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Crl.A.No.63 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	16.04.2024
Pronounced on	05.07.2024

CORAM :

THE HONOURABLE MR. JUSTICE M.S. RAMESH
AND
THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Crl.A.No.63 of 2019

1.Kasi @ Kasi Viswanathan
2.Siva @ Sivasakthi ...Appellants/Accused 1 and 2

Vs.

State rep. by
The Inspector of Police,
Udhagamandalam G1 Town
West Police Station.
Crime No.390/2011 ...Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code to set aside the judgment dated 30.10.2018 made in S.C.No.10 of 2013 on the file of the learned Sessions Judge of Magalir Neethimandram, (FTMC), Udhagamandalam at Nilgiris.

For 1st Appellant : Mr.Gopala Krishna Lakshmana Raju,
Senior Counsel



Crl.A.No.63 of 2019

for Mr.R.Radha Pandiyan

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For 2nd Appellant : Mr.Iyyaparaj
for Mr.L.Jaivenkatesh

For Respondent : Mr.Babu Muthu Meeran,
Additional Public Prosecutor

JUDGMENT

M.S.RAMESH,J.

This Criminal Appeal has been filed by accused 1 and 2, challenging the conviction and sentence imposed upon them vide judgment dated 30.10.2018 in S.C.No.10 of 2013 on the file of the learned Sessions Judge of Magalir Neethimandram, (FTMC), Udthagamandalam at Nilgiris.

2. For the sake of convenience, the parties are hereinafter referred to as per their ranking before the trial Court.

3 (i) It is the case of the prosecution that the 1st deceased-Thasthagir [hereinafter referred to as 'D1'] was working as a room boy in 'One ness' cottage situated at St.Mary's Hill, Udthagamandalam and the 2nd deceased-Iyass [hereinafter referred to as 'D2'], was his friend; that A1-Kasi @ Kasi Viswanathan, was staying in the house of his relative one Kumar



Crl.A.No.63 of 2019

@Kaliyaperumal and was studying MCA in Annamalai University, Chidamabaram and A2-Siva @ Sivasakthi and other juveniles in conflict with law viz., Vimal @ Purusothaman and Prabu, are his friends; that one year before the occurrence, one Balaji, gave a SIM Card to A1 for handing it over to one Imrose [PW24], who was engaged to D1; that A1 developed love affair with the said Imrose; that D1 contacted A1 through mobile phone and threatened him not to send messages to Imrose, as they were engaged; that A1 confirmed the fact of engagement with Imrose, who had told A1 that she would marry only D1; that infuriated A1 and he decided to do away with D1, with the help of his friends viz., A2 and the juveniles in conflict with law.

(ii) It is the further case of the prosecution that A1 planned a tour to Ooty where D1 was working and the juvenile in conflict with law Vimal @ Purusothaman, arranged a Tavera car bearing Regn.No.TN31 AD 5384; that A1 and juvenile in conflict with law Vimal @ Purusothaman and Prabhu, along with driver one Sathish [Pw3] went to Salem from Vadalur; that A2 joined them at Salem; that they all reached Ooty on 04.09.2011 at 7.00 a.m.;



Crl.A.No.63 of 2019

and that A1 contacted D1 and D1 arranged for the stay of accused at the said One ness Cottage where he worked.

(iii) According to the prosecution, on 05.09.2011, all the accused went for sight seeing with D1; that on return to cottage, D2 also came there and joined them; that in the meantime, A1 brought wooden reapers from the terrace of the cottage and hid it inside the cottage; that when D1 and D2 returned to cottage with a tiffen parcel, they all had tiffen and also consumed liquor; that when D1 was in the bedroom and D2 was in the hall of the cottage, at about 9.00 p.m., A1 assaulted D1 with a wooden reaper; that when D2 came there and questioned, A2 attacked D2 with another wooden reaper; that the juvenile in conflict with law Vimal @ Purusothaman, took the wooden reaper from A1 and pressed it over the neck of D1; that the other juvenile in conflict with law, took the wooden reaper from A2 and pressed it over D2; and that both deceased died due to the injuries sustained by them.

(iv) On 06.09.2011 at 9.00 a.m when PW1-Mahendran, who is a guide in Ooty and also runs the 'One ness' cottage on lease, visited the



Crl.A.No.63 of 2019

cottage, he saw the dead body of D2 in the front room and the dead body of D1 inside another room and he lodged a complaint [Ex.P1] to the respondent police at 9.15 a.m. PW33, the Sub-Inspector of Police, received the complaint and registered the FIR [Ex.P43] in Crime No.390 of 2011 for the offence under Section 302 of the IPC.

(v) PW36, the Inspector of Police, took up the investigation on the same day i.e., on 06.09.2011 and at 10.30 a.m., visited the scene of occurrence along with the sniffer dog and photographer [PW33]; he prepared the Observation Mahazar [Ex.P7] and Rough Sketch [Ex.P49] in presence of PW12 and one Shajahan at 3.00 p.m.; from the occurrence room No.1, he seized the blood stained pillows (2 Nos.) and blanket, cotton thread dipped in blood, a black-coloured purse, red-coloured Sony Ericson Cell Phone, cotton thread without bloodstain and a silver-coloured Dunlex-quartz wrist watch, which are marked as M.O.8 to M.O.15, under seizure mahazar [Ex.P9] at 3.30 p.m.; thereafter, from the occurrence room No.2, he seized the blood stained pillows (2 Nos.) and bed spread, cotton thread dipped in



Crl.A.No.63 of 2019

blood, thread without bloodstain, silver-coloured ESPRIT watch with black-coloured strap, black-coloured cell phone cover with black and silver coloured cell phone [Ipod (32GB)], a black-coloured purse, a lock with key with name 'TRI CIRCUS MADE IN CHINA' and a bloodstained

broken reaper piece, which were marked as M.O.16 to M.O.25, under seizure mahazar [Ex.P9].

(vi) Thereafter, PW36 conducted an inquest over the deadbodies of D1 and D2, in the presence of panchayatars and prepared the inquest report in respect of D1 [Ex.P51] and in respect of D2 [Ex.P50]; he seized a plastic jug [M.O.46] and an empty bottle with a cover with the label 'BRITISH Empire premium matured Brandy 750ml], which were marked as M.O.46 and M.O.47 respectively. He recorded the statements of other witnesses. The photographs of the occurrence place and the dead bodies were marked as M.O.7 series.

(vii) In the meantime, PW10, the Additional Director in charge of



Crl.A.No.63 of 2019

Ooty Mobile Forensic Science Laboratory, at the request of the police, visited the scene of the occurrence on 06.09.2011 and seized 11 burnt butts of Gold flake cigarette, the bloodstained hook of zip [M.O.2] and the button [M.O.3]. PW11, Inspector of Police, Finger Prints Bureau Nilgiris District, visited the scene of the occurrence on 06.09.2011 and lifted chance finger print from M.O.4-Glass tumbler [S1], chance finger print from M.O.5-two glass tumbler [S2] and chance finger print from M.O.6-empty beer bottle [S3]. He examined those finger prints and he received Ex.P4-Finger Print search slip-II, which contained specimen finger prints of A2 and gave Ex.P3-Finger Prints comparison report, stating that chance finger print S1 is identical with the right thumb finger print of D1 and chance finger print S2 is identical with the right index finger print of D2. He also gave Ex.P5-Finger Print examination report and Ex.P6-Fingerprint comparison report stating that chance finger print S3 is identical with the right index finger print of suspect Siva @ Sivasakthi [A2].

(viii) Thereafter, he sent the bodies of the deceased to Ooty Government Hospital for the conduct of postmortem. The Accident



Crl.A.No.63 of 2019

Registers in respect of D1 and D2 were marked as Ex.P48 and Ex.P47, respectively. PW20-Dr.Balasubramaniam, conducted a postmortem over the bodies of the deceased. He issued Ex.P19-postmortem certificate and after receipt of Ex.P20-Viscera report, gave his Final Opinion-Ex.P21 in respect of D1. Likewise, PW20 issued Ex.P22-postmortem certificate and after receipt of Ex.P23-Viscera report, had given his Final Opinion-Ex.P24 in respect of D2. Thereafter, PW30-Dr.Jaisingh, Head of Medico-legal Department of Coimbatore Medical College Hospital examined the Hyoid bones of both deceased and issued Hyoid bone reports-Ex.P35 and Ex.P36 in respect of D2 and D1 respectively.

(ix) After postmortem, PW36 seized the dress materials of the deceased [M.O.26 to M.O.33]. He also seized the green-coloured nylon belt [M.O.45], black-coloured leather belt, examined a few more witnesses and recorded their statements.

(x) On 09.09.2011 at 7.00 p.m., PW36 arrested the juvenile in conflict with law Vimal @ Purusothaman, near Railway gate at Vadalur in the



Crl.A.No.63 of 2019

presence of PW14 and PW23 and recorded his voluntary confession statement, the admissible portion of which was marked as Ex.P11. On his confession, PW36 seized a white colour Tavera car bearing Regn.No.TN-31-AD-5384 [M.O.1] from Vallalar car stand near Vadalur Bus Stand and on his identification, PW36 arrested another juvenile in conflict with law Prabhu at 10.30 p.m., at TSK Petrol Bunk, Vadalur, and recorded his voluntary confession statement in the presence of PW14 and PW23, the admissible portion of which is marked as Ex.P25. On his confession, PW36 seized a plastic cover [M.O.41] containing dress materials [M.O.37 to M.O.40] under Seizure Mahazar [Ex.P.26] from a bush near Manthada in Ooty to Coonoor Main Road, in the presence of witnesses.

(xi) Thereafter, PW26-Inspector of Prohibition Wing, Ooty was appointed as Special Officer on duty by the Superintendent of Police, Nilgiris District on 09.09.2011 and based on information about residence of A2-Siva @ Sivasakthi, he left for Hosur Sipcot Police Station at 10.00 a.m. On 11.09.2011 at 7.00 a.m, A2 surrendered before PW18-Village Administrative Officer of Juvuvadi Village and gave extra judicial confession



Crl.A.No.63 of 2019

pertaining to this double murder case and he produced A2 before the Inspector of Police, Hosur Sipcot Police Station with his Village Assistant at 7.30 a.m. The special report of PW18 is marked as Ex.P16. PW26 arrested A2 at 8.15 a.m., and recorded his confession in presence of PW18-VAO and the Village Assistant-Narayanan. Based on his confession, the admissible portion of which was marked as Ex.P17, PW26 seized jerkin [M.O.34], T-shirt [M.O.35] and a bloodstained reaper with nail [M.O.36] under Seizure Mahazar [Ex.P18] in the presence of PW19 and one Ranganathan and thereafter, he handed over the seized material objects and A2, to PW36 alongwith his Special Report [Ex.P27].

(xii) On 20.09.2011 at 10.00 a.m., PW31, the learned Judicial Magistrate of Coonoor, conducted Test Identification Parade at Central Jail, Coimbatore in respect of A2 in the presence of PW1 to PW5 and all of them correctly identified A2. Thereafter, at 2.00p.m., PW31 conducted an identification parade at Coimbatore Rehabilitation Home for the identification of juveniles in conflict with law Vimal @ Purusothaman and Prabhu. Ex.P38 series is the identification parade report relating to A2.



Crl.A.No.63 of 2019

WEB COPY (xiii) On 25.09.2011 at 11.15 p.m., based on secret information, PW36 arrested A1-Kasi @ Kasi Viswanathan, near Woodlands Hotel, Royapettah, Chennai, and recorded the voluntary confession statement given by A1, in the presence of PW27 and Sundar, the admissible portion of which is marked as Ex.P28. On the next day i.e., on 26.09.2011 at 3.00 p.m., he seized a bloodstained reaper with some blue colour paint here and there with nails on both sides [M.O.42], a bloodstained black-coloured shirt [M.O.43], bloodstained blue-coloured jeans [M.O.44] under Seizure Mahazar [Ex.P29]. Thereafter, PW36 sent the seized materials [M.O.52 to M.O.61] to Court, under Form-91. The said materials were sent for chemical examination, which was conducted by PW29, Scientific Officer of the Regional Forensic Science Laboratory. Ex.P32 is the Chemical Examination Report and Ex.P33 is the Serologist Report.

(xiv) On 04.10.2011 at 10.30 a.m., PW31, the learned Judicial Magistrate of Coonoor, conducted Test Identification Parade at Central Jail, Coimbatore in respect of A1 in the presence of PW1 to PW5 and all of them



Crl.A.No.63 of 2019

correctly identified A1. Ex.P40 series is the identification parade report relating to A1.

(xv) Thereafter, after examination of other witnesses, scientific experts and doctors, PW36 filed the final report on 23.05.2012 against the accused under Sections 302 and 302 r/w 34 of the IPC before the learned Judicial Magistrate, Udhagamandalam. On the same day, he sent the final report against the juveniles before the Juvenile Justice Board.

(xvi) On the appearance of the appellants, the provisions of Section 207 Cr.P.C., were complied with, and the case was committed to the Court of Session in S.C.No.10 of 2013 and was made over to the learned Sessions Judge, Magalir Neethimandram, (FTMC), Udhagamandalam at Nilgiris, for trial. The trial Court framed charges under Sections 302 and 302 r/w 34 of the IPC against the appellants and when questioned, the appellants pleaded 'not guilty'.



Crl.A.No.63 of 2019

(xvii) To prove the case, the prosecution examined 36 witnesses as P.W.1 to P.W.36, marked 61 exhibits as Ex.P1 to Ex.P61, and marked 47 Material Objects as M.O.1 and M.O.47. When the appellants were questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against them, they denied the same. The appellants did not examine any witnesses or mark any documents on their side.

(xviii) On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established the case beyond reasonable doubt and held the appellants guilty of offences under Sections 302 and 302 r/w 34 of the IPC and sentenced them as follows:

Accused No.	Offence under Section	Sentence imposed
A1 & A2	302 IPC	Each of them to undergo life imprisonment and to pay a fine of Rs.2,500/- in default to undergo simple imprisonment for three months.
	302 r/w 34 IPC	Each of them to undergo life imprisonment and to pay a fine of Rs.2,500/- in default to undergo simple imprisonment for three months.
The sentences were ordered to run concurrently.		

Hence, the accused have preferred the appeal challenging the said conviction



Crl.A.No.63 of 2019

and sentence.

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4. Heard Mr.Gopala Krishna Lakshmana Raju, learned Senior Counsel appearing for the 1st appellant, Mr.Iyyaparaj, learned counsel for the 2nd appellant and Mr.Babu Muthu Meeran, learned Additional Public Prosecutor for the respondent.

5. (i) The learned senior counsel appearing for the 1st appellant/A1 and the learned counsel appearing for the 2nd appellant/A2, submitted that the circumstances have not been conclusively established by the prosecution; that motive has not been established, though, PW8-father of the deceased and PW21-father of PW24 who said to have had a love affair with A1 were examined; that the circumstances of the accused travelling from Vadalur to Ooty on 04.08.2011, has not been established as the investigating officer failed to collect the CCTV footage available at the toll plazas, the toll receipts and receipts for filling fuel, on the way, which throws a doubt on this circumstance; that the 3rd circumstance relied upon by the prosecution viz., that D1 arranged for the stay of the accused in a cottage which was run



Crl.A.No.63 of 2019

by PW1 also has not been established; that though PW1 admitted that they maintained an arrival and departure ledger and had a bill book, none of them were seized or produced in trial; that the circumstances of last seen is also contrary to the entries made in Column No.4 of the inquest report [Ex.P51]; that the evidence of PW4, a delivery boy, who had allegedly last seen the deceased with the accused in the cottage at 8.00 p.m. cannot be believed since no records relating to the sale of food was marked; that the identification in the Test Identification Parade is of no value since the photographs of the accused were published in newspapers and the witnesses were aware of the same; that the opinion of the finger-print experts has been rightly disbelieved by the trial Court and hence, that circumstance is of no avail to the prosecution.

(ii) The learned counsels also relied upon the judgments of the Hon'ble Supreme Court relating to the appreciation of a case based on circumstantial evidence, viz., ***R.Sreenivasa Vs. State of Karnataka*** reported in ***2023 SCC OnLine SC 1132***.



Crl.A.No.63 of 2019

WEB COPY

(iii) The learned counsels submitted that the extra judicial confession said to have been given by A2 to the Village Administrative Officer-PW18, who is a total stranger, cannot be relied upon and referred to the judgment of the Hon'ble supreme Court in ***Moorthy Vs. State of Tamil Nadu*** reported in ***2023 SCC OnLine SC 1027***.

(iv) The learned counsel further submitted that the evidence reveals that even as early as on 07.09.2011, the investigating officers had come to the conclusion that the accused were involved in the offence and the extra judicial confession was recorded to suit their case. The learned counsels also relied upon the decision of the Hon'ble Supreme Court in ***Ashish Jain v. Makrand Singh and Others***, reported in ***(2019) 3 SCC 770***, in support of their submissions that the finger-prints of the accused were obtained without the order of the Magistrate and the same loses its credibility and cannot be a basis for comparison.

6. (i) The learned Additional Public Prosecutor submitted that all the



Crl.A.No.63 of 2019

circumstances have been conclusively established. Motive can be inferred from the evidence of PW8, PW21 and PW24 and from the fact that A1 had married PW24.

(ii) The learned Additional Public Prosecutor submitted that even in the absence of motive, if the other circumstances are established, the prosecution case can be accepted and relied upon the judgment of the Hon'ble Supreme Court in *Amitava Banerjee alias Amit alias Bappa Banerjee Vs. State of West Bengal* reported in (2011) 12 SCC 554.

(iii) The learned Additional Public Prosecutor also submitted that the fact that the accused came in a car is established from the evidence of PW3, PW155 and PW13 (car owner) and that merely because the CCTV footage and the receipts at the toll gate were not obtained, their oral



Crl.A.No.63 of 2019

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testimony cannot be discarded, especially, when nothing has been elicited in the cross examination to discredit their testimony.

(iv) The learned Additional Public Prosecutor further submitted that the circumstances of the accused staying in the hotel run by PW1 were spoken to by PW1, PW2 the son of PW1 and PW4 is the person who had delivered food to the accused on 05.09.2011 at about 8.00 p.m. Since the accused were friends of the Room Boy, an employee under PW1 it is possible that no record was maintained for their stay and therefore, the evidence of PW1, PW2 and PW4 cannot be discarded. The arrest and recovery have also been established conclusively and therefore, the prosecution has established its case beyond reasonable doubt.

7. (i) As stated earlier, the prosecution had examined 36 witnesses to prove its case. PW1 is the person who was running the cottage on a lease basis. D1 was working as a Room Boy in the said hotel. He speaks about seeing the bodies of the deceased at the hotel on 06.09.2011 at about 9.00



Crl.A.No.63 of 2019

a.m., and about the lodging of the complaint.

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(ii) PW2 is the son of PW1 who corroborates PW1 and speaks about receiving Rs.2,000/- as rent for the cottage. PW3 is the star witness for the prosecution, the taxi driver who had taken A1 and other juvenile accused from Vadalur and A2 from Salem to Ooty and about dropping them at the Cottage and taking them for site seeing and also about leaving Ooty at about 10.00 p.m on 05.09.2011. PW4 is the Delivery Boy who was working at My Kitchen at Lovedale, Ooty. He speaks about delivering food to the accused and the deceased on 05.09.2011 and had seen the four accused at Cottage.

(iii) PW5 was working as a Guide and had taken the accused with the deceased for a site seeing trip to a tourist place on 05.09.2011 and had identified the accused. PW6 has a mutton shop in Ooty and is the father of D2. He is a hearsay witness and speaks about his son not returning to home on 05.09.2011. PW7 is the brother of D2 and corroborates PW6. PW8 is the father of D1 and speaks about identifying the body of his son on



Crl.A.No.63 of 2019

06.09.2011 at the Cottage.

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(iv) PW9 is the neighbour living in an apartment next to the cottage, which was run on the ground floor and the 1st floor of the building and speaks about seeing the lights on in the Cottage at around 12.30 midnight i.e., on the night intervening 05.09.2011 and 06.09.2011. PW10 is the Assistant Director of Forensic Science Department, who speaks about visiting the cottage, picking up the cigarette, the bloodstained pant zip and the bloodstained buttons from the scene of the occurrence (M.O.1 to M.O.3).

(v) PW11 is the Inspector of Police, working in the Finger-print Department of Coimbatore Commissioner's office. He collected the finger-prints found in the glass tumblers, beer bottle and other articles from the scene of the occurrence.

(vi) PW13 is the owner of the car that was taken by the accused to Ooty. PW14 is the witness to the arrest of juvenile accused Purusothaman



Crl.A.No.63 of 2019

and recovery of Tavera car bearing Registration No. TN-31-AD-5384 on his confession. PW15 is the driver of the car, employed under PW13, who had engaged a call driver [PW3] to take the accused to Ooty.

(vii) PW16 is the Head Constable who assisted the investigation. PW17 is the Constable who seized the dress materials of the deceased [M.O.29 to M.O.33] and prepared a special report. PW18 was working as a VAO and is said to have recorded the extra judicial confession given by Siva-A2 and the extra judicial confession was marked as Ex.P14.

(viii) PW19 was working as a tailor and is a witness to the seizure of a wooden reaper, a jerkin and T-shirt on the confession of A2 from a place near Kateri Forest Check Post. PW20 was working as Superintendent in Government Hospital, Ooty and had conducted the postmortem for both the deceased and had issued postmortem certificate [Ex.P19], chemical analysis report [Ex.P20] and final opinion [Ex.P21] in respect of D1. He had also issued postmortem certificate [Ex.P22], chemical analysis report [Ex.P23] and final opinion [Ex.P24] in respect of D2.



Crl.A.No.63 of 2019

WEB COPY

(ix) PW22 was working in Annapoorna Hotel and speaks about the fact that the accused had food in the hotel. PW23 is the witness to the confession of juvenile accused-Purusothaman and Prabhu and recovery pursuant to their confession. PW24 is the wife of A1 and was supposed to have married D1, which according to the prosecution, infuriated A1 and was the motive for the occurrence. PW24 turned hostile.

(x) PW25 is the witness to the confession and recovery from the juvenile accused. PW26 was appointed as a Special Officer pursuant to the orders of the Superintendent of Police and had arrested the accused, recorded the confession and seized the articles mentioned above near Kateri Forest Check Post. PW27 speaks about the arrest and confession of Viswanathan-A1. PW28 is another witness of seizure of reaper [M.O.42], the bloodstained shirt[M.O.43] and the bloodstained jeans [M.O.45] on the confession of A1. PW29 was working in the forensic science department and had issued report [Ex.P33]. PW30 is working as a doctor and issued Ex.P35 and Ex.P36-reports stating that the hyoid bone was fractured in



Crl.A.No.63 of 2019

respect of both the deceased.

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(xi) PW31 was working as a Sub Judge and conducted the identification parade for witnesses PW1 to PW5. PW32 is the photographer who took the photographs of the deceased at the scene of the occurrence. PW33 is the Sub Inspector who registered the FIR. PW34 was working as a Court Clerk and speaks about the receipt of articles under Form-95. PW35, had made entries in the Accident Register [Ex.P47] in respect of D2 and [Ex.P48] in respect of D1. PW36 is the investigating officer.

8. (i) The prosecution case rests on circumstantial evidence. The postmortem doctor - PW20 had found external injuries on both the deceased and has stated in his report as follows:

External injuries in respect of D1:

- 1.Laceration middle of lower jaw 6x2x1cm exposing fracture of mandible bone and depression of right segment.
 - 2.Multiple laceration over right earlobe with contusion 8x10cm over right side of face and neck.
- Tongue inside mouth. Eyes closed. Blood discharge from nostrils and mouth. Loss of lower incisor teeth right side. Fracture of Hyoid bone with subcutaneous hematoma right side of neck and face. Chest well



Crl.A.No.63 of 2019

formed. All internal organs congested. Stomach contains about 300ml of dark fluid. Skull intact.”

External injuries in respect of D2:

- 1.Compression marks over neck of length 20 cm extending 2 cm in right of neck 6 cm breadth in middle of neck and 2 cm in left side of neck.
- 2.7 x 2x 1.5 cm laceration in right parietal region.
- 3.8 x 6 cm contusion over right temporal region including right pinna.
- 4.2 x ½ x ½ cm abrasion behind right ear.
- 5.3 x ½ cm abrasion over right shoulder.
- 6.½ x ½ abrasion over right shoulder near injury-5.
- 7.5 x 3 cm contusion over left shoulder.”

(ii) PW20 in his final opinion-Ex.P21 in respect of D1 had stated that the deceased died due to multiple antemortem injuries to jaw and hyoid bone. Similarly, with respect to D2, in his final opinion [Ex.P24], he had stated that he died of multiple antimortem injuries, including hyoid bone. He had also opined that those injuries could have been caused by the wooden reaper [M.O.36]

9. (i) It is the definite case of the prosecution that A1 had a motive to do away with D1 and since D2, his friend, intervened, the accused caused



Crl.A.No.63 of 2019

the death of D2 as well. The prosecution case is that A1 became friendly with PW24 after he handed over a SIM Card given by one Balaji (not examined) to PW24; that A1 and PW24 started exchanging messages frequently and became close to each other; and that when A1 came to know through PW24 that D1 was engaged to marry her, he decided to do away with D1. Apart from the extra judicial confession given by A2 to PW18, the prosecution had examined PW8, PW21 and PW24 to establish motive. Before we deal with the extra judicial confession, we propose to examine the evidence of the above three witnesses.

(ii) PW8 is the father of D1. He had deposed that D1 was engaged to his brother-in-law's daughter [PW24]. There is nothing in his evidence to infer the motive alleged by the prosecution. PW21 is the father of PW24-Imrose. He would say that they decided to get PW24 married to D1. He would add that PW24 left the house one year after D1 died and that he did not know anything about the case. The evidence only suggests that D1 was engaged with PW24.



Crl.A.No.63 of 2019

(iii) PW24 would state that she had a romantic relationship with A1 that her parents did not agree to her marriage proposal and thereafter, she got married to A1 on her own. She was treated as hostile by the prosecution. Except for a few suggestions by the prosecution that she turned hostile only to protect A1 and by suggesting to her the statements said to have been made by her to the police under Section 161 Cr.P.C., which she denied, nothing has been elicited to suggest the motive alleged by the prosecution. The very fact that A1 and D1 were friendly and it was D1 who arranged for the stay also belies the prosecution case with regard to motive, especially when the witnesses examined by the prosecution do not support the prosecution case to establish motive.

10.(i) The next evidence relied upon by the prosecution is the extra judicial confession said to have been given by A2. Admittedly, PW18 is a stranger to A2. He is said to have recorded the extra judicial confession. Further, the signature of A2 has not been obtained. In any case, the said extra judicial confession cannot be used against A1. It is well settled that the confession of a co-accused can only be used to lend assurance to other



Crl.A.No.63 of 2019

evidence on record.

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(ii) It is the case of the prosecution that A2 and two juvenile accused were A1's friends and they all agreed to cause the death of D1 to help A1 get married with PW24. Apart from the extra judicial confession of A2, there is no other evidence to suggest the motive for A2 and the juvenile accused. As stated earlier, PW18 is a total stranger to A2. In such circumstances, there was no necessity for A2 to appear before the Village Administrative Officer, a total stranger, to give a confession. PW18, as stated earlier, has not recorded a separate statement of A2 and even in his Special Report-Ex.P16, A2's signature is not found. If A2 had voluntarily appeared and given a confession, there is no reason why a separate statement was not recorded and the signature of A2 was not obtained. Therefore, we are not inclined to believe the extra judicial confession said to have been given by A2 to PW18. We may usefully refer to the following observations of the Hon'ble Supreme Court in ***Pawan Kumar Chourasia v. State of Bihar*** reported in **2023 SCC Online SC 259**.

“5. As far as extra-judicial confession is concerned, the law is well settled. Generally, it is a weak piece of evidence. However, a



Crl.A.No.63 of 2019

conviction can be sustained on the basis of extra-judicial confession provided that the confession is proved to be voluntary and truthful. It should be free of any inducement. The evidentiary value of such confession also depends on the person to whom it is made. Going by the natural course of human conduct, normally, a person would confide about a crime committed by him only with such a person in whom he has implicit faith. Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the Court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it is made. As a matter of rule, corroboration is not required. However, if an extra-judicial confession is corroborated by other evidence on record, it acquires more credibility.”

(iii) It is also well settled that in a case based on circumstantial evidence, the absence of proof of motive would not be fatal to the prosecution if other circumstances are strong and established to prove the guilt of the accused. The Hon'ble Supreme Court in *Amitava Banerjee alias Amit alias Bappa Banerjee v. State of West Bengal*, reported in 2011 (12) SCC 554 held that even in a case of circumstantial evidence, the absence of proof of motive by itself cannot be a reason to disbelieve the prosecution case, if the other circumstances have been established. The Hon'ble Supreme Court had held as follows:



Crl.A.No.63 of 2019

WEB COPY

“41. Motive for the commission of an offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. And yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. All that the absence of motive for the commission of the offence results in is that the court shall have to be more careful and circumspect in scrutinizing the evidence to ensure that suspicion does not take the place of proof while finding the accused guilty.

42. Absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what the Courts need to remember is that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence.

43. Human nature being what it is, it is often difficult to fathom the real motivation behind the commission of a crime. And yet experience about human nature, human conduct and the frailties of human mind has shown that inducements to crime have veered around to what Wills has in his book "Circumstantial Evidence" said:

"The common inducements to crime are the desires of revenging some real or fancied wrong; of getting rid of rival or an obnoxious connection; of escaping from the pressure of pecuniary or other obligation or burden of obtaining plunder or other coveted object; or preserving reputation, either that of general character or the conventional reputation or profession or sex; or gratifying some other selfish or malignant passion.""

(iv) From the above observations, it is clear that the absence of motive



Crl.A.No.63 of 2019

would be a factor which would weigh in favour of the accused in a case based on circumstantial evidence. However, it would not be fatal in all cases and it would depend upon the facts and circumstances of each case. It is also well settled that in the absence of proof of motive, the Courts have to be more careful and circumspect in analysing the evidence to ensure that suspicion does not take the place of proof.

(v). Having held that the motive has not been conclusively established by the prosecution, we may now analyse the other circumstances relied upon by the prosecution and as to whether those circumstances form a complete chain ruling out any other hypothesis.

11. (i) The next circumstance relied upon by the prosecution is the fact that the appellants as well as the juvenile accused took a cab from Vadalur to Ooty, under the guise of a site-seeing trip. It is the case of the prosecution that this circumstance is established through the evidence of PW3, PW13 and PW15.



Crl.A.No.63 of 2019

(ii) It is the prosecution case that the car bearing Regn.No.TN31 AD 5384 belonged to PW13 and PW15 was its driver. The appellants along with the juvenile accused had approached PW15 to take the car on hire and PW15, in turn, requested PW3, an acting driver, to take the accused to Ooty. All three witnesses supported the prosecution case.

(iii) PW3 the driver, is said to have taken the car from Vadalur on 03.09.2011 about 8.00 p.m., in which A1 along with the juvenile accused travelled. They went to Salem and picked up A2. They stayed at Mettupalayam that night and left for Ooty, the next day at 5.00 a.m., and reached Ooty around 7.30 a.m. There they met one Pavithran [PW2] and D1. D1 and Pavithran-PW2 took them to a cottage and PW3 stayed in the car.

(iv) It is the further version of PW3 that on 05.09.2011, all the accused, including D1 went to tourist places in an around Ooty and dropped the deceased at the bus stand and they went to the cottage and that all the accused told him that they would leave Ooty after D1 came to see them off



Crl.A.No.63 of 2019

and that D1 along with another person [D2] came there. He would also state that initially the juvenile accused came to the car and told him that they could leave after one hour. In the meantime, he heard some noise from the room. Thereafter, at about 10.00 p.m., all the accused got into the car. After they travelled for 10 minutes, they threw a bag on the road and thereafter, they asked him to stop in a place after Coonoor. The juvenile accused got down from the car and took the plastic cover from the car and when they came back, they came empty handed. They took rest at Kallakurichi that night and on 06.09.2011 at about 6.00 a.m., A1 made a phone call to someone, thereafter, a lady came and A1 got something from her and told that he had to pay the hire charges by pledging the jewels. A1 went and came after 15 minutes and paid the hire charges of Rs.9,000/- after filling fuel, which he inturn paid to PW15. It is his version that PW15 paid Rs.1500/- to him.

(v) PW13, the owner of the car, had also corroborated the evidence of PW3. He had stated that his driver PW15 took his permission to send the car through an acting driver and however, he did not know as to who took



Crl.A.No.63 of 2019

the car on hire. PW15 would also corroborate the evidence of PW3.

However, we find, strangely, that the prosecution had not collected any trip sheets of the car. That apart, it has been admitted by PW3 that in all toll plazas, there were CCTV cameras and he had the paid toll fee and collected receipts. He had also admitted that he had filled petrol and collected receipts for payment of money.

(vi) PW3 would also admit in the cross examination that he communicated with the accused over the phone during their travel. He had admitted in the cross examination that he had spoken to PW15 also during the travel when he went to Ooty. However, strangely, the prosecution had not collected any of the documents, such as toll fee receipts, petrol bunk receipts, CCTV footage or the trip sheet of the car. That apart they had also not taken any steps to obtain the Call Detail Record of the phones used either by the accused or by the witnesses, to confirm if the versions of the witnesses were true.

(vii) Strangely, in this case, though there is oral evidence of PW3,



Crl.A.No.63 of 2019

PW13 and PW15, there is no contemporaneous document to confirm the statements made by them, when nothing prevented the prosecution from collecting the toll fee receipts, trip sheets and other documents, which would corroborate the versions of PW3, PW13 and PW15. The accused had suggested to the investigating officer-PW36 that he had suppressed these documents since that would falsify the prosecution case. However, PW36 apart from denying it has not given any explanation for not collecting those vital documents.

(viii) In the light of the above, we are of the view that this circumstance has to be appreciated with greater caution and circumspection, especially in the absence of proof of motive.

(ix) PW3's version that he did not know anything about what happened in the cottage also appears to be highly improbable. PW3 did not state about his taking the car to anyone till 08.09.2011 until the police enquired him. He would also admit that he never acted as an acting driver for PW15 either before or after the occurrence. In the light of the infirmities



Crl.A.No.63 of 2019

in the investigation that we have just pointed out, it is highly unsafe to just rely on the oral evidence of PW3, PW13 and PW15, alone, especially when the time at which the events took place is a significant factor to appreciate the circumstances which could have been proved by the contemporaneous documents referred to above.

12. (i) The next circumstance relied upon by the prosecution is that the appellants and juvenile accused stayed in Oneness cottage and left for Ooty on 05.09.2011 at about 10.00 p.m., and on the next day the bodies of the deceased were found in the said cottage. PW1 and PW2 had stated about the fact that accused stayed in the lodge run by PW1. PW2 is the son of PW1. Both of them have stated that they were in the habit of maintaining ledgers and maintaining registers, as well as bill books. PW1 had stated that those books were misplaced.

(ii) Here again, there is only the oral evidence of PW1 and PW2 and no contemporaneous documents to confirm their version, when it is the admitted case of PW1 that they were in the habit of maintaining ledgers, obtaining Identity Cards of the guests and giving receipts for the payment



Crl.A.No.63 of 2019

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13. It is the case of the prosecution that PW1 to PW5 identified all the accused in the Test Identification Parade and in the deposition before Court. It is the case of the defence that the identification would have no value since it is borne out by evidence that on 07.09.2011, the pictures of the accused were published in the newspapers. PW22, who was working in a hotel near Lamb's Rock, a tourist place, has stated that he saw the pictures of the accused and the deceased in the newspaper on 07.09.2011. Therefore, in our view, the identification of the appellants in the Test Identification parade and the identification in Court by PW1 to PW5, by itself will be of no significance.

14. We had already discussed about the articles that were seized by the investigating officer at the place of occurrence and the dress materials and the articles from the accused on their confession. However, we find from the chemical analysis report [Ex.P32] and Serologist report



Crl.A.No.63 of 2019

[Ex.P33] that the blood grouping test was inconclusive and it was disintegrated. Therefore, the material objects seized on the disclosure statement of the accused cannot be connected with the occurrence and hence, the recoveries as such would be of no significance.

15. (i) As regards the finger print experts are concerned, we find that the specimen finger prints of the accused were taken by a Constable. The Constable was not examined and there is nothing on record to show whether he was declared to be qualified to take the impressions in terms of 801 4(K) of the Tamil Nadu Police Standing Orders. That apart, no permission was sought from the Magistrate for taking the specimen finger prints. It is well settled that though Section 5 of the Identification of Prisoners Act is not mandatory and the police officer is competent to take Fingerprints without the orders of the Magistrate to dispel any suspicion as to the bonafides and to eliminate the possibility of fabrication of evidence, it is eminently desirable that they are taken before or under the orders of the Magistrate. This has been reiterated by the Hon'ble Supreme Court in ***Ashish Jain v. Makrand Singh and Others***, reported in (2019) 3 SCC 770.



Crl.A.No.63 of 2019

WEB COPY (ii). Though, it is the opinion of the finger print expert that chance fingerprint-S1 matched with the finger print of A1 and chance fingerprint-S3 was identical with the right index finger of A2, in this case, we are of the view that the investigating officer ought to have obtained the order of the Magistrate to affirm the bonafides. We also find that the trial Court has disbelieved the opinion of the finger print expert and rightly so.

16. The other circumstance relied upon by the prosecution is that both the deceased who were last seen in the company of the appellants and juvenile accused at 8.30 p.m., inside the cottage. The prosecution relied upon the evidence of PW4 to prove this circumstance. According to PW4, he was working in a hotel and he was asked to deliver food to One ness Cottage, where he had seen the appellants along with juvenile accused. In his cross examination, he had stated that he had not informed anyone about delivering food even after he came to know that the deceased and his friend were murdered, until the police came to enquire him. He had identified, the accused in the test identification parade. However, here again, the hotel bill



Crl.A.No.63 of 2019

was not seized by the prosecution for the reasons best known to them, although PW4 would state that a bill was prepared. Further, PW4's version that he delivered food and saw all four persons together, along with the deceased, is not corroborated by the evidence of PW3. According to PW3, the driver of the car, the food was bought by the accused themselves and given to him by the accused and he did not speak about the supply of food by any delivery boy. PW4 also does not say about seeing a car or PW3 near the cottage. In the absence of any contemporaneous record, it would be highly unsafe to rely upon his evidence as regards last seen. That apart, the inquest report reveals that D1 was last seen by his mother at 5.30pm near a coffee company at Ooty Main Bazaar. This version is given contrary to the prosecution version.

17. The other aspect that we have observed is that the evidence of PW1 that the deceased had taken the keys of the bike to buy food for the accused and handed over the keys around 8.00 p.m., on the same day to his wife. This version is found in the complaint [Ex.P1]. There is nothing on record as to when the deceased returned to the hotel and as to how he



Crl.A.No.63 of 2019

WEB COPY

returned to the cottage after that. PW3 would only state that both the deceased came around 8.00 p.m., and even before that, the accused bought food and gave it to him. This would belie the prosecution case that PW4 saw all six persons in the hotel venue.

18. Strangely, though the prosecution had examined as many as 36 witnesses, no contemporaneous documents, which were available were seized during investigation and proved by the prosecution. The non seizure of vital documents, in our view, would lead to an adverse inference, against the prosecution.

19. The prosecution, inspite of the opportunity to collect the best evidence that we have just pointed out above, had not collected the same. Those would have not only established the circumstances conclusively, but also the time at which the events took place. In the instant case, we are of the view that the time at which all the events narrated by the prosecution took place, are vital to connect the circumstances pointed out by the



Crl.A.No.63 of 2019

prosecution, especially when the motive alleged by them, has not been conclusively established. On the contrary, the absence of the same raises doubt with regard to the prosecution case.

20. It is well settled that the circumstances concerned '*must or should*' be established and not '*may be*' established to hold the accused guilty of the offence. In this regard, it would be useful to refer to the following observations of the Hon'ble Supreme Court in ***Kamal v. State (NCT of Delhi)***, reported in **2023 SCC OnLine SC 933**.

“18. It can thus be seen that this Court has held that the circumstances from which the conclusion of guilt is to be drawn should be fully established. It has been held that the circumstances concerned "must or should" and not "may be" established. It has been held that there is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved". It has been held that 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. It has been held that the circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one sought to be proved, and that there must be a chain of evidence so complete so as not to leave any reasonable ground for the conclusion consistent with the innocence



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Crl.A.No.63 of 2019

of the accused and must show that in all human probability the act must have been done by the accused.”

21. In the light of the above, we are of the view that the circumstances sought to be established by the prosecution, have not been conclusively established and therefore, it would be highly unsafe to record a finding of guilt against the appellants. Hence, the conviction and sentence imposed on the appellants, are liable to be set aside.

22. In the result, the Criminal Appeal is allowed and the appellants are acquitted of the charges. The conviction and sentence imposed upon the appellants in S.C.No.10 of 2013 dated 30.10.2018, on the file of the learned Sessions Judge of Magalir Neethimandram, (FTMC), Udthagamandalam at Nilgiris, are set aside. The fine amount, if any, paid by the appellants shall be refunded. Bail bonds, if any, executed shall stand discharged.

[M.S.R.,J.]
05.07.2024

[S.M.,J.]

Index:Yes/No

Neutral Citation:Yes/No

Speaking order/Non-speaking order

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Page 42 of 45



WEB COPY



Crl.A.No.63 of 2019



WEB COPY



Crl.A.No.63 of 2019

M.S.RAMESH, J.
and
SUNDER MOHAN, J.

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To

1. The Sessions Judge,
Magalir Neethimandram (FTMC),
Udhagamandalam at Nilgiris.
2. The Inspector of Police,
Udhagamandalam G1 Town
West Police Station.
3. The Superintendent of Prisons,
Central Prison, Coimbatore.
2. The Public Prosecutor,
High Court of Madras.

Pre-delivery Judgment in
Crl.A.No.63 of 2019



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Crl.A.No.63 of 2019

05.07.2024