



Crl.A.No.97 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.03.2024

CORAM :

THE HON'BLE MR. JUSTICE M.S.RAMESH

AND

THE HON'BLE MR. JUSTICE SUNDER MOHAN

Crl.A.No.97 of 2020

and Crl.M.P.No.20195 of 2023

D.Thiagarajan

... Appellant/A2

vs.

State rep. By
The Inspector of Police,
Nazarethpet Police Station,
Chennai.
(Cr.No.588 of 2014)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973, to call for the entire records in connection with the S.C.No.27 of 2015 on the file of the learned II Additional District and Sessions Judge, Thiruvallur at Poonamallee, and set aside the Judgment dated 31.01.2020.

For Appellant : Mr.R.Ganesh Kumar



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For Respondent : Mr.A.Gokulakrishnan
Additional Public Prosecutor

JUDGMENT

(Order of the Court was delivered by SUNDER MOHAN,J.)

This Criminal Appeal has been filed by A2, challenging the conviction and sentence imposed upon him vide judgment dated 31.01.2020 in S.C.No.27 of 2015 on the file of the learned II Additional District and Sessions Judge, Thiruvallur at Poonamallee.

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 deceased and A2 were brothers; that since the deceased was an alcoholic and was causing trouble to the family members by demanding money for consuming alcohol and lying on the streets after drinking, A2 decided to do away with the deceased with the help of A1 and A3, his friends; that pursuant to the conspiracy, A1 took Rs.1000/- from A2 on 26.08.2014 and took the deceased in his



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motorcycle bearing Regn.No.TN12A3007 to a wine shop; that after the deceased consumed alcohol, A1 took the deceased to a secluded place and slapped him; and that thereafter he removed the shirt of the deceased and strangled him, thereby causing his death.

(ii) It is the further case of the prosecution that the body of the deceased was found by PW1, who was a Ward Member of Meppur Panchayat, near Chembarampakkam drinking water pond i.e., within his Ward, and he gave a complaint at 12.00 noon, which was registered by the Sub Inspector of Police [PW17] under Section 174 of the Cr.P.C. in Cr.No.588 of 2014. The printed FIR was marked as Ex.P11.

(iii) PW19, the Inspector of Police went to the scene of the occurrence and prepared the Observation Mahazar (Ex.P2) and Rough Sketch (Ex.P10). He conducted an inquest over the dead body of the deceased between 8.00 to 10.00 a.m., and prepared the inquest report [Ex.P17]. Thereafter, he sent the body for postmortem. PW16-Doctor conducted the postmortem and issued a postmortem certificate (Ex.P8).



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(iv) On 29.08.2014 at 1.00 p.m., A1 appeared before the Village Administrative Officer [PW4] and is said to have given an extra judicial confession [Ex.P3], in the presence of PW6 and PW7. The Village Administrative Officer produced A1 along with the confession statement to the investigating officer PW19.

(v) PW19 recorded the confession in the presence of PW4 and other witnesses and seized the two wheeler viz., Yamaha Bike [M.O.2] of A1 along with the mobile phone with SIM cards [M.O.1] under seizure mahazar [Ex.P5]. The admissible portion of the confession was marked as Ex.P4. He also seized the dress materials of A1. At about 9.30p.m on the same day, A2 and A3 appeared before the investigating officer and thereafter, they were arrested by him. On the confession given by A2/appellant, the admissible portion of which is marked as Ex.P6, the police seized M.O.3 and M.O.5, mobile phones belonging to A2/appellant and A3, respectively under seizure mahazar Ex.P14. He thereafter altered the offence to Section



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302 of the IPC and sent the accused for judicial remand to the learned Magistrate. The alteration report is marked as Ex.P16. He sent the dress materials of the accused and deceased to the Forensic Science Laboratory. He also collected the call details record of the accused (Ex.P19) and after examination of all witnesses, filed a final report against the accused for the offences under Sections 302 r/w 120-B and 34 of the IPC, before the learned Judicial Magistrate No.I, Poonamallee.

(vi) On the appearance of the accused, 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.27 of 2015 and was made over to the learned II Additional District and Sessions Judge, Thiruvallur at Poonamallee for trial. The trial Court framed charges under Sections 302 r/w 34 and 120-B r/w 34 of the IPC against the accused and when questioned, the accused pleaded 'not guilty'.

(vii) To prove the case, the prosecution examined 19 witnesses as P.W.1 to P.W.19, marked 19 exhibits as Exs.P1 to P19, and marked 5



Material Objects as M.O.1 to M.O.5. When the accused were questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against them, they denied the same. The accused neither examined any witnesses, nor marked any documents.

(viii) On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established the case beyond reasonable doubt and held that A1 and A2/appellant were guilty of the offences charged against them. However, as charges levelled against A3 were not proved by the prosecution, the trial Court acquitted A3. Further, as A1 died pending trial, the charges against A1 abated. The appellant/A2 was convicted and sentenced as follows:-

<i>Offence under Section</i>	<i>Sentence imposed</i>
302 r/w 34 IPC	To undergo rigorous imprisonment for life and also to pay a fine of Rs.1,000/- in default to undergo one month rigorous imprisonment
120-B r/w 34 IPC	To undergo rigorous imprisonment for life and also to pay a fine of Rs.1,000/- in default to undergo one month rigorous imprisonment

The above sentences were ordered to run concurrently. Hence, A2/appellant has preferred the appeal challenging the said conviction and sentence.



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4. Heard, Mr.R.Ganesh Kumar, learned counsel appearing for the Appellant/A2 and Mr.A.Gokulakrishnan, learned Additional Public Prosecutor appearing for the respondent/State.

5. Mr.R.Ganesh Kumar, the learned counsel for the appellant/A2 submitted that A1 died during trial and A3 was acquitted by the trial Court. The prosecution case which rests on circumstantial evidence has not been proved; that the extra judicial confession said to have been given by A1 cannot be the basis for conviction of the appellant/A2; that though PW11 and PW14, are said to have last seen the accused with the deceased, PW11 turned hostile and PW14 is not a reliable witness; and that the motive has not been established. Hence, he submitted that the judgment of conviction is liable to be set aside.

6. The learned Additional Public Prosecutor *per contra* submitted that PW14, had last seen the deceased with the appellant and the other accused; that the other circumstances have been conclusively established pointing out



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only the guilt of the appellant/A2; and that the judgment of conviction is not liable to be interfered with. Hence, he prayed for dismissal of the appeal.

7. We have carefully considered the rival submissions and perused all the relevant materials available on record.

8. PW1 had seen the body of the deceased on 27.08.2014 at about 12.00p.m. He had noted that there were certain injuries on the left hand and right eye of the deceased. PW16, the postmortem doctor found the following external injuries on the deceased.

“1. Reddish abrasion 3x2 cm Right knee, 2 x 1cm middle third front of right leg, 2x1, 1x0.5 dorsum of right hand, 2x1, 1x0.5, 0.5x0.7cm upper third of left forearm.

2. Dark red contusion 3x2x0.25cm both elbow, lower third of right arm 3x2x0.25cm.

3. A complete, regular, symmetrical brownish ligature abrasion encircles. The front and sides of the neck at the level of thyroid cartilage of 19cm. The upper border of ligature mark to right mastoid process is 6cm with width 3.5cm, to the chin is 9 cm with width 3-4cm and to the left mastoid process is 6cm with width 3-4cm, the lower border of ligature



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mark to the sternal notch is 5cm, occipital protrubrence to ligature mark is 6 cm and to C7 transverse process is 8 cm. On Further Dissection: The Base of the Ligature Abrasion is contused, underlying strap muscles where found contused of 4x3x2.5cm and both sternomastoid muscles contused of 3x2x2.5cm on both sides, dark red contusion 3x2x0.25cm over right thyroid cartilage with fracture of right thyroid cartilage with extensive bruising seen over retropharyngeal and para vertebral region. HYOID BONE AND OTHER LARYNGEAL CARTILAGES: Intact.

4. On dissection of head: scalp: Dark Red Scalp contusion seen over right parietal 3x2x.25cm and right occipital 4x3x0.25cm region of scalp. DURAMETER: intact. SKULL BONES: intact. Brain: Liquefied.

ON DISSECTION OF THORAX AND ABDOMEN: Heart: Flabby, Multiple Petechial Hemorrhage seen over surface of left ventricle, C/S: Decomposing. LUNGS: Flabby, C/S. Decomposing. STOMACH: 20 ml of green coloured fluid, Mucosa: C/S: Decomposing. INTESTINES: Distended with Gas. LIVER/SPLEEN/KIDNEYS: Flabby, C/S: Decomposing. BLADDER: Empty. PELVIS AND SPINAL COLUMN: Intact, VISCERA SENT FOR CHEMICAL ANALYSIS”

He had opined that the deceased would appear to have died of asphyxia due to strangulation. Therefore, the prosecution has established that the deceased suffered a homicidal violence.

9. As regards the involvement of the accused, the prosecution seeks to



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primarily rely upon the extra judicial confession given by A1 before PW4 in the presence of PW6 and PW7 and the evidence of PW14 who had last seen the deceased along with the accused.

10. PW1, as stated earlier was the complainant who saw the body of the deceased; PW2 and PW3 are mahazar witnesses, who attested Ex.P2; PW4, is the Village Administrative Officer who recorded the extra judicial confession of A1; PW5 attested the confession of A1; PW6 and PW7 are the assistants of PW4-VAO; PW8 and PW9 belongs to the village of the accused and they turned hostile; PW10 is the Sub Inspector of Police, who assisted the investigating officer in recording the 161 statements; PW11 is said to have last seen A1 with the deceased and turned hostile; PW12, saw the body of the deceased at 1.30 p.m., and has spoken about the presence of police and the body being taken to the hospital by ambulance; PW13 is the Village Administrative Officer, who witnessed the confession of the accused before the police officers; PW14 is the witness who had last seen the accused with the deceased; PW15 is the constable who took the body to Kilpauk Medical College Hospital for postmortem; PW16, is the



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postmortem doctor; PW17 is the Sub Inspector of Police, who registered the FIR; PW18 is the scientific officer in the Forensic Science Laboratory who issued Ex.P9-Report; and PW19 is the investigating officer, who filed the final report.

11. From the above it could be seen that except for the extra judicial confession there is no other evidence to prove the motive for the occurrence and the conspiracy. PW9 who was examined to prove the conspiracy meetings between the accused turned hostile.

12. The next circumstance relied upon by the prosecution is the circumstance of the deceased being last seen with the accused. PW11 who was examined on the side of the prosecution has, turned hostile as stated earlier. PW14 had stated that he saw A1 along with the deceased-Mani on 26.08.2014 in the evening. He had not seen the other accused including the appellant/A2. A2 and A3's presence is not spoken to by any of the witnesses including PW14.



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13. We are now left only with the extra judicial confession of A1 given to PW4. Ex.P3. A1 died during trial. A3 was acquitted as stated earlier. The extra judicial confession given by A1 cannot be the sole basis for convicting the appellant and the law is well settled on this aspect. The confession of A1/co-accused can be used only in terms of Section 30 of the Indian Evidence Act, 1872, which reads as follows:



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"30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.—When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

The law is well settled that the prosecution has to produce all other evidence and can use the confession of the co-accused only to lend assurance to the other evidence on record. However, in this case we find that there is no other evidence and the extra judicial confession therefore, cannot be used even to lend assurance. The prosecution cannot begin with the extra judicial Confession. In this regard, we may refer to the observations of the Hon'ble Supreme Court in ***Pancho Vs. State of Haryana*** reported in (2011) **10 SCC 165**, which read as follows:

"26. In Haricharan Kurmiv. State of Bihar [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] the Constitution Bench of this



Court was again considering the same question. The Constitution Bench referred to Section 3 of the Evidence Act, 1872 and observed that confession of a co-accused is not evidence within the meaning of Section 3 of the Evidence Act. It is neither oral statement which the court permits or requires to be made before it as per Section 3(1) of the Evidence Act nor does it fall in the category of evidence referred to in Section 3(2) of the Evidence Act which covers all documents produced for the inspection of the court. This Court observed that even then Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused. Thus, though such a confession may not be evidence as strictly defined by Section 3 of the Evidence Act, “it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way”. (Haricharan case [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] , AIR p. 1188, para 11a.)

27. This Court in Haricharan case [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] further observed that Section 30 merely enables the court to take the confession into account. It is not obligatory on the court to take the confession into account. This Court reiterated that a confession cannot be treated as substantive



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evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right.

28. This Court in Haricharan case [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence."

14. Next the recovery of the cellphone from the appellant/A2 has no significance and the prosecution has not established how the recovery



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would incriminate the appellant/A2.

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15. For all the above reasons, we are of the view that the prosecution has failed to establish its case beyond reasonable doubt and therefore, the conviction and sentence imposed on the appellant/A2, are liable to be set aside.

16. Accordingly, the Criminal Appeal is allowed and the appellant/A2 is acquitted of the charges. The conviction and sentence imposed upon the appellant/A2 in S.C. No.27 of 2015 dated 31.01.2020, on the file of the learned II Additional District and Sessions Judge, Thiruvallur at Poonamallee, are set aside, and the appellant/A2 is directed to be set at liberty forthwith, unless his presence is required in connection with any other case. Bail bond, if any, executed shall stand discharged. Consequently, the connected Criminal Miscellaneous Petition is closed.

(M.S.R.,J.) (S.M.,J.)
07.03.2024



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Index : yes/no
Neutral citation : yes/no
Speaking/Non-speaking order
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M.S.RAMESH,J.

AND

SUNDER MOHAN,J.

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Copy to:

- 1.The II Additional District and Sessions Judge,,
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- 2.The Inspector of Police Circle,
Nazarethpet Police Station,
Chennai.
3. The Superintendent of Prisons,
Central Prison, Puzhal.
- 3.The Public Prosecutor
High Court of Madras,
Chennai – 600 101.

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