



Crl.A.(MD)Nos.95 and 177 of 2020

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DATED : 10.10.2022

CORAM :

THE HONOURABLE MRS.JUSTICE J. NISHA BANU

and

THE HONOURABLE MR.JUSTICE N. ANAND VENKATESH

Crl.A.(MD)Nos.95 and 177 of 2020

Yuvaraj

... Appellant / Accused No.1
in Crl.A(MD)No.95 of 2020

Suresh

... Appellant/ Accused No.2
in Crl.A(MD)No.177 of 2020

Vs.

State Represented by
The Inspector of Police,
Thuraiyur Police Station,
Tiruchirappalli District.
(Crime No.177 of 2014)

... Respondent/Complainant
in both cases

COMMON PRAYER: Criminal Appeals filed under Section 374 of
Criminal Procedure Code, 1973, against the judgment and order dated



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30.01.2020 in S.C.No.6 of 2016 on the file of the learned III-Additional District and Sessions Judge, Tiruchirappalli District.

For Appellants : Mr.J.Anand Kumar
in Crl.A(MD)No.60 of 2020 for A1

Mr.P.Andiraj
for Mr.T.J.Ebenezer Charles
in Crl.A(MD)No.177 of 2020

For Respondent : Mr.A.Thiruvadi Kumar
Additional Public Prosecutor
(In both cases)

COMMON JUDGMENT

J.NISHA BANU, J.
and
N.ANAND VENKATESH, J.

These Criminal Appeals have been filed against the order and judgment of the learned III-Additional District and Sessions Judge, Tiruchirappalli District, made in S.C.No.6 of 2016, dated 30.01.2020 convicting and sentencing the appellants in the following manner:



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<i>Rank of the Accused</i>	<i>Conviction for offence under Section</i>	<i>Sentence/Punishment</i>
A1 & A2	Section 364 IPC	5 years Rigorous Imprisonment and fine of Rs.500/- each, in default, to undergo 6 months Rigorous Imprisonment.
	Section 394 IPC	5 years Rigorous Imprisonment and fine of Rs.500/- each, in default, to undergo 6 months Rigorous Imprisonment.
	Section 302 IPC	Life Imprisonment and fine of Rs. 1000/- each, in default, to undergo 6 months Rigorous Imprisonment.
	Section 201 IPC	3 years Rigorous Imprisonment and fine of Rs.500/- each, in default, to undergo 6 months Rigorous Imprisonment.

All the above sentences were ordered to run concurrently.

2. The case of the prosecution is that the deceased was owning a car (M.O.7) and he used to be a taxi driver. One Senthil Kumar is said to have made a phone call to P.W-2 on 04.07.2014 at about 7.00 p.m. and he was asked to send the car. P.W-2 is said to have informed that he is not in a position to immediately engage a driver and hence, gave the phone number of the deceased and asked the caller to get in touch with the deceased and engage his services. Accordingly, the



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deceased is said to have been approached by the accused persons and he was asked to wait near Ammapatti cross road. The accused persons got into the car and the car was going towards Chinnasalempatti. The accused persons asked the deceased to stop the car to attend nature's call. When the car was stopped, the accused persons, with an intention to steal away the belongings of the deceased, used a towel (M.O.15) and a rope (M.O.8) and strangled the deceased, who died inside the car. Thereafter, the deceased was taken in the same car and the dead body of the deceased was concealed in a bridge situated at Kannanur-Marukkalampatti road and thereafter, the accused persons took away the mobile phone of the deceased, cash of a sum of Rs.3000/- and also the car of the deceased.

3. A complaint was given by P.W-1, who is the wife of the deceased, on 05.07.2014 and based on the same, a man missing FIR was registered in Crime No.177 of 2014, marked as Ex.P10.

4. The investigation was initially taken up by P.W-23 and thereafter, it was continued by P.W-26 and a final report was laid before



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the learned Judicial Magistrate, Thuraiyur. The copies were served on the accused persons under Section 207 Cr.P.C. and the case was committed to the Principal District and Sessions Court, Tiruchirappalli under Section 209 Cr.P.C. The case was made over to the Court below and charges were framed against the accused persons for offence under Sections 364, 394, 302 and 201 of IPC.

5. The prosecution examined P.W-1 to P.W-26 and marked Exhibits P1 to P26 and identified and marked M.O.1 to M.O.15. The incriminating material that emerged during the trial was put to the accused persons while questioning under Section 313 (1) (b) Cr.P.C. and the same was denied as false.

6. The Trial Court, on considering the facts and circumstances of the case and on appreciation of oral and documentary evidence, gave a finding that the prosecution has proved the case beyond reasonable doubts and thereby, convicted and sentenced the accused persons in the manner stated supra. Aggrieved by the same, these Criminal Appeals have been filed before this Court.



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7. Heard Mr.J.Anand Kumar, learned counsel appearing for A1, Mr.P.Andiraj for Mr.T.J.Ebenezer Charles, learned counsel appearing for A2 and Mr.A.Thiruvadi Kumar, learned Additional Public Prosecutor appearing for the respondent in both cases.

8. This Court has carefully considered the submissions made on either side and the materials available on record.

9. This case is sought to be proved by the prosecution through circumstantial evidence. The circumstances relied upon by the prosecution are:

- a) The death of the deceased was homicidal.
- b) Accused persons hired the vehicle of the deceased and the same is clear from the evidence of P.W-2.
- c) Last seen theory spoken by P.W-13, P.W-14 and P.W-15.
- d) Recovery from A1 and A2 spoken by P.W-9, P.W-10 and P.W-11 along with the evidence of P.W-23.
- e) The call details marked as Ex.P26 and spoken by P.W-24 and P.W-25.



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- f) Evidence of P.W-7 for purchase of M.O.8-rope and identification of A2 in the witness box and
- g) Non-explanation of the incriminating circumstance viz. the recovery of car from A2 based on his confession and the presumption under Section 114 (a) of the Indian Evidence Act.

10. In a case of circumstantial evidence, every circumstance must be fully proved and the circumstances must form a chain of evidence so complete as to exclude every hypothesis other than the guilt of the accused. This Court has to test as to whether the prosecution was able to fulfil this requirement to justify the conviction and sentence imposed against the accused persons.

11. Insofar as the death of the deceased is concerned, the evidence of the postmortem doctor, who was examined as P.W-19 and through whom the postmortem report was marked as Ex.P9, shows that the deceased died of asphyxia due to ligature strangulation. It is therefore clear that this is a case of homicidal death.



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12. The next circumstance that is relied upon by the prosecution is the evidence of P.W-2. This witness was contacted by one Senthil Kumar from a particular phone number and was asked to hire his car. Since P.W-2 was not able to hire the car, he is said to have suggested the name of the deceased. Thereafter, the accused persons engaged the services of the deceased. The other portion of the evidence of P.W-2 which was relied upon by the prosecution is that he received a call from the deceased that he has reached Kalipatti within 5-10 minutes. The phone calls received by P.W-2 has not been established by the prosecution and the evidence of this witness does not in anyway help in fixing the culpability of A1 and A2 and this witness could not have spoken as to who hired the services of the deceased on the fateful day.

13. Insofar as the last seen theory is concerned, the prosecution has mainly relied upon the evidence of P.W-13 to P.W-15. P.W-13 states in his evidence that he was standing near Ammapatti Mariamman temple on 04.07.2014 at about 8.00 p.m. and he saw the deceased coming in the car (M.O.7) and he saw two persons sitting at the



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back seat. Admittedly, P.W-13 does not know the accused persons and the persons whom he saw on 04.07.2014, were seen for the first time in the Court on 16.12.2016 and it is totally unbelievable that he could remember the faces of two persons whom he had seen during the night time. That is the reason why even the Trial Court, at paragraph No.11 of the judgment, gave a finding that the evidence of P.W-13 is totally unbelievable.

14. Insofar as the evidence of P.W-14 is concerned, he states that he saw the car parked near the bridge and two persons standing near the car. The evidence of this witness also does not help the prosecution in fixing A1 and A2.

15. The next evidence is that of P.W-15 who speaks about the car driven by the deceased on 04.07.2014 at about 8.00 p.m. and he makes it very clear that he did not notice the two persons, who were sitting in the back seat of the car. It is therefore evident that the evidence of P.W-13 to P.W-15 does not really help the prosecution to establish the last seen theory.



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16. The next circumstance that has been relied upon by the prosecution is the call details record (CDR) marked as Ex.P26, by examining P.W-24 and P.W-25. It is quite unfortunate that these two witnesses, who are police officers, did not even care to take the statement of the nodal agency and the CDR, which was marked as Ex.P26 is inadmissible in evidence since Section 65B of the Evidence Act was not complied with. The oral evidence of P.W-24 and P.W-25 cannot be a substitute to the certificate mandated under Section 65B(4) of the Evidence Act. The judgment of the Apex Court in ***Ravinder Singh @ Kaku v. State of Punjab*** reported in (2022) 7 SCC 581: 2022 Live Law(SC) 461 makes this position very clear. The Court below erroneously relied upon the CDR details spoken by P.W- 24 and P.W-25.

17. Insofar as the evidence of P.W-7 relied upon by the prosecution for the purchase of rope (M.O.8), this witness states that two boys purchased the rope on 04.07.2014 and even without a test identification parade, this witness identified the accused when he was examined on 16.11.2016, which is totally unnatural. Even the Trial Court



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did not believe the evidence of P.W-7 and the same is clear from the finding rendered at paragraph No.10 of the judgment.

18. The learned Additional Public Prosecutor was vehemently supporting the case of the prosecution based on the recovery of the car (M.O.7) while arresting A2 in the presence of P.W-10. It was submitted that since A2 was not able to give any explanation as to how the car of the deceased was found in his possession, the learned Additional Public Prosecutor pressed into operation Section 114(a) of the Evidence Act. The learned Additional Public Prosecutor also relied upon the judgment of the Apex Court in *Limbaji and Others v. State of Maharashtra* reported in (2001) 10 SCC 340. It was further contended that the confession and recovery from A2 can be put against A1 also by virtue of Section 30 of the Evidence Act.

19. This is a very strange case where the mobile phone and the car of the deceased was identified by P.W-8, who belongs to that village. The natural course of conduct would be to identify the same through P.W-1, who is none other than the wife of the deceased. A2 is



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said to have been arrested on 05.07.2014 at about 06.30 p.m. Based on his confession, Ex.P4 and Ex.P5 Mahazar were prepared and M.O.5, M.O.6. M.O.7, M.O.8, M.O.10, M.O.11 and M.O.15 were recovered in the presence of P.W-9 and P.W-10. P.W-9 turned hostile and P.W-10 talks about the recovery of the material objects. The main recovery that was focused by the learned Additional Public Prosecutor was the recovery of the car (M.O.7) from A2.

20. Section 114 of the Evidence Act talks about the circumstances where the Court may presume the existence of certain facts. Illustration (a) talks about a man in possession of the stolen goods soon after the theft and the Court may presume that he is either the thief or he has received the stolen goods, unless he can account for his possession. Section 4 of the Evidence Act talks about the effect of the term “may presume”. Wherever the Act provides that the Court may presume a fact, the Court can either regard such fact as proved, unless and until it is disproved or the Court can call for the proof of it. Hence, it is clear that it is not mandatory for the Court to straight away act on the presumption and the Court is expected to take into consideration the



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common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

21. In the present case, strangely the identification of the car is made by a rank third party P.W-8, instead of the wife of the deceased, P.W-1. This is an unnatural conduct. That apart, the recovery of the car *per se* cannot be put against A2 when all the other links in the chain of circumstances remains unproved. Hence, this Court has to necessarily look for further proof apart from the recovery and such a proof is not available in the present case. The judgment of the Apex Court relied upon by the learned Additional Public Prosecutor will not have any application to the facts of the present case, since in that case, the Apex Court took into consideration the other circumstances proved by the prosecution and hence, applied the presumption under Section 114(a) of the Evidence Act. In view of the same, the recovery of the car by itself cannot be a ground to convict the accused persons.

22. Insofar as the recovery from A1 is concerned, he was arrested on 07.07.2014 at about 05.30 p.m. and M.O.9 and M.O.12 were



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recovered under Ex.P6 Mahazar. The recovery itself is doubtful since P.W-8 had identified the mobile phone and the car between 10.00 a.m. and 10.30 a.m. on 07.07.2014 and whereas Ex.P6 was prepared only at 05.30 p.m. on 07.07.2014. The evidence of the witnesses and the relevant documents marked shows that totally 4 mobile phones were recovered (two belonging to the deceased and the balance two allegedly belonging to each of the accused persons). Strangely, only two mobile phones belonging to the deceased were identified and marked as material objects and the phones belonging to the accused persons were not brought on record. If really the accused persons had made phone calls before picking up the deceased, it is not clear as to why their mobile phones were not identified and marked as material objects. There is no explanation by the Investigating officer on this aspect.

23. There is absolutely no evidence against A1 and the so called confession of A2 cannot be put against A1, more particularly, when the prosecution did not prove the case beyond reasonable doubts even as against A2.



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24. In the present case, the accused persons are not known to any of the witnesses and strangely, the prosecution did not conduct Test Identification Parade. Similarly, the Investigation Officer could have easily lifted the fingerprints from the car (M.O.7) to prove the involvement of A1 and A2 in the crime. This was also not done in the present case. The Court below, after rendering adverse findings on certain vital issues, relied upon the confession of the accused to sustain the conviction and sentence against them.

25. This is yet another case where a murder for gain had taken place and the prosecution has goofed up the investigation. The prosecution has not established each link in the chain of circumstances and the chain gets snapped at various places. In view of the same, the benefit of doubt has to be given to the accused persons and they must be acquitted from all the charges.

26. In the result, the order and judgment of the learned III-Additional District and Sessions Judge, Tiruchirappalli, made in S.C.No.6 of 2016, dated 30.01.2020 is hereby set aside and the accused



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persons are acquitted from all charges. The accused persons shall be released from the jail forthwith, if their custody is not required in any other case. Fine amount, if any, paid by the accused persons shall be refunded to them. These Criminal Appeals accordingly stand allowed.

[J.N.B., J.] [N.A.V., J.]
10.10.2022

Index : Yes/No
Internet : Yes
PJJ

To

1. The III-Additional District and Sessions Judge,
Tiruchirappalli District.

2. The Inspector of Police,
Thuraiyur Police Station,
Tiruchirappalli District.

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



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PJL

**Judgment made in
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