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Crl.A.No.616 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.03.2023

CORAM:

**THE HONOURABLE Mr.JUSTICE M.SUNDAR
and
THE HONOURABLE Mr.JUSTICE M.NIRMAL KUMAR**

**Crl.A.No.616 of 2022
and
Crl.M.P.No.8178 of 2022
in
Crl.A.No.616 of 2022**

Chinnamani (M-46)
S/o.Kandhan

... Appellant/Accused

-Vs-

1.The STATE rep. By its
The Inspector of Police
Vennandur Police Station
Namakkal
(Crime No.374/2016)

... Respondents/Complainant

PRAYER :

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, against the Judgment dated 04.01.2019 made in S.C.No.34 of 2017 on the file of the Sessions (Fast Track Mahila) Judge, Namakkal.



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For Appellant : Dr.S.Manoharan

For Respondent : Mr.E.Raj Thilak
Additional Public Prosecutor

JUDGMENT

[Judgment of the Court was made by **M.NIRMAL KUMAR, J.**]

Criminal Appeal No.616 of 2022 has been filed challenging the order of conviction and sentence passed by learned Sessions (Fast Track Mahila) Judge, Namakkal in S.C.No.34 of 2017 dated 04.01.2019.

2.The appellant is a single accused charged for offence under Section 302 IPC. After full fledged trial, Trial Court had convicted the appellant and sentenced him to undergo life imprisonment along with fine of Rs.2,000/-, in default of payment of fine, to undergo six months rigorous imprisonment, against which the present appeal has been preferred by the appellant.



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3. During the course of trial, P.W.1 to P.W.15 were examined and Exs.P.1 to P.16 and Material objects M.O.1 and M.O.2 series were marked on the side of the prosecution. On the side of the defence, no witnesses were examined and no documents were marked.

4. The gist of the case is that the appellant/accused is the husband of the deceased. The appellant/husband and the deceased/wife got married 11 years prior to the occurrence and out of wedlock, they have two girl children aged about 10 years and 7 years. The deceased was in the habit of going out of house without any reason unnecessarily during day as well as night hours which was questioned by the appellant and he suspected her fidelity. On 01.12.2016 when the appellant's wife went out of her house at about 9.00 P.M and returned back, she was questioned by the appellant/accused, however she did not care for him and again went out. Enraged over her activity, the appellant/accused decided to do away with his wife and on the night intervening between 01.12.2016 and 02.12.2016 at about 1.00 AM when the appellant's wife was sleeping on a cot, the appellant is said to have strangled her using nylon rope and thereby caused the death of his wife.



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5. On the complaint of P.W.1, who is the father of the deceased, a case came to be registered. On receipt of the complaint, P.W.15/Inspector of Police visited the scene of occurrence and prepared a rough sketch/Ex.P.14 in the presence of witnesses. Then he conducted inquest over the body of the deceased and thereafter, sent the body for postmortem. In the meanwhile, the Inspector of Police examined the witnesses viz., P.W.1/father of the deceased, P.W.2/mother of the deceased, P.W.3/brother of P.W.1, P.W.4 and P.W.5/uncle of the deceased and recorded their statements. All the witnesses had stated about the appellant's conduct of quarrelling with his wife frequently suspecting her fidelity. Further, P.W.1 to P.W.5 had seen the rope mark on the neck of the deceased Poongodi. P.W.7/Lakshmi, who is the sister-in-law of the accused had heard the quarrel between the accused and the deceased frequently. P.W.8 is a witness for the observation mahazar and P.W.9 is the VAO who recorded the confession statement of the accused. On the confession of the accused, M.O.1/nylon rope was recovered. P.W.10 is the photographer who took photographs of the body of deceased and the photographs were marked as M.O.2 series. P.W.11 is the doctor who conducted postmortem over the



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body of the deceased and he had confirmed that the death was due to strangulation and also about the presence of dark reddish ligature abrasion around the neck and contusion over right side of thyrohyoid muscle and further gave final opinion that “*The deceased would appear to have died of Asphyxia due to ligature strangulation*” as per Ex.P10. P.W.13 is the forensic expert and P.W.15 is the Investigating Officer who examined the witnesses and collected the documents. The Trial Court on conclusion of trial had convicted the appellant as stated above.

6.The primary contention of the learned counsel for the appellant is that the appellant being an illiterate and hailing from marginalized society has got no means to contest the case and no one came forward to support him. Further, he had no access to legal aid and therefore, the Trial Court appointed a legal aid counsel to defend the case on behalf of the appellant/accused. Through the Legal Aid Counsel appointed by the Trial Court, the appellant/accused filed a petition under Section 311 Cr.P.C., in Crl.M.P.No.531 of 2018 in S.C.No.34 of 2017 to recall PW1 to PW15, but the same was dismissed, thereafter, left it at that stage. The Trial Court proceeded with the case based on the chief examination of witnesses, which



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went unchallenged and, convicted the appellant/accused and imposed capital punishment of life sentence.

7.The learned counsel for the appellant further submitted that as per Section 137 of the Indian Evidence Act, 1872, evidence includes chief examination, cross examination and re-examination. In the instant case, chief examination of the witnesses alone recorded, the witnesses were not subjected to any cross examination and hence, it cannot be taken that evidence is completed and concluded. Awarding of capital punishment without full fledged trial would amount to violation of fundamental right. The learned counsel for the petitioner relied upon the decision of the Hon'ble Apex Court dated 24.02.2011 made in the case of ***Md. Sukur Ali v. State of Assam***, wherein the Hon'ble Apex Court referring to Articles 21 and 22(1) of the Constitution observed that depriving a person of his life or liberty should be fair. The learned counsel further relied upon the unreported decision of this Court dated 17.02.2017 made in ***Criminal Appeal No.14 of 2017*** wherein this Court had stressed the importance and purpose of cross examination by quoting the observation of the Hon'ble Supreme Court in the case of “***Kartar Singh Versus State of Punjab***



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reported in 1994 (3) SCC 569 and Jayendra Vishnu Thakur Versus

State of Maharashtra reported in 2009 (7) SCC 104” and reiterated the principle that it is an essential ingredient of reasonable, fair and just procedure to an accused who is to seek his liberation through the Court process that he should have effective legal assistance. Thus, in the light of the above, the learned counsel for the appellant prayed for setting aside the judgement of the Trial Court.

8.*Per contra*, the learned Additional Public Prosecutor fairly submitted that in the instant case, none of the witnesses have been cross examined. The learned Additional Public Prosecutor by referring to paragraph 7 of the Trial Court judgment submitted that earlier one Mr.R.Sivaraman, Advocate appeared for the accused but he did not cross examine the prosecution witnesses. Thereafter, one Mr.V.Balakrishnan, Advocate appeared for the accused and he also failed to cross examine the witnesses. In such situation, a Legal Aid Counsel by name M.Syed Kadar was appointed, who entered appearance on 16.08.2018 after closing of prosecution side evidence. The said Legal Aid Counsel filed a petition under Section 311 Cr.P.C to recall P.W.1 to P.W.15 and the said petition



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was dismissed by the Trial Court on 26.09.2018. Thereafter, the Trial Court gave sufficient time [3 months] for the Legal Aid Counsel to challenge the dismissal of the Section 311 Cr.P.C petition, however no such appeal was filed till 26.12.2018 and therefore, the Trial Court without waiting further, posted the case for judgment and judgment of conviction was rendered by the Trial Court on 04.01.2019.

9.He further submitted that as per Section 304 (1) Cr.P.C, in a trial before the Court of Sessions, if the accused is not represented by a pleader and where it appears to the Court that the accused has no sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expenses of the State. In this case, it had been done. The appellant/accused was given all opportunity and sufficient time to cross examine the witnesses, which was not utilized by him. Thereafter only the Trial Court pronounced judgment of conviction.

10.The apprehension of the learned Additional Public Prosecutor is that if the judgment of the Trial Court is set aside and if the appellant is let out on bail, the Trial cannot be conducted in a fair manner within a



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reasonable time. He would further submit that the appellant has been in prison from the date of his arrest and he had never been out of prison during the entire trial period.

11.The occurrence is of the year 2016 and the case is of the year 2017 and all the witnesses have been examined in the year 2017. Now if the petitioner is let out on bail, the Trial cannot be concluded expeditiously. On instructions, the learned Additional Public Prosecutor further submits that the Trial can be completed within a period of three months and the witnesses can be produced without delay and there will not be any delay on the part of the prosecution. If the appellant cooperates, the Trial can be completed within a short period.

12.Considering the submissions made by both sides and on perusal of the materials placed before this Court, this Court is of the view that as the judgment of the Trial Court came to be passed without completion of cross examination on the part of the appellant/accused, it amounts to denial of fundamental right of the appellant/accused who is denied for being defended effectively and properly. In the instant case, no doubt a Legal Aid



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Counsel was appointed but it was only in letter and not in spirit, the Legal Aid Counsel had not effectively defended the appellant/accused. The Constitutional Bench of the Hon'ble Apex Court in “**Menaka Gandhi Versus Union of India reported in AIR 1978 SC 597**” held that *'The procedure for depriving a person of his life or liberty to be fair, reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against the accused in the absence of a counsel'*. In this case, mere presence of counsel without any cross examination of witnesses would be of no avail. The reported judgment of the Hon'ble Apex Court in “**Kartar Singh Versus State of Punjab reported in 1994 3 SCC 569**” explained the purpose of cross examination in paragraph No.278 in the following words:

“278. Section 137 of the Evidence Act defines what cross- examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are :



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(1) to destroy or weaken the evidentiary value of the witness of his adversary;

(2) to elicit facts in favour of the cross- examining lawyer's client from the mouth of the witness of the adversary party;

(3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;

and the questions to be addressed in the course of cross- examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character.”

13.Thus, before convicting a person, the Courts have to be vigilant, cautious and get satisfied that the Constitutional guarantees and right of accused are provided in letter and spirit and not in words. More so, while awarding capital punishment. In this case, the appellant/accused has been denied just and fair trial. It is to be seen that the appellant/accused is in confinement during the entire trial period. Hence, it cannot be said that for the purpose of delay and to drag the case, cross examination of witnesses were not done. For the fault of the counsel, the appellant/accused cannot be



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punished and allowed to sufferance of the sentence.

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14. In the light of the above discussions, we are of the considered view that the judgment of the Trial Court dated 04.01.2019 made in S.C.No.34 of 2017 is liable to be set aside and accordingly set aside and the Criminal Appeal stands allowed with the following directions to the Trial Court:

(i) The Trial Court to proceed with the trial from the stage of cross examination. P.W.1 to P.W.15 are hereby recalled and cross examination of the witnesses shall be carried out without any delay preferably on day to day basis.

(ii) The concerned District Legal Services Authority has to appoint a senior advocate from the legal aid panel to effectively defend the appellant.

(iii) The Trial Court after giving sufficient opportunity shall conclude the Trial within a period of three months starting from 3rd April 2023 and in any event not later than July 2023.

(iv) All the rights of the appellant/accused are preserved.



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15.In view of the judgment made in the captioned Criminal Appeal, Criminal M.P.No.8178 of 2022 filed for suspension of sentence is hereby dismissed. No costs.

[M.S.J] [M.N.K.J]

06.03.2023

Speaking Order/Non-Speaking Order

Neutral Citation : Yes/No

Internet : Yes/No

Index : Yes/No

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Note : Issue order copy on 10.03.2023.

To

- 1.The Sessions (Fast Track Mahila) Judge,
Namakkal.
- 2.The Inspector of Police,
Vennandur Police Station,
Namakkal.
- 3.The Public Prosecutor,
High Court, Madras.



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4.The District Legal Services Authority,
Namakkal.

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