed under Section 374(2) of the Code of Criminal Procedure, to call for the entire records connected to the judgment in S.C.No.171 of 2011 on the file of the learned Additional Sessions Judge, Fast Track Court No.2, Thoothukudi, dated 30.11.2011 and set aside the conviction and sentence imposed against the appellants.

For Appellant
in CrI.A.(MD)No.290/17 : Mr.G.Karuppasamy Pandian

For Appellants
in CrI.A.(MD)No.167/19 : Mr.S.Ravi,
Legal Aid Counsel

For Respondent
in both appeals : Mr.M.Chandrasekaran,
Additional Public Prosecutor

**COMMON JUDGMENT****B.PUGALENDHI, J.,**

These appeals are directed against the conviction and sentence ordered by the learned Additional Sessions Judge, Fast Track Court No.2, Thoothukudi, in S.C.No.171 of 2011, dated 30.11.2011.

2. The trial Court has framed charges against the accused under Sections 302 and 397 IPC and after full fledged trial, found them guilty, convicted and sentenced them as detailed below:

Accused	Section of Law	Sentence of imprisonment	Fine amount
A1 & A2	302 IPC	To undergo imprisonment for life.	Rs.500/-, each, in default to undergo rigorous imprisonment for one year.
	397 IPC	To undergo rigorous imprisonment for seven years.	Rs.100/-, each, in default to undergo rigorous imprisonment for six months.

3. The appellant in CrI.A.(MD)No.290 of 2017 is the first accused and the appellant in CrI.A.(MD)No.167 of 2019 is the second accused. When CrI.A.(MD)No.290 of 2017 came up for hearing on 09.04.2019, it was brought to the knowledge of this Court that the second accused has not filed any appeal challenging the judgment of the trial Court. Therefore, this Court, through video conferencing, enquired the second accused, who is lodged in Central Prison, Palayamkottai and he has stated that he has no means to engage a Counsel and to file an appeal. Therefore, this Court appraised the second accused of his right to free legal aid and the Superintendent of Central Prison, Palayamkottai was directed to produce the second accused / Muniasamy before this Court on 11.04.2019. When the second accused was produced before this Court on the said date, he expressed that he does not have any means to engage a Counsel and requested the Court to appoint a legal aid Counsel and he also gave a written statement to this effect. In his presence, this Court nominated one Mr.S.Ravi [Enrol.No.822/1997], an Advocate of more than 20 years of standing in the Criminal Bar to defend the second accused / Muniasamy and the second accused had also agreed for the same. Thereafter, CrI.A.(MD)No.167 of 2019 came to be filed.

4. Since both the appeals are arising out of the judgment dated 30.11.2011 in S.C.No.171 of 2011, they are taken up together for disposal.



5. The background facts, as projected by the prosecution, in a nutshell, are as follows:

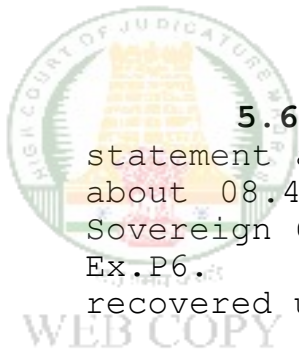
5.1. The deceased in this case, namely, Pattukaniammal, was residing at Arumuganeri East Street. After the demise of her husband, namely, Yesuthasan, she was living alone in that house and her elder brother [PW2] was residing in the Fish Market Street of Madathuvilai. The daughter of the deceased, namely, Eban Christilla [PW3] and her husband, namely, Packiaraj [PW1] were residing at Nasarath village and PW1 was working as a Driver in the Government Transport Corporation at Thiruchendur.

5.2. On 29.08.2010, at about 03.30 pm, PW2 went to his sister's house and found that his sister, Pattukaniammal, was lying dead near the Bathroom. He immediately informed PW1 and PW1 went to the occurrence place along with PW3. After visiting the place of occurrence, PW1 went to Arumuganeri Police Station and lodged the complaint before the Sub-Inspector of Police, namely, Mrs.Sabitha (who was not examined due to her maternity leave) and she recorded the complaint of PW1 in Crime No.340 of 2010, Arumuganeri Police Station for the commission of offence under Sections 302 and 380 IPC on 29.08.2010 at 06.00 pm. The copy of the complaint is marked as Ex.P1 and the printed First Information Report is marked as Ex.P13.

5.3. After registering the case, the Sub-Inspector of Police handed over the First Information Report to the Head Constable [PW9] on 29.08.2010 at 07.00 pm, who, in turn, handed over the same to the learned Judicial Magistrate, Thiruchendur, at about 10.00 pm.

5.4. The Inspector of Police, Thiruchendur, who was in-charge for Arumuganeri Police Station [PW12] received the information from the Sub-Inspector of Police around 07.00 pm and proceeded to the place of occurrence at 07.30 pm and prepared the observation mahazar [Ex.P2] and rough sketch [Ex.P14] in the presence of PW7 and another. He conducted the inquest from 08.30 pm to 10.30 pm and the inquest report was marked as Ex.P15. Thereafter, he sent the body of the deceased to Kayalpattinam Government Hospital through the Constable [PW10], for postmortem. He also recovered cement pieces with and without blood [MOs 4 & 5] from the place of occurrence in the presence of PW7 and also examined PWs 1 to 4 and recorded their statements.

5.5. The Inspector of Police, Arumuganeri Police Station [PW13] took charge on 03.09.2010 and he collected the files from PW12 and verified with the place of occurrence. He formed a special team to arrest the accused and they have arrested the accused on 10.09.2010 at about 08.30 am at Arumuganeri Seenithopu Junction in the presence of the Village Administrative Officer [PW8] and the Village Assistant.



5.6. The first accused, Jebaraj, gave a voluntary disclosure statement and it was recorded in the presence of PW8 and another at about 08.45 am and pursuant to the confession statement, a three Sovereign Gold Chain [MO1] was recovered under the cover of mahazar Ex.P6. A bloodstained lungi [MO6] was also recovered under the cover of mahazar Ex.P7.

5.7. The second accused, Muniasamy, had also given a confession statement to PW13 and pursuant to this confession statement, one pair of Gold Stud [MO2] was recovered under the cover of mahazar Ex.P8.

5.8. PW11 conducted the postmortem on 30.08.2010 at about 11.30 am and he noted down the following injuries:

"... .. face is severely congested with petechoal haemorrhages under the skin and conjunctival blood stained both coming through the nostrils and mouth. Contusions over chin (2 x 2 cm) and right side of lower lip (2 x 1.5 cm) present over the left side of neck, there is an area of congestion of 7 cm in length about 4 cm in width with an underlying area of pallor with (NC) haemorrhages seen. While exploring the neck there are areas of haemorrhages of varying size seen in sub cut tissues and neck muscles. There are few crescentic abrasions over sides of skin of neck. Fracture of left greats horn of hyoid bone and superior tips of thyroid cartilage is seen.

Blood stainy over skin of (NC) was present. A laceration of 3 x 2 x 1 cm over post aspect of scalp with scalp stain present. On internal examination of (NC) lungs - right lung 460g left lung 430g congested empty. Heart 200 mg congested on external examination of abdomen stomach empty. Liver congested 1500g. Spleen (NC) congested. Right kidney 100g left kidney 100g congested. Intestines congested. Uterus (NC) no fracture of spine or (NC) Brain (NC) and membrane were intact."

He gave a opinion that the deceased appears to have died of Asphyxia due to Smothering and Strangulation.

5.9. After examination of the remaining witnesses, PW13 filed the final report before the learned Judicial Magistrate, Thiruchendur in P.R.C.No.14 of 2011 and after committal, the case was taken up for trial in S.C.No.171 of 2011 on the file of the learned Additional Sessions Judge, Fast Track Court No.2, Tuticorin.

5.10. On the side of the prosecution, 13 witnesses were examined and 21 exhibits were marked and 9 materials objects were produced.



6. The available evidences from the prosecution side are as follows:

i) PW1 is the son-in-law of the deceased and he speaks about the call received from PW2 with regard to the murder of his mother-in-law as well as the missing of articles.

ii) PW2 is the brother of the deceased and he deposed that when he went to his sister's house, she was found dead near the bathroom and he informed the same to his sister's daughter [PW3] and her husband [PW1].

iii) PW3 is the daughter of the deceased and wife of PW1. Her evidence corroborates with that of PWs 1 & 2.

iv) PW4, a neighbour, deposed that on 29.08.2010, in the morning hours, the deceased came to her house and took milk and at about 03.00 pm, when she went to the deceased's house, she found the deceased dead and was lying near the bathroom.

v) PW5 is said to have witnessed the accused near the place of occurrence on 29.08.2010 at 06.30 am.

vi) PW6 is said to have witnessed the accused near the place of occurrence on 29.08.2010 at about 07.30 am.

vii) PW7 is the Mahazar witness.

viii) PW8 is the Village Administrative Officer and he was examined for the arrest and recovery.

ix) PW9 is the Head Constable who received the First Information Report on 29.08.2010 at 07.00 pm and delivered the same to the Judicial Magistrate, Thiruchendur on 29.08.2010 at 10.00 pm.

x) PW10 is the Constable who handed over the body of the deceased along with requisition letter to the Medical Officer for postmortem and after postmortem, collected the material objects and handed over the dead body to the relatives of the deceased.

xi) PW11 is the Doctor who conducted Autopsy on the body of the deceased.

xii) PW12 speaks about the receipt of complaint, registration of the case and conducting of the preliminary investigation.

xiii) PW13 speaks about the further investigation as well as the filing of the final report.

7. After the prosecution evidence was closed, the incriminating materials were put to the accused under Section 313 Cr.P.C. and the accused denied the same. One Santhanamari, wife of the second accused was examined as defence witness [DW1] and through her, Ex.D1 to D4 were marked.

8. In conclusion of the trial, the learned trial Judge has convicted the appellants as stated above. As against the conviction and sentence, the appellants have filed these appeals.

9. Heard the learned Counsel appearing for the respective parties and perused the documents placed on record.



10. The learned Counsel for the appellants has raised the following grounds for the consideration of this Court:

10.1. The occurrence was taken place inside the house. Admittedly, there is no eye witness to the occurrence and the circumstances relied upon by the prosecution contradict with each other, so as to establish the guilt of the accused.

10.2. The trial Court ought to have disbelieved the evidence of PWs 5 & 6, as they have not disclosed the presence of the appellants to the investigation officer for a long period. They were examined by the police only on 10.09.2010, ie., after the arrest of the accused and their statements reached the Court only on 11.03.2011. The delay in sending the statements of the important witnesses has not been explained by the prosecution.

10.3. The second accused was in an unlawful custody for about eight days and was falsely implicated in this case. That apart, the alleged arrest and recovery from the accused does not corroborate with the deposition of PW2, who is the brother of the deceased, as he has deposed that the accused were secured within 4 or 5 days after the occurrence.

11. Per contra, Mr.M.Chandrasekaran, learned Additional Public Prosecutor, submits that from the evidence, the prosecution had clearly established that it was the appellants, who committed the murder of the deceased. Therefore, according to the learned Additional Public Prosecutor, the conviction and sentence imposed by the trial Court on the accused does not require any interference at the hands of this Court.

12. This Court has paid it's anxious consideration to the rival submissions made by the learned Counsel on either side and also perused the documents placed on record.

13. This is a case of murder for gain and the case rests upon circumstantial evidence. In a case based on circumstantial evidence, the prosecution is required to prove the circumstances projected by it beyond reasonable doubt and the proved circumstances should establish a close link with each other and form a complete chain unerringly pointing to the guilt of the accused and there should not be any other hypothesis, which will be inconsistent with the guilt of the accused. Keeping this broad principles in mind, we have scrutinized the evidence carefully.

14. The following circumstances are projected by the prosecution in support of their case:

i) The deceased Pattukaniammal was found dead in her residence on 29.08.2010 at 03.30 pm. She sustained injuries and the Doctor who conducted the postmortem has given his opinion that the



deceased appears to have died of Asphyxia due to Smothering and Strangulation.

ii) PW5, a resident of Arumuganeri witnessed the appellants / accused in a suspicious circumstances just half an hour prior to the occurrence.

iii) PW6, a resident of Arumuganeri has also witnessed the appellants / accused near the place of occurrence at about 07.30 am on the date of occurrence.

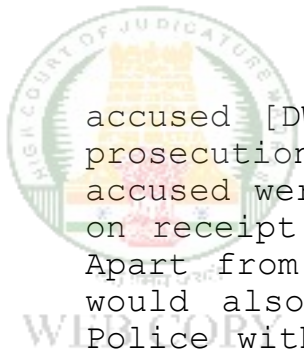
iv) The appellants / accused were arrested on 10.09.2010 at about 08.30 am in the presence of PW8 and MOs 1 to 3 and 6 were recovered pursuant to their disclosure statements.

15. The two circumstances which are against the appellants are the last scene theory, as stated by PWs 5 & 6 and the arrest and recovery of material objects from the appellants / accused.

16. Insofar as the last seen theory is concerned, PW5, a resident of Arumuganeri, is said to have witnessed the appellants on the date of occurrence just half an hour prior to the occurrence and he found the activities of the appellants doubtful and therefore, he has also enquired them. Similarly, PW6, a resident of Arumuganeri, found the accused in a suspicious circumstance on the date of occurrence, half an hour after the occurrence. But, PW12, the Inspector of Police, who conducted the preliminary investigation would state that when he examined the witnesses, he was not informed about any suspicious activities of any person, from the place of occurrence, at the time of occurrence.

17. Insofar as the arrest and recovery is concerned, the accused are said to have arrested by PW13 on 10.09.2010 at about 08.30 am in the presence of PW8 / Village Administrative Officer and another. But, PW2 in his evidence would state that within 4 or 5 days, he found the accused in the custody of the police. It is the specific case of the appellants that they were taken to illegal custody on 03.09.2010 and against the same, the father of the second accused one Shanmugasundaram sent a Telegram about the illegal detention of his son on 04.09.2010 and the same was marked as Ex.D3. The wife of the second accused, namely, Santhanamari, who was examined as DW1, has also sent a Telegram about the illegal detention of her husband at the hands of the respondent police from 03.09.2010 and the same was marked as Ex.D4. But, the learned trial Judge has accepted the plea taken by the learned Assistant Public Prosecutor that the accused were taken to the police station for enquiry on 03.09.2010 and therefore, it cannot be termed as that of an illegal detention from 03.09.2010 based on the Telegrams given by the father and wife of the second accused.

18. The first Telegram by the father of the second accused [Ex.D3] was given on 04.09.2010. Thereafter, the wife of the second



accused [DW1] gave the second Telegram [Ex.D4] on 06.09.2010. The prosecution has taken a plea while cross examining DW1 that the accused were taken for the purpose of enquiry and they were let off on receipt of the Telegram. But that was not the evidence of PW13. Apart from the evidence of DW1, PW2 / the brother of the deceased would also admit that the accused were taken to custody by the Police within 4 or 5 days from the date of occurrence. Therefore, this Court is unable to believe the alleged arrest and recovery from the accused.

19. Apart from the above material defects, no steps have been taken to collect the finger prints from the place of occurrence and to compare the same with that of the accused. A specific defence was also taken that the finger prints have not been placed before the Court, since the finger prints collected does not tally with the finger prints of the accused.

20. PW5 and PW6 were examined only on 10.09.2010, after the arrest of the accused and it appears, their statements have also reached the Court belatedly, ie., only on 11.03.2011. PW5 is said to have witnessed the accused half an hour prior to the occurrence and PW6 is said to have witnessed the accused half an hour after the occurrence, in a suspicious circumstances. But, this fact has not been elucidated when the inquest was conducted over the body of the deceased on the date of occurrence. These statements emerging belatedly, after a considerable time, cannot be given much weightage to link the accused with the crime.

21. Though the prosecution has succeeded in proving that the death of the deceased was a murder for gain, but, who had caused the murder has not been clearly established by the prosecution.

22. From the foregoing discussions, in our considered view, though the prosecution can be held to have created a suspicion against the accused, the suspicion, however, strong it may be, shall not take the place of proof. While dealing with the circumstantial evidence, there is always a danger that conjecture or suspicion lingering on the mind may take the place of proof. Suspicion, however, strong cannot be allowed to take the place of proof and, therefore, the court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof.

23. The Supreme Court in the case of **Sheila Sebastian v. R.Jawaharaj and another**, reported in (2018) 7 SCC 581, in Paragraph No.28, has observed as under:

"Law is well settled with regard to the fact that however strong the suspicion may be, it cannot take the place of proof. Strong suspicion, coincidence, grave doubt cannot take the place of proof. Always a duty is cast upon the Courts to ensure that suspicion does not take place of



the legal proof."

24. The Supreme Court in the case of **Jaharlal Das v. State of Orissa**, reported in (1991) 3 SCC 27, has observed in Paragraph No.9 that caution must be borne in mind that in cases depending largely upon circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however strong cannot be allowed to take the place of proof.

25. In **Padala Veera Reddy vs State of A.P.** reported in 1991 SCC Criminal 407, the Supreme Court laid out the test which has to be adopted in dealing with cases of circumstantial evidence and the same reads thus:

"15. ...in a case of circumstantial evidence such evidence must satisfy the following test:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

26. However, as we have pointed out earlier, in the present case, the circumstances relied upon by the prosecution, in our considered view, have not been proved by the prosecution beyond reasonable doubt. It has been consistently laid down by the Hon'ble Supreme Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.

27. The Court cannot convict an accused on mere surmises, conjecture and suspicion. The prosecution is expected to prove the guilt of the accused beyond all reasonable doubts. In this case, as we have already pointed out, at the most, it can be said that the prosecution has succeeded in creating a suspicion against the accused and it has miserably failed to prove the case against the accused beyond reasonable doubts and thus, we are bound to give the benefit of doubt to the accused and to acquit him.



28. In view of the foregoing discussions, this Court is inclined to extend the benefit of doubt to the appellants / accused, as the prosecution has failed to prove the case beyond any reasonable doubt.

29. In fine,

i) both the appeals are allowed and the judgment of conviction and sentence ordered by the learned Additional Sessions Judge, Fast Track Court No.2, Thoothukudi, in S.C.No.171 of 2011 dated 30.11.2011, are set aside and the appellants are acquitted of both the charges.

ii) since the appellants are in jail, they are directed to be set at liberty forthwith, unless their detention is authorized in connection with any other case.

Sd/-

Assistant Registrar (Writs)

// True Copy //

Sub Assistant Registrar(CS)

To

1)The Additional Sessions Judge,
Fast Track Court No.2,Thoothukudi.

2)The Inspector of Police,
Arumuganeri Police Station,
Arumuganeri, Thoothukudi District.

3)The Superintendent,
Central Prison,
Palayamkottai.

4)The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.N.PRAGALATHAN, Advocate SR-88332.

+1 CC to Mr.S.Ravi, Advocate SR-88780.

Judgment made in
CrI.A. (MD)Nos.290 of 2017 & 167 of 2019
20.09.2019

CS(01.10.2019) 10P 8C