

IN THE HIGH COURT OF JUDICIATURE AT MADRAS

Reserved on : 16.12.2019

Pronounced on : 05.02.2020

CORAM :

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE R. PONGIAPPAN

Criminal Appeal No. 227 of 2019

Tamilselvan ... Appellant

versus

State : Inspector of Police,
Paramathi Circle,
Jedarpalayam Police Station,
Namakkal District. ... Respondent
Crime No.50 of 2016

Criminal Appeal filed under Section 374 of the Code of Criminal Procedure, against the conviction and sentence passed by the learned Sessions Judge [Fast Track Mahila Court], Namakkal in S.C.No.17 of 2017 dated 13.03.2019.

For Appellant : Mr.A.Padmanaban

For Respondent : Mrs. M. Prabhavathi
Additional Public Prosecutor

J U D G M E N T

R. PONGIAPPAN, J

The present Appeal has been filed by the appellant/accused against the judgment passed in S.C.No.17 of 2017 dated 13.03.2019 on the file of the learned Sessions Judge [Fast Track Mahila Court], Namakkal.

2. The appellant is the sole accused in the above said case. The accused stood charged for the offences under Sections 302 and 201 of IPC. The accused denied all the charges and opted for trial. Therefore, he was put on trial on the charges. After full-fledged trial, the learned Sessions Judge [Fast Track Mahila Court], Namakkal, found the accused guilty of offences

under Sections 302 and 201 of IPC. Accordingly, the accused was convicted and sentenced to undergo Life Imprisonment and he was directed to pay a fine of Rs.5,000/-, in default to undergo 6 months Rigorous Imprisonment for the offence under Section 302 of IPC and he was convicted and sentenced to undergo 7 years Rigorous Imprisonment along with a fine of Rs.3,000/-, in default to undergo 3 months Rigorous Imprisonment for the offence under Section 201 of IPC. The trial Court ordered the sentences to run concurrently. Challenging the conviction and sentence, the accused is before this Court with the present Criminal Appeal.

3. The deceased in this case is 9 months old child Dharnish. The deceased is the son of the accused. PW1 is the defacto complainant in this case and he is none other than the brother-in-law of the accused. PW2 is the father of the accused. PW3 is the sister of the accused. PW4 and PW5 are brothers-in-law of the accused. PW6 is the Village Administrative Officer and PW7 is the Village Assistant. PW8 is the Personal Assistant to Revenue Divisional Officer and PW9 is the Member of Child Help Line. PW10 is a Milk Vendor vending milk in the locality.

4. The case of the prosecution is that the marriage between the accused and one Revathi was solemnised eight years ago and due to such wedlock, two children were born. Due to matrimonial dispute, on 20.12.2015, the wife of the accused Revathi committed suicide by consuming poison. In connection with the death of his wife, the accused was remanded to judicial custody. PW1, brother of the deceased Revathi and brother-in-law of the accused was taking care of the two minor children born to Accused and Revathi. When the appellant was released on bail on 15.03.2016, he came to the house of PW1 and took the custody of the minor children with him. It is the further case of the prosecution that the accused suspected that the minor son Dharnish was not born to him and therefore, he administered the adhesive gel solution into his mouth with an intention to commit his murder. After the death of the minor child, the accused allegedly buried the dead body of the minor child by digging the earth on the North Western side of his house in the corn groove. The accused also set fire to the dead body of the minor child by pouring adhesive solution and thereafter closed the pit. After closing the pit, he had sprinkled cow dung to ensure that the smell did not emanate therefrom.

5. On 18.03.2016, PW10, the Milk Vendor in the locality, had informed PW1 that he saw the accused and he is in search of the minor Dharnesh. Immediately, PW10 also informed PW1 that he telephoned PW2, father of the accused and asked him about the whereabouts of the child but he pleaded ignorance. PW1 also

searched for the minor child but in vain. PW2 has given a complaint on 25.03.2016 to the Child Line, Namakkal by dialling 1098 and informed about the missing of the minor child Dharnesh. On 29.03.2016, PW1 has given the complaint to the Inspector of Police, Paramathi Velur Police Station based on which a case under the caption "Child Missing" was registered in Crime No. 50 of 2016. The complaint lodged by P.W.1 was exhibited as Ex.P.17. The printed F.I.R. was marked as Ex.P.16. After the registration of the case, PW13, Head Constable handed over the same to the Inspector of Police, Jedarpalayam Circle, for investigation.

6. In the meantime, on 30.03.2016, when P.W.6 [Murugesan] a Village Administrative Officer at Jamin Ezhalampalli Village is in his Office at about 6.00a.m., along with P.W.7 [Prabu], the accused herein surrendered before him and made a voluntary confession stating that the Police was searching him in relation to the death of his son. The said confession statement given by the accused was recorded by P.W.6 under Ex.P.3. Immediately, after recording the confession statement, P.W.6 and P.W.7 brought the accused to the Jedarpalayam Police Station and produced him before the Police along with the Special Report.

7. P.W.14 [Kumar] is now working as Inspector of Police, Pallapatti Police Station. On 30.03.2016, at about 6.00a.m., when he was in-charge as a Inspector of Police, Jedarpalayam Police Station, P.W.6 and P.W.7 produced the accused before him along with Special Report. On examination, the accused gave confession statement and the same was recorded in the presence of P.W.6 and P.W.7. After recording the same, he altered the section of law as Sections 302 and 201 of IPC under Ex.P.18. In the confession statement, the accused admitted the offence and willing to produce P.V.C. solution and spade, which are all used for the commission of offence. After recording the confession statement, the accused brought the Inspector of Police and other witnesses to the occurrence place and identified P.V.C. solution and spade, which were hidden near to the occurrence place. The same was recovered by P.W.14 under the cover of Mahazar Ex.P.5. After recovering the same, he returned to the Police Station along with the accused and sent the accused to judicial custody.

8. During the time when he visited the scene of occurrence, he prepared an observation Mahazar and Rough Sketch under Ex.P.21 and Ex.P.20 respectively. He recorded statements from the witnesses, who attested the confession statement, recovery Mahazar and Observation Mahazar. After completing the above formalities, he sent a requisition letter to the Tahsildar for conducting inquest.

9. P.W.8 [Loganathan] is now working as a Personal Assistant to the Divisional Revenue Officer, Namakkal. On 30.03.2016, at about 10.00a.m., he received the requisition given by P.W.14 and went to the scene of occurrence. Before conducting the inquest, he found the dead body of the child in a decomposed stage. He prepared an Inquest Report under Ex.P.8 and thereafter, he has given the requisition to the Doctor for conducting autopsy.

10. P.W.12 Dr. Gokularamanan was at the relevant time attached to the Salem Government Mohan Kumaramangalam Medical College Hospital. On 30.03.2016, he received the requisition letter from P.W.8 and conducted autopsy on the scene of occurrence itself as the dead body was found in a decomposed stage. During the time of Post-mortem, he found the following injuries:-

"External injury :

Body Highly Decomposed body with peeling of cuticles all over the body exposing underlying decomposing soft tissues.

Internal injury :

O/D Head : Scalp - Intact & Decomposing, Cranial Vault-Intact, Dura Mater-Intact.

Brain - Liquified Soft and decomposing.. Base of Skull-Intact.

O/D Neck: Tissues Found as a partly decomposing mass, structures not recognised.

O/D Thorax: RIBS-Intact, Heart-Shrunken on C/S Flabby soft and decomposing, both lungs - shrunken, soft and decomposing found as a mass.

O/D Abdomen: Stomach not recognised and found as a decomposing mass. Spleen and both kidneys C/S Soft, and found as a decomposing mass. Pelvis and Spinal Column-Intact."

11. On chemical examination, P.W.14 found no poisonous substance was found in the viscera. Since the dead body was in the decomposed stage, he is not in a position to tell the cause of death. The Postmortem Certificate issued by him was marked as Ex.P.12 and the Final Opinion issued by him was marked as Ex.P.13. After completing the above formalities, P.W.14 handed over the case records to P.W.15 for further investigation.

12. P.W.15 [Sureshkumar] is now working as Deputy Superintendent of Police, Ramanathapuram. On 29.03.2016, when he was working as Inspector of Police, Paramathy Police Station, he received the case records from P.W.14 and at about 10.00a.m., he went to the scene of occurrence and prepared Rough Sketch under Ex.P.22. He examined the witnesses and recorded the

statements. Through the Judicial Magistrate, he sent the Material Objects, which were collected from the scene of occurrence, for chemical examination. He completed the investigation and laid a charge sheet against the accused herein for the offence under Sections 302 r/w 201 of IPC.

13. In order to prove the case on the side of the prosecution, as many as 15 witnesses were examined as P.W.1 to P.W.15 and 23 documents were exhibited as Ex.P.1 to Ex.P.23 besides 4 Material Objects are marked as M.O.1 to M.O.4. Out of the above said witnesses, P.W.1 [Baskaran] is the brother-in-law of the accused. According to him, he lodged a oral complaint before the Police regarding the missing of the minor child. He said that the Police obtained a signature in blank white paper and he did not know how the death of the minor child happened.

14. P.W.2 [Ponnusamy] is the father of the accused and P.W.3 [Vanitha] is the sister of P.W.2. Both of them have not supported the case of prosecution. P.W.4 [Nallusamy] and P.W.5 [Karuppusamy] are the brothers of the accused wife. According to them, their sister was given in marriage with the accused and thereafter, she consumed poison and committed suicide. Before that she gave birth to two children, namely, Dharnish [deceased] and Nensika. They had further stated that on 14.03.2016, when the accused was released on bail in a case related to the death of their sister, the accused came to their house and took his two children. From PW10, he came to know about the missing of the minor child. Thereafter, he reported the same to P.W.2. and only on 30.03.2016, he came to know that the accused murdered the child Dharnish.

15. P.W.6 [Murugesan] the then Village Administrative Officer deposed that while he was in the Office along with his Assistant, on 30.03.2016 the accused herein surrendered before him and gave a voluntary confession statement. He has further stated that the confession given by the accused was recorded by him and in the said statement, he obtained the signature of the accused. Thereafter, along with the Special Report, he handed over the accused to the Inspector of Police, Jedarpalayam. On enquiry by the Inspector of Police, the accused again gave confession statement, in which, he admitted the offences and willing to identify the Material Objects, which were used for committing the offence. The said confession given by the accused was recorded and based on the confession, M.O.1 and M.O.2 were recovered in the presence of P.W.6.

16. P.W.7 is the Assistant to P.W.6, who has also supported the evidence given by P.W.6. P.W.8 is the Personal Assistant attached to the Divisional Revenue Office, Namakkal. He has spoken about the conducting of investigation and about

the preparation of Inquest Report. He gave requisition to the Doctor for conducting autopsy.

17. P.W.9 [Manikandan] was working as a Staff in Child Line Department, Namakkal. He has spoken that on 26.03.2016 when he was in his Office, P.W.2 telephonically called him and requested to lodge the complaint in respect to the missing of his grand child. After due enquiry, the accused admitted the offence and identified the scene of occurrence, in which, the dead body of child was buried. He has further stated that after identification of the dead body, he took the photographs in the place of occurrence and he sent the same to the Investigation Officer through WhatsApp.

18. P.W.10 [Devaraj] has stated that after the occurrence when he was in the residence of accused, the accused complained about the missing of his son.

19. P.W.11 [Arunagiri] the then Head Constable attached to Jedarpalayam Police Station. He has spoken about the handing over of viscera to the Forensic Department for chemical examination.

20. P.W.12 [Dr.Gokularamanan] is the Doctor attached to the Salem Government Mohan Kumaramangalam Medical College Hospital. He has spoken that on 30.03.2016, he received the requisition letter from P.W.8 and conducted autopsy over the dead body of Dharnish on the scene of occurrence itself.

21. P.W.13 [Chandrasekaran] is a Head Constable attached to Jedarpalayam Police Station and he has stated about receiving of the complaint from P.W.1 and about the registration of the case.

22. P.W.14 [Kumar] and P.W.15 [Sureshkumar] are the Police Officers, who had stated about the filing of charge sheet after completing the investigation.

23. When the above incriminating materials were put to the appellant/accused under Section 313 Cr.P.C., he denied the same as false, however, he did not choose to examine any witnesses nor did he mark any documents on his side.

24. On perusal of materials and on considering the arguments advanced by either side, the learned Sessions Judge [Fast Track Mahila Court], Namakkal, convicted the appellant / accused as stated supra. Challenging the same, the present Criminal Appeal has been filed by the accused / appellant.

25. We have heard Mr. A. Padmanaban, learned counsel appearing for the appellant, Mrs. M. Prabhavathi, learned Additional Public Prosecutor appearing for the State and also perused the records carefully.

26. The learned counsel appearing for the appellant would contend that in respect to lodging of complaint, there are lot of contradictions in the evidence of P.W.1 and P.W.9. Further, the earliest information was given to the Police only by P.W.9 through What's App. But the same was not investigated by the Investigating Officer and thereby, the registration of the case itself is not in accordance with law. The prosecution has not approached this Court with clean hands and the trial Court without considering the same, convicted the accused. Accordingly, he prayed for allowing the appeal and setting aside the order of conviction.

27. Per contra, Mrs. M. Prabhavathi, learned Additional Public Prosecutor appearing for the State would contend that, though the evidence given by P.W.1 is not in support of the prosecution, the evidence given by P.W.13 [Head Constable] will establish the registration of the case and therefore, it cannot be held that the prosecution suppressed the details of registering the case.

28. Upon considering the arguments advanced by either side, it is true as per the case of prosecution, P.W.1 has lodged the complaint before P.W.13 and based on the said complaint, the case was registered against the accused. In this regard, though P.W.13 has clearly stated about the receiving of complaint from P.W.1. But the author of the document, P.W.1 has simply stated that the Police obtained his signature only in blank paper, further he identified signature found in the complaint as his own. Therefore, the said contradiction available in the evidence of P.W.1 and P.W.13 is creating a doubt as to whether the prosecution has putforth the real fact in respect to registration of the case.

29. Similarly, as per the evidence of P.W.9, on 26.03.2016 itself, the occurrence was reported to the Police Station. He has specifically stated that after examining the accused and after visiting the scene of occurrence, he lodged the complaint before the Police Station. In this regard, P.W.14 and P.W.15 does not say anything about the receiving of complaint from P.W.9. Though the evidence given by P.W.9 is against the case of prosecution, he was not treated as a hostile witness by the prosecution and thereby, his entire evidence cannot be rejected in toto. As per the evidence of P.W.9, for the same occurrence, one another complaint was received by the

Police before registration of the case on 29.03.2016. Accordingly, the complaint given by P.W.9 was suppressed by the Police and the same was also a fatal to the prosecution.

30. The next aspect in this case is, the prosecution has projected its case by way of circumstantial evidence. In this regard, P.W.6, who is the Village Administrative Officer has clearly stated about the recording of extra judicial confession statement from the accused. According to him, on 30.03.2016, the accused surrendered before him and gave a confession, in which, he admitted the occurrence.

31. On the other hand, as per the evidence of P.W.9, on 26.03.2016 itself, the accused was examined by P.W.9 and on enquiry, he identified the scene of occurrence. Therefore, the said evidence concludes that before recording the extra judicial confession, the accused herein confessed the occurrence before P.W.9, and hence, the extra judicial confession statement recorded by P.W.6 cannot have much value in accepting the case of the prosecution.

32. In the case of STATE OF HARYANA vs. JAGBIR SINGH reported in 1977 SCC [Cr1.] 638, in which, our Honourable Apex Court has held as follows:

"6. The High Court found a very serious infirmity in the entire prosecution case from an admission which had been made earlier by Sukhbir Singh (PW 18), the father of the deceased. From that statement the High Court found that Sukhbir Singh had admitted that the accused were arrested by the police in this case on March 16, 1975, the very day the dead body of his son was found at the Ram Lila Grounds. If the arrest of the accused on March 16 is true, as stated by Sukhbir Singh, not only the extra-judicial confession of the accused before Deputy Prasad on March 18, 1975 but also the recoveries of the blood stained clothes and kirpans made by the police on March 18, 1975 following the alleged statements of the accused lose all credibility. This is the principal ground on which the High Court came to the conclusion that there was "padding" in the prosecution case and that certain evidence was fabricated in order to implicate the accused."

33. Therefore, applying the principle laid down by our Hon'ble Apex Court with the case in our hand, this case also suffered from number of infirmities. In general, the extra

judicial confession and recovery will be a weak piece of evidence. Thus, the said documents have to be necessarily supported by other evidence. But, in this case, as per the case of prosecution, the scene of occurrence was initially identified by the accused to the Police on 30.03.2016 but the witnesses examined by the prosecution established the fact that on 26.03.2016 itself the place of occurrence was identified to P.W.9. So, the said contradictions arising out of evidence given by P.W.9 and P.W.6 and Investigation Officer create a doubt whether the case of prosecution is true or not.

34. The learned counsel appearing for the appellant would further contend that the prosecution has not established the factum of death by way of chemical examination, without seeing the cause of death, it is not possible for accepting the case of prosecution as a genuine one. In this regard, the learned counsel relied upon the judgment of our Hon'ble Apex Court in THE STATE OF PUNJAB vs. BHAJAN SINGH reported in 1975 AIR [SC] 258, in which, it has held as follows:-

"13..... According further to the doctor, he could not find the cause of death because the two dead bodies were in a decomposed state. In the face of the above evidence of the doctor, it is not possible to hold that the death of the two persons, whose bodies were recovered, was homicidal."

35. Applying the principle set out in the case referred by the learned counsel for the appellant, in this case also, the Doctor, who conducted autopsy gave evidence that no poisonous substance was available in the viscera and hence, he is not in a position to give any opinion about the death of the child. According to the evidence of Doctor, the cause of death has not been proved by the prosecution. In fact, during the time of occurrence, it is alleged that the deceased administered P.V.C. solution in the mouth of child and killed him. But the report given by the experts is against the said fact, which means as per the report issued by the Forensic Department, no poisonous substance was found in the viscera. Therefore, the said aspect create a doubt whether the story putforth by the prosecution is found true or not. There are several infirmities in the case of the prosecution in respect of registration of the case, identifying the scene of occurrence, recording the extra judicial confession and about the cause of death.

36. In the judgment relied upon by the learned counsel for the appellant reported in AIR 1960 MADRAS 370, this Court has held as follows:-

"11. It is obvious that, in order to bring home guilt to the accused, the prosecution must

affirmatively establish that the human remains exhumed in this case were those of the deceased Sellayee. If that fails, it would obviously be most unsafe to act upon the retracted judicial confession, even if we believe that the confession might have been voluntarily made, and that it does contain elements of truth. For it is a fundamental maxim of the Criminal Jurisprudence administered in this country, that suspicion and conjecture cannot take the place of legal proof."

37. So, the ratio laid down by the Honourable Apex Court in the above case clearly applies to the case in our hand. In this case also, as already observed, there are number of infirmities found in connecting the accused with the nexus of the crime, the trial Court without appreciating the same, convicted the accused. Hence, this Court has no hesitation to hold that the prosecution has miserably failed to prove the case against the appellant.

38. In the result, the Criminal Appeal is allowed and the conviction and sentence imposed upon the appellant by the learned Sessions Judge [Fast Track Mahila Court], Namakkal in S.C.No.17 of 2017 dated 13.03.2019, is set aside and the appellant is acquitted. Fine amount paid, if any, is directed to be refunded to the appellant. Bail bonds executed, if any, shall stand terminated.

Sd/-

Assistant Registrar(CS IV)

//True Copy// सत्यमेव जयते

Sub Assistant Registrar

sri/rsh

To

1.The Sessions Judge,
Foot Track Mahila Court,
Namakkal.

2.The Judicial Magistrate,
Paramathy.

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Paramathi Circle,
Jedarpalayam Police Station,
Namakkal District.

4.The Public Prosecutor,
High Court, Madras.

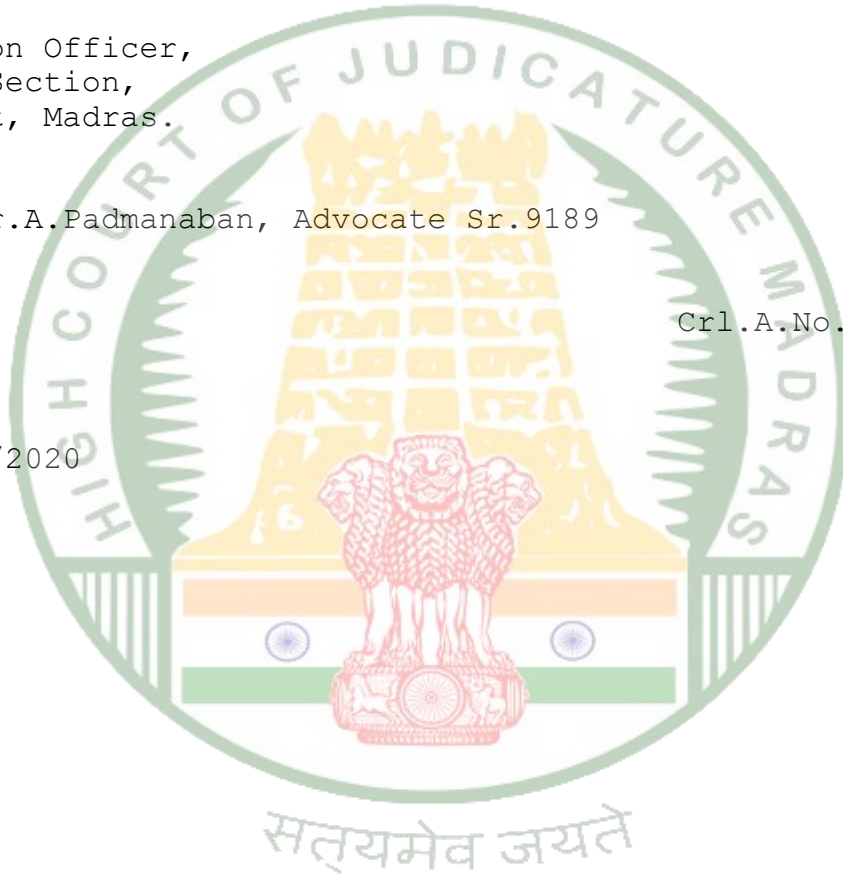
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