



BAIL SLIP

Kathirvelsamy and Mahesh petitioners/Appellants/Accused Nos a and 2 were released on bail vide high court order dated 16.04.2019 and made in Crl.MP(MS).No. Nos.10232 and 10233 of 2018 respectively in CRL.A.(MD).No. 450 of 2018.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.09.2021

CORAM

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

AND

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRL.A (MD)No.450 of 2018

1.Kathirvelsamy

2.Mahesh

.. Appellants/A1 & A2

-vs-

State Represented by
The Inspector of Police,
Earvadi Police Station (Circle),
Thirukurunkudi Police Station,
Crime No.139 of 2015,
Tirunelveli District.

.. Respondent/Complainant

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure against the judgment of the learned IV Additional Sessions Judge, Tirunelveli, Tirunelveli District in S.C.No.592 of 2016, dated 24.09.2018.

For Appellants :: Mr.V.Kathirvelu
Senior Counsel for
Mr.K.Prabhu

For Respondent :: Mr.S.Ravi
Additional Public Prosecutor

J U D G M E N T

(Judgment of the Court was delivered by V.BHARATHIDASAN, J.)

The appellants are arrayed as Accused Nos.1 & 2 in S.C.No.592 of 2016, on the file of the learned IV Additional Sessions Judge, Tirunelveli. Totally there are eight accused, the appellants along with other accused stood charged for the offences under Sections 120-B(1), 148, 153-A(1)(b), 364, 302 and 302 r/w 149 I.P.C. The trial Court, while acquitting the other accused against the respective charges framed against them, convicted A1 and A2 under Section 302 I.P.C. alone and sentenced them to undergo Life Imprisonment and to pay a fine of Rs.1,000/- in default to undergo



one year Rigorous Imprisonment. The trial Court acquitted the appellants/A1 and A2 from other charges. Challenging the aforesaid conviction and sentence, the appellants are before this Court with this Criminal Appeal.

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2.The case of the prosecution in brief is as follows:

The deceased in this case, namely, Sheik Mohammed Kaja Mohideen was an auto driver and a district office bearer in a political party. Alleging that, earlier, some members belonging to the deceased's political party attempted to murder a party functionary belongs to a rival political party, and in order to wreck vengeance, all the accused hatched a conspiracy. In furtherance of the same, on 21.12.2015, all the accused have formed an unlawful assembly and the appellants/A1 and A2 abducted the deceased in an auto and took him to a remote place at Gandhinagar, A1 attacked him with knife indiscriminately and A2 attacked him with iron rod and caused his death, left the body there and fled away. On coming to know about the same, P.W.1, mother of the deceased, rushed to the scene of occurrence, after seeing the dead body, she immediately lodged a complaint (Ex.P.1) before the respondent police at about 10.30 p.m. on 21.12.2015.

3.P.W.37, Sub-Inspector of Police, on receipt of the complaint registered a F.I.R. in Crime No.139 of 2015 under Section 302 I.P.C. and sent the F.I.R. (Ex.P.45) to the concerned Judicial Magistrate Court, and copy to the Inspector of Police (P.W.38) and other higher officials.

4.P.W.38, Inspector of Police of the respondent Police, on receipt of the F.I.R. proceeded to the scene of occurrence at 11.15 p.m. on 21.12.2015, and with the help of torch light and the head light of the Police Jeep prepared Observation Mahazar (Ex.P.2) and Rough Sketch (Ex.P.46) in the presence of witnesses. She engaged the services of sniper dog and called the experts from the forensic department. Then, she sent the body of the deceased to the Tirunelveli Government Medical College Hospital. She recovered bloodstained sand (M.O.19), Sample Sand (M.O.20) and the auto bearing registration No.TN-72-H-9041 (M.O.1). On the next day morning, at about 11.30 a.m., in Tirunelveli Government Medical College Hospital, she conducted inquest in the presence of witnesses and panchayatars and prepared Inquest Report (Ex.P.48). Then, she sent the body for postmortem autopsy through Head Constable - (P.W.34) along with a memo.

5.P.W.31, Associate Professor & Head, Department of Forensic Medicine, Tirunelveli Medical College Hospital, Tirunelveli, conducted postmortem autopsy and prepared postmortem report (Ex.P.31). He gave his opinion that, the deceased would have died of asphyxia due to aspiration of blood as a consequence of stab injury



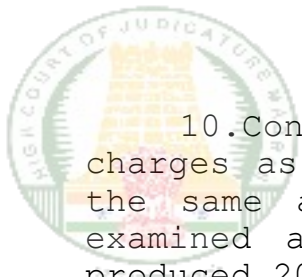
to left side of neck and injury No.10 is fatal in nature.

6.After postmortem, since the relatives of the deceased refused to receive the body demanding arrest of the accused, he sent the body to the mortuary. Then, she recorded the statements of witnesses. In the mean time, by an order passed by the Superintendent of Police, Tirunelveli, the investigation was transferred to P.W.39.

7.P.W.39, Inspector of Police, Manoor Police Station, continued the investigation and recorded the statements of witnesses. On 29.12.2015, he summoned A1 in this case for enquiry. At the time of enquiry, A1 voluntarily gave a statement admitting the guilt, and P.W.39 arrested him. Based on the admissible portion of his confession, he recovered the bloodstained knife (M.O.13), Bloodstained dhothi (M.O.7), bloodstained Banian (M.O.8) and bloodstained Shirt (M.O.9). Based on the confession of A1, he arrested A2 on the same day at 1.00 p.m. On such arrest, he has also voluntarily gave a confession. Based on the disclosure statement he recovered the bloodstained iron rod (M.O.15), Bloodstained white shirt (M.O.9), bloodstained black pant (M.O.10), motor cycle bearing registration No.TN-20-AM-7624 (M.O.11) and cellphone (M.O.14). On the very same day, he arrested A3 and A4 and they have also voluntarily gave confessions, based on the confession given by A3, he recovered two bill-hooks (M.O.16 series). Then, he arrested A5 and A6 and based on the confession statement given by A5, he recovered TN-72-AX-1933 - motorcycle (M.O.17) and the sketch to murder the deceased (Ex.P.18). He sent all the accused to judicial custody.

8.Based on the investigation, he altered the offence to Sections 147, 148, 302, 120(b)), 109 r/w 34 I.P.C. and filed the alteration report (Ex.P.34). In the mean time, A7, appeared before the V.A.O. (P.W.30) and gave an extra-judicial confession, on that, P.W.39 arrested him and sent him for judicial custody. Once again, the offence was altered including Sections 364 and 153-A I.P.C. and filed another alteration report (Ex.P.52). Subsequently, on 04.01.2016, Test Identification Parade was conducted by the learned Judicial Magistrate, Nanguneri. On 08.01.2016, he took police custody of A4 and A7, where they have given confessions, based on the admissible portion of confession statement of A4 he recovered another knife (M.O.18) and sent the accused for judicial custody and sent the material objects to the Judicial Magistrate concerned under form 95. Then, he handed over the investigation to P.W.40.

9.P.W.40 continued the investigation and recorded the statements of other witnesses, collected call details of the mobile phone seized from A2 and after completion of investigation, on 25.03.2016, filed a final report.



10. Considering the above materials, the trial Court framed charges as mentioned in paragraph No.1, and all the accused denied the same as false. In order to prove its case, the prosecution examined as many as 40 witnesses, marked 56 documents and also produced 20 material objects.

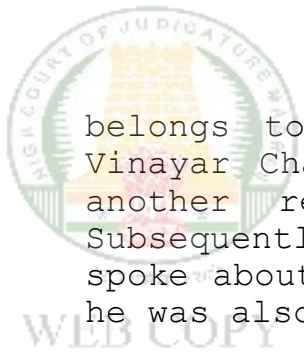
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11. Out of the witnesses examined, P.W.1 is the mother of the deceased. According to her, on 21.12.2015, at about 9.00 p.m., she received an information that her son was murdered, immediately she rushed to the scene of occurrence, thereafter, filed a complaint (Ex.P.1) before the respondent police and also identified the auto and the dresses worn by the deceased.

12. P.W.2, accompanied with P.W.1, and he wrote the complaint as stated by P.W.1 and lodged the complaint before the respondent police along with P.W.1. P.W.3, is running a brick kiln near the scene of occurrence. On the date of occurrence, at about 8.45 p.m. to 9.00 p.m., he got an information from P.W.4, his employee, that some one was found murdered and an auto was standing near it, then he informed the same to the police at 10.30 a.m., on the next day morning he came to know that the deceased has been murdered. P.W.4, was working in the brick kiln. At about 9.30 p.m. on the date of occurrence, he see a dead body and informed the same to his owner. P.W.5 is an auto driver. According to him, A1 called him over mobile phone and told him that A5, asked him to contact him, but he avoided the phone call, then, he went to see A5, and A5 told him to help A1. On the next day, he came to know about the murder.

13. P.W.6 is an auto driver. He is known to the deceased and is also known to A1, A2 and A5. According to him, A5, in this case is also an auto driver and prior to the occurrence some persons attacked A5, and A1 and A2 suspected that the deceased was the man behind the occurrence. On 21.12.2015, at about 7.00 to 7.30 p.m., the deceased was sitting in his auto, at the auto stand, in the opposite side A1 and A2 were standing, when he asked them, they simply avoided him. After some time, the deceased taken a lady passenger in the auto, both A1 and A2 followed him in a motorcycle and he also identified the motorcycle. Prosecution relied on his evidence to show that, A1 and A2 are last seen together with the accused, before the occurrence.

14. P.W.7, another auto driver, turned hostile. P.W.8, another auto driver, also known the accused. According to him, on 21.12.2015, at about 7.45 p.m., he saw A1, A2 and other four accused standing near Gandhi Nagar main road and discussing. P.W.9 is a tempo driver, he spoke about the law and order problem created after the occurrence and he was treated as hostile. P.W.10, was examined to prove the conspiracy, he was treated as hostile to some extent. P.W.11 is the Treasurer of the Tempo Drivers Association and he has also turned hostile. P.W.12, known to A5, according to him, A5



belongs to a political party and he conducted procession during Vinayar Chathoorthi, which was opposed by the people belonging to another religion, hence, there was a dispute between them. Subsequently, A5, was attacked by some unknown persons, he also spoke about the law and order problem subsequent to the occurrence, he was also treated as hostile to certain extent.

15.P.W.13, is running a mobile shop, he knew the deceased as well as A5 and he also spoke about the earlier quarrel between A5 and other religion people, he was also treated as hostile witness. P.W.14 is running a cycle shop, was known to A5 and the deceased, he spoke about the earlier procession conducted by A5 and the quarrel between A5 and other religion people. P.W.15, an auto driver, knew both the deceased and A5, according to him, on 21.12.2015, at 7.00 p.m., the deceased was standing with his auto, at that time A1 and A2 standing there in a two-wheeler, at about 7.30 p.m. the deceased took a passenger in his auto, A1 and A2 followed him in a two wheeler, subsequent to the occurrence, he identified both A1 and A2, in the Test Identification Parade.

16.P.W.16, a milk vendor, turned hostile. P.W.17, a driver, turned hostile. P.W.18 also turned hostile. The evidence of P.W.19 has no substance. P.W.20, witness to the observation mahazar, disputed the contents of the observation mahazar and he was treated as hostile. P.W.21, another witness to the observation Mahazar, also turned hostile. P.W.22, is witness to the observation mahazar. P.W.23, Motor Vehicle Inspector, spoke about the ownership of the two wheelers, and given owner ship certificates (Exs.P.5 and P.6). P.W.24, Assistant Engineer, Tamil Nadu Electricity Board, spoke about the power supply in the area and he has also given certificate (Ex.P.8). P.W.25 is the Branch Manager of Tamil Nadu Transport Corporation, Tirunelveli. According to him, from 22.12.2015 to 27.12.2015, no buses were operated through Ervadi, to that effect he has issued a certificate (Ex.P.9). P.W.26, Branch Secretary of a political party, turned hostile. P.W.27, Assistant, working in the mortuary of Tirunelveli Government Medical College Hospital, spoke about the body of the deceased kept in the mortuary.

17.P.W.28, Village Administrative Officer, is witness to the arrest of A1 to A5 and confession given by them and recovery of material objects. P.W.29, Assistant Director, in the Forensic Lab, Tirunelveli, examined the bloodstained material objects and gave Serological Report (Ex.P.24) and Chemical Analysis Report (Ex.P.25). P.W.30, Village Administrative Officer, before whom A7 appeared and has given extra-judicial confession and he also witnessed the arrest, confession and recovery of material objects.

18.P.W.31, Associate Professor & Head, Department of Forensic Medicine, Tirunelveli Medical College Hospital, Tirunelveli, conducted postmortem autopsy and issued postmortem certificate



(Ex.P.31) and found the following injuries in the dead body:

"The body was first seen by the undersigned at 2.25 PM on 22.12.2015. Its condition then was rigor mortis present all over the body. Post-mortem commenced at 2.25 PM on 22.12.2015.

APPEARANCES FOUND AT THE POST-MORTEM. Moderately nourished body of a male. Finger and toe nails pale.

THE FOLLOWING ANTEMORTEM INJURIES WERE NOTED:

1. An oblique gapping incised like laceration of size 11x15cmx Cavity deep seen in left side of forehead. It extends from left side of root of nose to left temporal region. On dissection underlying left side of frontal bone found fractured and depressed of size 10x2cm, radiating crack fracture of length 10cm extends to left anterior cranial fossa.
2. An oblique cut injury of size 5x1x1cm seen in middle of left ear. It cuts underlying left ear cartilage and underlying soft tissues.
3. An oblique cut injury of size 5x1x1cm seen in lower part of left ear. It lies 15cm below injury no.2. It is having a tails of length 3cm in its front.
4. Abraded contusion of size 5x1cm seen in left cheek. On dissection underlying soft tissues contused.
5. A horizontal scratch abrasion of length 7cm seen in left side of neck.
6. A horizontal scratch abrasion of length 3cm lies 2cm below chin. It is in line with injury No.5.
7. A horizontal scratch abrasion of length 5cm lies 2cm below injury no.6.
8. A horizontal scratch abrasion of length 2cm seen in front of middle of neck.
9. A horizontal scratch abrasion of length 4cm lies in front of lower part of left side of neck. It lies 3cm below injury no.8.
10. An oblique gapping stab injury of size 6x1x7cm seen in left side of neck. On dissection it passes downwards and medially and stabs underlying vessels, nerves and left side of larynx.
11. An oblique gapping stab injury of size 2x1x1cm lies 1cm outer in injury no.10. It stabs underlying soft tissues.
12. An oblique scratch abrasion of length 7cm lies 0.5cm below injury no.10.
13. An oblique scratch abrasion of length 7cm lies 0.5cm below injury no.12.
14. A cut injury of size 4x2x0.5cm seen below left ear.
15. Laceration with abraded margins of size 4x1cmxBone deep seen in left side of occipital region.
16. Abraded contusion of size 7x4cm seen in top in left shoulder.



17. Abrasion of size 15x0.5cm seen in lower part of left forearm.
18. Tip of left 3rd finger found missing. Tissue at the cut end appears to be clean cut.
19. Contusion of size 14x15cm seen in outer aspect of left thigh.
20. Abrasion of size 1x0.5cm seen in left side of middle of back.
21. 3 Small puncture wounds of size 0.5x0.5x0.5cm seen in front of right shoulder.
22. A cut injury of size 1x0.5x0.5cm seen in right thumb.

OTHER FINDINGS:

Heart: Normal and coronary vessels patent.

Hyoid bone: Intact

Larynx & trachea filled with blood clots.

Stomach Contains 20gms of partially digested food particles, no specific smell and mucosa pale.

Lungs, Liver, Spleen, Kidney & Brain: Normal c/s pale.

Small intestine: Contains 20ml of yellow colour fluid, no specific smell and mucosa pale.

Bladder: Contains 20ml of urine.

Blood sample collected for grouping and typing. Viscera preserved for C.A.

Death would have occurred 12 to 24 hours prior to autopsy.

OPINION AS TO CAUSE OF DEATH:

THE DECEASED WOULD APPEAR TO HAVE DIED OF ASPHYXIA DUE TO ASPIRATION OF BLOOD AS A CONSEQUENCE OF STAB INJURY TO LEFT SIDE OF NECK. INJURY NO.10 IS FATAL IN NATURE."

He was of the opinion that the deceased would have died of asphyxia due to aspiration of blood as a consequence of stab injury to left side of neck and injury No.10 is fatal in nature.

19.P.W.32, Judicial Magistrate, Nanguneri, conducted Test Identification Parade, for A1 and A2, and he filed a report Ex.P.36. P.W.33 is the Head Clerk, working in Judicial Magistrate Court, Valliyoor. P.W.34, Head Constable, identified the body of the deceased for postmortem. P.W.35, Police Photographer, took photos in the scene of occurrence. P.W.36, another Head Constable, handed over the First Information Report to the Judicial Magistrate, Valliyoor on 22.12.2015 at 3.30 a.m. P.W.37 is the Sub-Inspector of Police, who registered the F.I.R. P.W.38, Inspector of Police, conducted initial investigation. P.W.39, Inspector of Police, recorded the statements of witnesses, arrested the accused, recorded the confession and recovered material objects. P.W.40, Inspector of Police, continued the investigation and filed the final report.



20.The above incriminating materials were put to the accused under Section 313 Cr.P.C.. The accused denied the same as false. The accused have not examined any witness on their side, however, they marked the signature of P.W.2 found in the summons issued to him for enquiry.

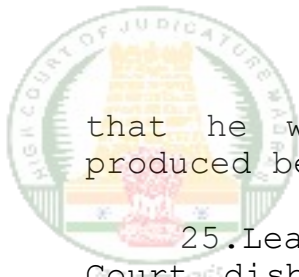
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21.Having considered the above materials, the trial Court convicted the appellants/A1 and A2 under Section 302 I.P.C. and sentenced them as stated above. Challenging the aforesaid conviction and sentence, the appellant is before this Court with this Criminal Appeal.

22.Mr.V.Kathirvelu, learned Senior Counsel, appearing for the appellants/A.1 and A.2, would contend that, it is a case of circumstantial evidence, the prosecution is only relying upon the evidence of P.W.6 and P.W.15, who said to have seen both the accused following the deceased's auto-rickshaw at about 7.30 p.m., on 21.12.2015. Except that, there is no other evidence available to connect the accused with the murder. According to the learned Senior Counsel, the case of the prosecution is that all the eight accused conspired together and in furtherance of the conspiracy A1 and A2, attacked the deceased. Even according to the prosecution, the motive is only against A5, who said to have been attacked at the instance of the deceased. However, the trial Court acquitted all the accused under the charges 120(B) and 149 I.P.C., but convicted the appellants only under Section 302 I.P.C. based on the one and only circumstance that the accused followed the deceased before the occurrence.

23.According to the learned Senior Counsel, in a case of circumstantial evidence, the prosecution has to prove the chain of circumstances unerringly pointing the guilt of the accused. In the instant case except one circumstance, no other chain of circumstances available to prove the guilt of the appellants. Even as per the evidence of P.W.6 and P.W.15, they have not informed the same immediately to the police. Only after 6 days they were examined by the police. Both the witnesses belong to the deceased's religion and also close friends of the deceased and they are interested witnesses and their testimony cannot be relied upon to convict the accused.

24.Learned Senior Counsel further submitted that, there are lot of discrepancies in giving information to the police. According to P.W.1, she has given complaint to P.W.36, Sub-Inspector of Police, at 10.30 p.m., whereas P.W.3, owner of a brick-kiln, has informed about the occurrence to the police at about 10.00 to 10.30 p.m. and he was informed that they have already received a complaint. That apart, the arrest of A1, cannot be believed as according to P.W.28, P.W.39, called A1, for enquiry and he appeared before him and during enquiry, he voluntarily said to have given a statement and based on



that he was arrested and that alleged statement has not been produced before the Court.

25.Learned Senior Counsel would further submit that the trial Court disbelieved all the witnesses and acquitted other accused except the appellants and the appellants have been convicted based on a solitary circumstance that, they had followed the deceased, which will not conclusively prove the guilt of the appellants and hence, the appellants are entitled for acquittal.

26.Mr.S.Ravi, learned Additional Public Prosecutor appearing for the State, would submit that, it is an admitted fact that the accused and deceased belongs to two different religions and different political parties. The motive has been established by the prosecution that, A5 in this case has been attacked by some unknown persons. Alleging that the deceased, was the master mind behind that attack, and these accused are close friends of A5, also belonging to same political party, in order to wreck vengeance followed him and attacked him. P.W.6 and P.W.15, who are important witnesses in this case, spoke about the last seen theory. Both of them, saw the appellant standing in the Erwadi Auto Stand, at about 7.30 p.m., while, the deceased took a passenger in his auto, the appellants followed him in a two wheeler and within short time he was murdered, for which, no explanation was forthcoming from the appellants. Considering the said circumstance, coupled with the motive and recovery of bloodstained weapon and the bloodstained cloths based on the confession of A1 and A2, the trial Court has rightly convicted the appellants.

27.Learned Additional Public Prosecutor further submitted, even though the trial Court disbelieved the evidence of witnesses regarding the conspiracy, relied upon the above circumstances, rightly convicted the appellants. He would further submit that merely because the other accused were acquitted, it will not automatically absolve these accused from involvement in the offence. According to him, 'man may lie, but circumstance will not lie' and considering the same, the trial Court convicted the appellants, which requires no interference by this Court.

28.We have considered the rival submissions and the materials available on record carefully.

29.This is a case of circumstantial evidence. It is trite law that, in the case of circumstantial evidence, the prosecution should fully establish the circumstances, and the facts so established should be consistent only with the hypothesis of the guilt of the accused; the circumstances should be of conclusive in nature and tendency, should exclude every possible hypothesis except the one to be proved. The prosecution also must prove the chain of evidence so complete as not to leave any reasonable ground for the conclusion



consistent with the innocence of the accused.

30.The Hon'ble Supreme Court in **Hanumant Govind Narsundkar v. State of M.P. [AIR 1952 SC 343]**, has held as follows:

10. .. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

31.The above judgment has been followed in **Anjan Kumar Sarma v. State of Assam [(2017) 14 SCC 359]**, wherein it is held as follows:

"13. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(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. (See: *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116] SCC p. 185, para 153; *M.G. Agarwal v. State of Maharashtra* [AIR 1963 SC 200] AIR SC para 18)"

32.In the instant case, the prosecution has strongly relied upon one circumstance i.e., last seen theory. P.W.6 and P.W.15 are the witnesses to support that circumstance. According to them, P.W.6, the deceased was an auto-driver and on the date of occurrence

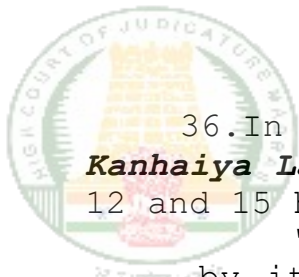


i.e., on 21.12.2015, at about 7.30 p.m., the deceased was in the auto-stand and in the opposite direction the appellants were standing. While P.W.6, approached them and asked as to whether they need any auto, they replied that they do not require any help. Thereafter, the deceased engaged a lady passenger and left the auto-stand, the appellants followed the auto-rickshaw in a two-wheeler. P.W.15, is another auto-driver. According to him, both the appellants were standing near the auto-stand and at about 7.30 p.m., the deceased took a passenger in his auto and left the place, the appellant followed the auto. Thereafter, he identified both the accused in the test identification parade. According to the prosecution, the accused found in the company of the deceased shortly before the occurrence, and they have not given any plausible explanation, and this is a strong circumstance against them.

33.The next circumstance relied on by the prosecution is the recovery of bloodstained weapon and also bloodstained dresses of the deceased. According to P.W.39, Inspector of Police/Investigation Officer, on 29.12.2015, A1, was summoned to appear for enquiry in the police station, where he voluntarily gave a statement, admitting his guilt. Thereafter, he was arrested and after arrest, he voluntarily gave confession statement and based on the disclosure statement recovery was made. P.W.28, Village Administrative Officer of Nambithalaivanpattayam Village, is witness to the arrest and recovery.

34.These are the two strong circumstances, apart from motive, relied upon by the prosecution to prove the guilt of the accused. Now, we have to see whether those circumstances relied upon are fully established, from which, the conclusion of guilt of the accused can be drawn, and it forms a complete chain of circumstances, to show that in all probability the murder has been done by the accused.

35.So far as the first circumstance i.e., the last seen together is concerned, from the evidence of P.W.6 and P.W.15, it could be seen that both accused were not found in the company of the deceased. Prior to the occurrence, both of them were found near the auto-stand, where the deceased parked his auto. Thereafter, they were said to have followed the auto-rickshaw of the deceased. Apart from that, no other evidence is available to show that accused has followed the auto till the scene of occurrence. Even though the deceased said to have took a lady passenger in the auto, that lady was not examined by the prosecution. Merely following the accused for some distance before the occurrence, cannot lead to the inference that, it is the appellants/A1 and A2 committed the crime, there must be some more evidence connecting the appellants with the crime.



36. In similar circumstance, the Hon'ble Supreme Court in **Kanhaiya Lal v. State of Rajasthan [(2014) 4 SCC 715]**, in paragraph 12 and 15 held as follows:

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

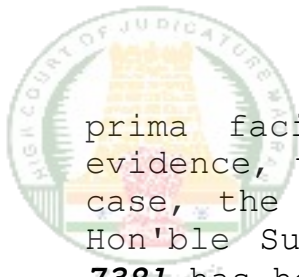
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15. The theory of last seen - the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh v. State of Rajasthan [(2010) 15 SCC 588]*."

37. The circumstance of last seen together cannot by itself be held that the accused is guilty of the offence. It is settled that the only circumstance of last seen together, will not complete the chain of circumstances and it is not consistent only with the hypothesis of the guilt of the accused. The Hon'ble Supreme Court in **Arjun Marik v. State of Bihar [1994 Supp (2) SCC 372]**, in paragraph No.31, it is held as follows:

"31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."

38. It is the contention of the learned Additional Public Prosecutor that the burden is on the accused to explain under Section 106 of Evidence Act, how that occurrence took place, and in the absence of any explanation from the accused, adverse inference has to be drawn against them. That contention cannot be countenanced for the simple reason that, the primary burden is on the prosecution



prima facie establish the guilt of the accused by letting in evidence, then only, the burden shifts on the accused. Here, in this case, the prosecution did not discharge their initial burden. The Hon'ble Supreme Court in **Gargi v. State of Haryana [(2019) 9 SCC 738]** has held as follows:

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"33.1. Insofar as the 'last seen theory' is concerned, there is no doubt that the appellant being none other than the wife of the deceased and staying under the same roof, was the last person the deceased was seen with. However, such companionship of the deceased and the appellant, by itself, does not mean that a presumption of guilt of the appellant is to be drawn. The Trial Court and the High Court have proceeded on the assumption that Section 106 of the Indian Evidence Act directly operates against the appellant. In our view, such an approach has also not been free from error where it was omitted to be considered that Section 106 of the Indian Evidence Act does not absolve the prosecution of its primary burden. This Court has explained the principle in *Sawal Das (supra)* in the following:-

"10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused."

39. Mere non-explanation on the part of the accused alone would not be sufficient to establish the charge against the accused. Absence of explanation would only provide an additional link to complete the chain of circumstances. In the absence of proof of other circumstances, the only circumstance of last seen together cannot be made the basis of the conviction.

40. The Hon'ble Apex Court in **Anjan Kumar Sarma v. State of Assam [(2017) 14 SCC 369]**, held as follows:

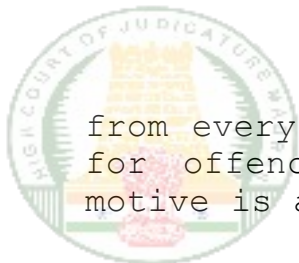
"23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. ..."



41. That apart, both P.W.6 and P.W.15 are close friends of the deceased and also belong to his religion. Admittedly, there is a long standing enmity between the two religions in that area and frequent law and order problem was created. In that circumstance, they are interested witnesses. Even though the occurrence has taken place on 21.12.2015, both of them did not disclose the same to anybody. Only after a week, they appeared before the respondent police and informed the police about the story and there is no plausible explanation for not exposing the same to anybody immediately after the occurrence. It also creates a strong suspicion regarding the truthfulness of their testimony. Hence, it is not safe to rely upon their evidence to convict the accused.

42. The next circumstance is recovery of the weapon and bloodstained dresses of the appellants based on their confession under Section 27 of the Evidence Act. It is the evidence of P.W.39, investigating officer, that on 29.12.2015. Eight days after the occurrence, A1 was called to the police station for enquiry, where he said to have given a statement, based on that statement, he was arrested and after arrest, he has voluntarily given a confession in the presence of P.W.28, Village Administrative Officer, and based on the admissible portion of confession, the material objects were recovered. Thereafter, on his confession, A2 was arrested. This story is highly unbelievable. There is no reason why that accused has appeared before the police and admitted his guilt. That apart, the alleged statement, said to have been given by A1 also was not marked before this Court. It creates a strong suspicion regarding arrest of A1. That apart P.W.28, Village Administrative Officer, witness to the confession and recovery stated that police recorded confession statements of five persons in the police station on that day. It is also his evidence that at about 7.30 a.m., the Inspector of Police asked him to come to police station, as he wants to examine an accused. It is not known, when there are independent witnesses available in that area, why he asked P.W.28, who is said to be residing far away from the police station to be a witness for arrest and confession of the accused. That apart another Village Menial, accompanied P.W.28 and present along with him, was not examined, which creates doubt on the arrest and recovery.

43. Another circumstance relied on by the prosecution is motive. Admittedly, the motive is against A5 alone, as he was attacked by some unknown persons, suspecting that the deceased was master mind behind it. Absolutely, there is no material available to show that the appellants have any motive against the deceased except saying that the appellants and A5 belongs to some political outfit. It is the case of the prosecution that, totally 8 accused hatched conspiracy and in furtherance of the same A1 and A2 attacked the deceased and caused his death. Now, the trial Court disbelieved that story and acquitted all the accused including the accused/appellant



from every charge, and the appellants/A1 and A2 were convicted only for offence under Section 302 I.P.C. In the said circumstance, motive is also not proved against the accused.

44.Considering all those circumstances, we are of the considered view that, the prosecution has failed to prove the guilt of the appellants beyond reasonable doubt and the Court below without considering those aspects has convicted the appellants believing the last seen together theory, which alone is not sufficient for convicting the appellants/A1 and A2. Hence, the conviction and sentence imposed by the trial Court on the appellants are liable to be set aside and the appellants are entitled for acquittal.

45.In the result, Crl.A.(MD) No.450 of 2018 is allowed and the conviction and sentence imposed on the appellants/A1 & A2, by the learned IV Additional Sessions Judge, Tirunelveli, in S.C.No.592 of 2016, by the judgment dated 24.09.2018, are hereby set aside. The appellants/A1 & A2 are acquitted of the charges levelled against them. Fine amounts, if any, paid by the appellants/A1 & A2 shall be refunded to them. Bail bonds executed by them also shall stand cancelled.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

sj

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. The IV Additional and Sessions Judge,
Tirunelveli.
- 2.The Judicial Magistrate,
Valliyoar.
- 3.The Inspector of Police,
Earvadi Police Station (Circle),
Thirukurunkudi Police Station,
Tirunelveli District.



4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to

The Section Officer, (2C)
Criminal Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.K.PRABHU, Advocate (SR-29885[F] dated 22/09/2021)

Criminal Appeal No.(MD) No.450 of 2018
21.09.2021

ES (CO)
KB(12.10.2021) 16P 8C