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Crl.A.No.111 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2023

CORAM

**THE HONOURABLE MR.JUSTICE M.SUNDAR
AND
THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR**

Orders Reserved On 05.04.2023	Orders Pronounced On 12.04.2023
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CRL.A.No.111 of 2019

Murugan

... Appellant

Vs.

State Rep. by the Inspector of Police,
Jolarpet Police Station,
Vellore District.
Crime No.206 of 2016

... Respondent

PRAYER: Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code, to call for the entire records in connection with S.C.No.66 of 2017 on the file of the learned Additional District and Sessions Judge, Thiruppathur, Vellore District and set aside the judgment dated 12.02.2019.



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For Appellant : Mr.V.Paarthiban
for Mr.E.Kannadasan
For Respondent : Mr.E.Raj Thilak
Additional Public Prosecutor

JUDGMENT

[Judgment of the Court made by M.Nirmal Kumar, J.]

The appellant/accused in S.C.No.66 of 2017 on the file of the learned III Additional District and Sessions Judge, Tirupattur was convicted by judgment dated 12.02.2019 and sentenced to undergo one month simple imprisonment for the offence under Section 341 IPC, to undergo imprisonment for life for the offence under Section 302 IPC and to pay a fine of Rs.1000/-, in default to undergo three months simple imprisonment, to undergo seven years rigorous imprisonment for the offence under Section 397 IPC and to undergo three years rigorous imprisonment for the offence under Section 201 read with 302 IPC and to pay a fine of Rs.500/-, in default to undergo three months simple imprisonment. Against which, the present appeal is filed.

2.Before the Trial Court, on the side of the prosecution P.W.1 to



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P.W.13 were examined, Ex.P1 to Ex.P16 and M.O.1 to M.O.5 were marked.

On the side of the defence, D.W.1 was examined, Ex.D1 and Ex.D2 were marked.

3.The case of the prosecution is that the appellant is a resident of Kudiyanakuppam, Jolarpettai and his friend minor Sasikumar is a resident of Boyar Vattam, T.Veerapalli, Natrampalli Taluk. The appellant and his minor friend were in the habit of committing theft of two wheelers. On 01.04.2016 at about 6.30 p.m. Near Kudiyanakuppam lake and Elango's Guava Orchard, the appellant and the said minor Sasikumar in furtherance of common intention of committing the offence had wrongfully restrained the minor Sathyamoorthy, who was returning home in a TVS XL Super motorcycle bearing registration No.WB-E-1188 after attending his School Annual Day function rehearsal, the appellant and minor Sasikumar picked up a quarrel with him. The said minor Sasikumar took away the two wheeler key and forced the said minor Sathyamoorthy to hand over the two wheeler to them. Thereafter, quarrel picked up the said minor Sasikumar hit the minor Sathyamoorthy on his forehead with a wooden log/M.O.5, the



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appellant abetted and joined the attack. The said minor Sathyamoorthy swooned and fell down, sensing minor Sathyamoorthy dead, he was dragged and thrown in the nearby lake. The appellant and the said minor Sasikumar taken the vehicle and the same was hidden in the house of the appellant, sensing they would be caught, they fled from the Villages. P.W.1/father of the said minor Sathyamoorthy finding that his son had not returned home even after 6.30 p.m., enquired with the School and he was informed that his son had left the School. Thereafter, he enquired for his son and made searches in the nearby places including with P.W.3 (a relative of father of deceased). Later P.W.3 on coming to know about the boy missing called P.W.10/his friend, informed that both had seen the appellant, minor Sasikumar and minor Sathyamoorthy near Elango Guava Orchard on that day at about 5.00 p.m. who were quarreling, which fact was informed to P.W.1 and others. Thereafter, they made a search near that area and unable to find anything in the dark, P.W.1 informed the Fire Service but they were also unable to find anything in the dark. On the next day i.e., 02.04.2016 between 6.00 a.m. and 6.30 a.m. the Fire Service Personnels found the drowned body of the deceased minor Sathyamoorthy and lifted the dead



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body to the floor.

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4.P.W.1 lodged a complaint/Ex.P1, P.W.12/Sub-Inspector of Police registered FIR/Ex.P10 and informed to his superiors. P.W.13/Inspector of Police on getting the information visited the scene of occurrence at 8.00 a.m., conducted inquest, sent the body for Postmortem, prepared observation mahazar and rough sketch and examined the witnesses. The Juvenile Offender minor Sasikumar sensing fear of being caught approached P.W.6/Village Administrative Officer on the next day i.e., 03.04.2016 at about 8.00 a.m., gave a voluntary confession narrating the sequence of events, that he along with the appellant assaulted the said minor Sathyamoorthy and thrown away the body into the lake and thereafter, the appellant taking away the two wheeler/M.O.1. P.W.6 recorded the confession of the juvenile offender and produced him to P.W.13, before whom again the said minor Sasikumar gave a confession which was recorded and on his confession, wooden log/M.O.5 recovered. Further, on getting information that the appellant was present near the Railway gate, P.W.13 along with P.W.6 went there and arrested the appellant, who gave a



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confession/Ex.P4 and on his confession, TVS XL Super/M.O1 was recovered, coming to know that P.W.3 and P.W.10, the witnesses who last seen the appellant, deceased and the other accused together were willing to give statement under Section 164 Cr.P.C., steps taken to record their statements. Though initially P.W.3 was also willing but later he refused to give statement under Section 164 Cr.P.C. P.W.7/Judicial Magistrate No.III, Tirupattur recorded the statement of P.W.10 under Section 164 Cr.P.C. P.W.4/Postmortem Doctor gave the Postmortem Certificate/Ex.P2 and final opinion stating that the death of the deceased was due to his head injury. P.W.8 is the Doctor who examined the hyoid bone and gave a report that no fracture was found. P.W.9/Scientific Officer of the Forensic Department gave Viscera report that no poisonous substances found. Thereafter, on conclusion of investigation charge sheet filed. In this case, D.W.1/Vice Principal of Universal School in which the deceased studied was examined and through him, Ex.D1/attendance sheet and Ex.D2/list of students who participated in the School Annual Day function-2016 were marked. The Trial Court on the evidence of the witnesses and the documents and material objects, convicted the appellant as stated above.



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5.The learned counsel for the appellant submitted that the Trial Court convicted the appellant based on the uncorroborated testimony evidence of P.W.3 and P.W.10, the evidence of P.W.3 and P.W.10 are self contradictory as well as contradictory with each other. The evidence of P.W.10 is a inconsistent one. P.W.10 stated that he saw the appellant along with the deceased and the juvenile accused on 01.04.2016 at about 6.30 p.m., at that time they were quarreling. He would submit that the Trial Court failed to consider that there have been material contradictions between the evidence of P.W.1, P.W.2 and P.W.10 as regards the availability of minor Sasikumar/juvenile accused as well as the appellant in their respective house on 01.04.2016. He further submit that P.W.11/Fire Service Officer stated that he went to the scene of occurrence on the request of P.W.12/Sub-Inspector of Police, on the other hand, P.W.12 state that he had not made any request to P.W.11 prior to registration of FIR. In this case FIR was registered on 02.04.2016 at about 7.15 a.m., whereas P.W.11 submits that on the night of 01.04.2016, he along with his team made a search but due to



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darkness nothing could be identified, thereafter on the next day early morning at about 6.00 a.m. again went to the scene of occurrence and found the dead body of minor Sathyamoorthy in the lake. He would further submit that as regards the arrest and recovery from the appellant, there are vital contradictions in the evidence of P.W.6 and P.W.13. Further, the case has been projected as though the appellant and the juvenile accused Sasikumar were habitual offenders involved in the theft of vehicles but there is no evidence in support of the same and the appellant has no bad antecedents. He further submitted that the Trial Court failed to look into the fact that there is no motive attributed for the alleged occurrence. This is a case of circumstantial evidence and the Trial Court convicted the appellant on the last seen theory on the evidence of P.W.3 and P.W.10, whose evidence are contradictory and unbelievable. P.W.3 admits that his Father's younger brother is related to P.W.1. Further, the evidence of P.W.10 is contrary to his prior statements. Further, the recovery of M.O.1 is highly doubtful. The appellant had been projected as though he absconded but the evidence is contrary to the same. Further, case proceeds based on the confession of the co-accused, the juvenile who is said to have given a confession to P.W.6 but



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no such confession produced and marked in this case. The alleged confession admittedly recorded on 03.04.2016 much after registration of the case. He further submitted that as per Section 30 of the Evidence Act, the confession of co-accused can be considered only in case of the confessor being tried jointly for the same offence in the same trial. In this case, admittedly the confessor minor Sasikumar is a juvenile and he was tried separately. He further submitted that in case of circumstantial evidence the Apex Court had time and again held that the facts must be so established and should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable or any other hypothesis except that the accused is guilty and the circumstantial evidence should be of a conclusive nature and events should be so interconnected leading to resistible inference that it is the accused who had committed the offence. In this case links are not so connected and the Trial Court on a wrong appreciation of evidence had convicted the appellant. In support of his contention, the learned counsel relied upon the decision of the Apex Court in the case of *Satye Singh and another vs. State of Uttarakhand* reported in *2022 Livelaw SC 169*.



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6.Per contra, the learned Additional Public Prosecutor submitted that in this case a minor who is aged about 12 years studying 7th Standard was murdered for gain by the appellant and the juvenile accused. On 01.04.2016, minor Sathyamoorthy was returning from his School after witnessing the School Annual Day practice and on his way back, near Elango's Guava Orchard the juvenile accused a neighbour wrongfully restrained the said minor Sathyamoorthy riding a TVS XL Super, snatched the two wheeler's key and picked up a quarrel, when Sathyamoorthy showed resistance, the juvenile accused took a wooden log and hit on the head of the deceased. The appellant joined the attack. The said minor Sathyamoorthy swooned to the floor, finding he is dead, the appellant and the juvenile disposed of the dead body by throwing it in the lake, thereafter they took the vehicle and fled from the place of occurrence. He would submit that P.W.3 and P.W.10 at that point of time passed through the Orchard found the appellant, juvenile accused and the deceased together quarreling, thinking that it is a friendly quarrel they have not questioned them and proceeded further. P.W.1, father of the deceased finding that his



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son had not returned home even after 6.30 p.m. enquired the School and found that his son already left the School. Thereafter, P.W.1 searched for his son and informed relatives. P.W.3's father's younger brother who is known to P.W.1 was also informed about his son not returning home. At that time, P.W.3 recollected seeing P.W.1's son quarreling with the appellant and the other accused. Immediately, P.W.3 and P.W.10 informed P.W.1 about the same and thereafter, they made a search near the place of quarrel i.e., Elango's Guava Orchard. P.W.1 immediately called the Fire Service, P.W.11/Fire Station Officer went to the place of occurrence along with his team, since it was dark nothing could be found and thereafter, on the next day morning at about 6.00 a.m. they found the dead body of minor Sathyamoorthy in the lake which was lifted up to the floor. At that time, there was abrasions found in cheek, eyelids, lips and on the face of minor Sathyamoorthy, hence P.W.1 lodged a complaint/Ex.P1 with P.W.12.

7.He further submitted that P.W.12 registered FIR/Ex.P10 and informed his superior P.W.13/Investigating Officer. P.W.13 reached the scene of occurrence, prepared observation mahazar and rough sketch in the



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presence of P.W.5, enquired the witnesses, conducted inquest and sent the body for postmortem. P.W.4/Postmortem Doctor after autopsy found that the deceased had sustained fracture in the skull and gave a report that the death was due to head injury. The juvenile accused sensing fear of getting caught appeared before P.W.6/Village Administrative Officer, gave a confession, narrated the sequence of events and involvement of the appellant in the commission of murder of deceased. P.W.6 produced the juvenile accused to P.W.13 who recorded the confession and recovered the wooden log/M.O.5. P.W.13 got information about the appellant, that he was present near the Railway gate, P.W.13 along with P.W.6 went there, arrested the appellant, recorded his confession and on his confession, recovered TVS XL Super/M.O.1. In this case, P.W.10 had given statement under Section 164 Cr.P.C. in support of the prosecution. P.W.3 and P.W.10 are the witnesses who clearly spoken about seeing the appellant, juvenile accused and deceased together and quarreling near Guava Orchard. He would further submit that the arrest and confession had been proved by the evidence of P.W.6 and all other witnesses supported the case of the prosecution. It is proved that the appellant was last seen together with the



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deceased and the appellant had not given explanation for the same. Further, the appellant examined D.W.1/Vice Principal of the School, at that point of time, D.W.1 was incharge of L.K.G. students dance practice and hence, his evidence does not help the appellant in any manner. He further submitted that the Trial Court on the evidence of P.W.3 and P.W.10 on the last seen theory and the recovery made from the accused, M.O.1, had rightly convicted the appellant. In support of his contention, the learned Additional Public Prosecutor relied upon the decision of the Apex Court in the case of ***State of Rajasthan vs. Kashi Ram*** reported in ***(2006) 12 SCC 254***. He would further submit that in this case it is circumstantial evidence which has been clearly proved by the prosecution and each link have been well connected by the cogent evidence of the witnesses. Hence, he prayed for dismissal of the appeal.

8.Considering the submissions made and on perusal of the materials, it is seen that this is a case of circumstantial evidence. In this case, P.W.3 and P.W.10 are the witnesses, who last seen the appellant, juvenile accused and the deceased together on 01.04.2016 at about 6.30 p.m. P.W.1 and



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P.W.2 are the parents of the deceased minor Sathyamoorthy, their evidence is to the effect that on 01.04.2016 at about 4.30 p.m, after coming back from the School, the deceased took TVS XL Super bearing registration No.WB-E-1188 to the School to witness the rehearsal of the School Annual Day programme. Thereafter, he had not returned home till 10.00 p.m. and his parents started making enquiry with his friends, relatives and neighbours. At that time, P.W.3 and P.W.10 who came to know about the same met P.W.1 and informed him they saw the appellant, juvenile accused and the deceased together near Guava Orchard at about 6.30 p.m. and they were in a quarrel, finding nothing unusual they proceeded. During investigation, the juvenile accused said to have appeared before P.W.6/Village Administrative Officer, gave a confession, thereafter he was taken to P.W.13 to whom again he gave confession and based on his confession, M.O.5/wooden log was recovered. In the confession, the juvenile accused narrated the sequence of events and the appellant restraining and attacking the deceased with wooden log and thereafter, disposing of the dead body into the lake. In this case, the confession of juvenile not produced and marked. After the confession of juvenile accused, the appellant was arrested near the



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Parumpettai Railway gate at about 11.45 a.m. on 03.04.2016. On his arrest and confession, M.O.1/TVS XL Super is said to have been recovered from the residence of the appellant. Thus, the Trial Court had proceeded based on the evidence of P.W.3 and P.W.10 on the principle of last seen theory.

9.The evidence of P.W.3 and P.W.10 are highly doubtful. In this case, both these witnesses were sponsored for recording statement under Section 164 Cr.P.C. P.W.3 appeared before the Magistrate, namely, P.W.7 on 06.05.2016 and on oath had stated that நான் சொல்ல விரும்பவில்லை, எனக்கு சம்பவத்தை பற்றி ஒன்றும் தெரியாது. Hence, no statement was recorded. P.W.10 appeared before P.W.7 on 28.04.2016 and his statement under Section 164 Cr.P.C has been marked as Ex.P7. On going through his statement, he gives a different version than that have been deposed by him before the Trial Court. In his statement under Section 164 Cr.P.C., P.W.10 not mentioned anything about he and P.W.3 present together on 01.04.2016 and witnessing the appellant, juvenile accused and the deceased together and quarreling. On the contrary, in his statement under 164 Cr.P.C., he states that while he was near the Orchard



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along with his friend Arunkumar, he saw Sasikumar/juvenile accused, Murugan/appellant and minor Sathyamoorthy/deceased were talking with each other, 15 minutes thereafter he saw minor Sasikumar and Murugan proceeding in the TVS XL Super vehicle but minor Sathyamoorthy was not found. Admittedly, in this case the said Arunkumar not examined as witness. Further, he states that at 9.00 p.m, when he went to the field to collect pumpkin, he saw P.W.1 and P.W.2, parents of minor Sathyamoorthy were coming in the opposite, when enquired they informed that their son not returned from the School, then he informed that he saw the appellant, juvenile accused and their son minor Sathyamoorthy together at 6.30 p.m. In his evidence, P.W.10 had given improvised and contradictory version as though P.W.10 and P.W.3 were together and saw Sathyamoorthy being threatened by the appellant and another accused. P.W.3 who refused to give 164 statement for the reason that he does not know anything about the accused but in the trial gives a contradictory statement. The presence of P.W.3 is not mentioned in the 164 Statement. Thus, the evidence of P.W.3 and P.W.10 are highly doubtful and does not inspire any confidence.



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10.P.W.6, the witness for the confession and recovery for both juvenile accused and the appellant. Apart from this, it is also projected as though the juvenile accused minor Sasikumar gave extra judicial confession to P.W.6. In this case neither the alleged extra judicial confession given to P.W.6 nor the confession given to P.W.13 leading to recovery under Section 27 of the Evidence Act, neither produced nor marked. For recovery of M.O.5/wooden log, seizure mahazar/Ex.P15 and Form 95/Ex.P16 alone marked, this would not satisfy the requirement of Section 27 recovery in recovering M.O.5. In the absence of confession, Ex.P15 and Ex.P16 are of no consequence. As regards recovery of M.O.1, Ex.P4 is the confession and Ex.P5 is the seizure mahazar. P.W.6 admits in his evidence that he had not verified the details and ownership of the vehicle. In this case, M.O.1 not identified by P.W.1 and P.W.2, mere recovery of the article, without any evidence connecting M.O.1 with the alleged crime committed by the accused is of no consequence hence, the discovery made in this case cannot be sustained.

11.As regards the abscondness of the appellant and the juvenile



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accused, P.W.2 admits the presence of juvenile accused as well as the appellant in their respective house and hence, no adverse inference can be drawn. In this case, FIR/Ex.P10 came to be registered on 02.04.2016 at about 7.15 a.m. and P.W.13/Investigating Officer admits that he on receipt of information visited the scene of occurrence, commenced the investigation at about 8.00 a.m, started collecting evidence and recorded statement of witnesses. P.W.6's evidence is that the juvenile accused voluntarily appeared before him and gave a confession on 03.04.2016 at about 8.00 a.m and projected as though an extra judicial confession given which is taken as yet another circumstances to convict the appellant. This cannot be so, the said confession not marked as an exhibit/document in this case. Further, investigation already commenced on 02.04.2016, it is admitted that P.W.6/Village Administrative Officer, is a stranger to the juvenile accused and there is no reason for the juvenile accused to place confidence with P.W.6 and to give such confession. Added to it, according to Section 30 of the Evidence Act, the confession of co-accused can be considered if the accused are jointly tried for the same offence. In this case, the appellant was not tried jointly with the juvenile accused. Further, P.W.13 admits that



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the case against the juvenile accused before the Juvenile Court got abated since he passed away even before commencement of trial. Thus there is no evidence, ocular, circumstantial or otherwise, which could establish the guilt of the accused.

12.The Hon'ble Apex Court in the case of ***Prakash vs. State of Karnataka*** reported in ***(2014) 12 SCC 133***, held as follows:

“51.It is true that the relevant circumstances should not be looked at in a disaggregated manner but collectively. Still, this does not absolve the prosecution from proving each relevant fact.

“6.In a case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypotheses and should be consistent with only the guilt of the accused.”

13.Further, the Hon'ble Apex Court in the case of ***Musheer Khan vs. State of Madhya Pradesh*** reported in ***(2010) 2 SCC 748***, held as follows:

55.Section 27 starts with the word “provided”.



Therefore, it is a proviso by way of an exception to Sections 25 and 26 of the Evidence Act. If the facts deposited under Section 27 are not voluntary, then it will not be admissible, and will be hit by Article 20(3) of the Constitution of India. (See *State of Bombay vs. Kathi Kalu Oghad* [AIR 1961 SC 1808])

56. The Privy Council in *Pulukuri Kotayya vs. King Emperor* [1947 PC 67] held that Section 27 of the Evidence Act is not artistically worded but it provides an exception to the prohibition imposed under the preceding sections. However, the extent of discovery admissible pursuant to the facts deposited by the accused depends only on the nature of the facts discovered to which the information precisely relates.

57. The limited nature of the admissibility of the facts discovered pursuant to the statement of the accused under Section 27 can be illustrated by the following example:

Suppose a person accused of murder deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, but as a result of such discovery no inference can be drawn against the accused, if there is no evidence connecting the knife with the crime alleged to have been committed by the accused.

58. So the objection of the defence counsel to the



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discovery made by the prosecution in this case cannot be sustained. But the discovery by itself does not help the prosecution to sustain the conviction and sentence imposed on A-4 and A-5 by the High Court.”

14.In this case, there is no chain of evidence so complete with all links intact for a proof beyond doubt conclusion and conviction. Thus, looking at the case from any angle, it is seen that the prosecution had failed to prove that the appellant had committed the offense beyond all reasonable doubt. Accordingly, the Criminal Appeal stands allowed and the appellant is acquitted from all the charges levelled against him.

(M.S.,J.) (M.N.K.,J.)
12.04.2023

Speaking Order/Non Speaking Order
Index : Yes/No
Neutral Citation: Yes/No
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M.SUNDAR, J.,
and
M.NIRMAL KUMAR, J.,

cse

To

- 1.The Inspector of Police,
Jolarpet Police Station,
Vellore District.
- 2.The III Additional District and Sessions Judge,
Thiruppathur.
- 3.The Public Prosecutor,
High Court, Madras.

Pre-delivery order made in

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12.04.2023