



CrI.A(MD) No.114 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 25.09.2024

Pronounced on : 19.10.2024

Coram:

**THE HONOURABLE MR. JUSTICE C.V. KARTHIKEYAN
AND
THE HONOURABLE MS. JUSTICE R. POORNIMA**

CrI.A.(MD)No.114 of 2021

A.Annal .. Appellant/Victim/wife of deceased

Vs.

1.State rep. by

The Inspector of Police,
Kalakadu Police Station,
Tirunelveli District

Crime No.114/2004 .. Respondent/Respondent/Complainant

2.Ebenezer ... Respondent / Respondent/Accused 1

3.Kannan ... Respondent / Respondent / Accused 2

4.Mahendren ... Respondent /Respondent /Accused 3



Crl.A(MD) No.114 of 2021

Prayer: Criminal Appeal filed under Section 372 of the Criminal Procedure Code, to call for the records in S.C.No.206 of 2004 on the file of III Additional Sessions Judge, Tirunelveli allowing this appeal and to set aside the judgment dated 30.11.2020 and convict the respondents 2 to 4 for the offences punishable under Sections 120(B) read with 302 and 109 r/w. 302 I.P.C, 1860.

For Appellant : Mr.G.Krishnamurthy

For Respondents : Mr.S.Ravi,
Additional Public Prosecutor for R1

: Mr.S.Palanivelayutham for R2

J U D G M E N T

(Judgment of this Court delivered by R.POORNIMA,J.)

This Criminal Appeal is filed against the acquittal of the accused / respondents 2 to 4 in the judgment dated 30.11.2020 passed by the III Additional Sessions Judge, Tirunelveli, in S.C.No.206 of 2004 by acquitting the respondents 2 to 4 from the charges for the offences punishable under Sections 302 read with Section 120(B) and 109 I.P.C, 1860. The appellant herein is the wife of deceased Iyyappan who has

2/24



Crl.A(MD) No.114 of 2021

been examined as P.W.4 in the trial Court in S.C.No.206 of 2004, she had preferred this Criminal Appeal, against the order of acquittal, under Section 372 Cr.P.C, 1973.

2. The brief facts of the case are as follows:

2.1. One Iyyapan, husband of the appellant, was done to death on 23.03.2004. A case was initially registered under Section 174 Cr.P.C, 1973 and later, altered into Sections 302 read 120(B) and 109 I.P.C, 1860. As per the prosecution case, the deceased Iyyapan, was an important witness in a criminal case which was pending before the Chief Judicial Magistrate Court, Tirunelveli against the accused Nos.2 and 3. Due to the above, Accused Nos.2 and 3 anticipated an unfavourable result in their favour and therefore, they had previous enmity against Thiru.Iyyapan.

2.2. On 15.03.2004, in a tea shop, Accused Nos.1 to 3, hatched criminal conspiracy to commit the murder of Thiru.Iyyapan. In that conspiracy, Accused Nos. 2 and 3 induced accused No.1 to do away



Crl.A(MD) No.114 of 2021

Iyyapan (deceased) and on such instigation and abetment, on 22.03.2004, when the deceased-Iyyapan was attending a marriage, the first accused in order to complete the plan made Iyyapan to consume alcohol. When he became unconscious, the first accused with intention to commit murder, took him in a two wheeler to north of Mavadi south of Salaipudhur and attacked him with Iron rod and inflicted injuries and thereby, caused his death. The Inspector of Police, Kalakadu Police Station filed charge sheet against A1 to A3. This was taken cognizance by the Judicial Magistrate in P.R.C.No.19 of 2009 and copies were furnished to the accused as contemplated under Section 207 Cr.P.C. As the offence against the accused were exclusively triable by the Court of Session, the judicial Magistrate committed the case to the Principal Sessions Court, Tirunelveli. The case was taken by the Principal Sessions Court in S.C.No.206 of 2004 and the Principal Sessions Judge made it over to the III Additional Sessions Judge on 15.02.2005. After receipt of the case, the learned Additional Sessions Judge framed charges against the first accused under Sections 120(B) read with 302, 109 read with 302 I.P.C and against the Accused Nos.2 and 3 under Section 120(B) read with 302 and 109 read with 302 I.P.C. Since the accused pleaded not guilty and



Crl.A(MD) No.114 of 2021

claimed to be tried, the III Additional Sessions Judge, conducted trial.

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2.3. To prove the case of the prosecution, 20 witnesses were examined and Ex.P1 to Ex.P29 were marked and Material Objects M.O.1 to M.O.10 were produced. After full trial, since the Court found that the prosecution failed to prove the case beyond all reasonable doubt, acquitted the accused from the above charges.

3. Aggrieved by the said order, this Criminal Appeal has been filed by the victim, on the following grounds:

(i) The judgment of the lower Court is against law, weight of evidences and probabilities of the case and hence, liable to be set aside.

(ii) The lower Court ought to have believed the evidence of P.W.1 to P.W.21 and convicted the respondents 2 to 4.

(iii) The lower Court ought to have accepted the evidence of exhibit P.1 to P29 and convicted the respondents 2 to 4.

(iv) The lower Court ought to have accepted the evidence of M.O. 1 to M.O.10 and convicted the respondents 2 to 4.

(v) The lower Court deliberately deviated from the regulated



Crl.A(MD) No.114 of 2021

procedure to write a judgment. Further, the lower Court did not narrate the entire deposition of the prosecution witnesses while writing the judgment with an intent and determination to acquit the respondents 2 to 4.

(vi) The lower Court did not compel the prosecution to examine Senthil Kumar, who is the main witness rather allowed the prosecution to dispense with his appearance mechanically.

(vii) The lower Court with pre-determined intention to acquit the respondents 2 to 4 discussed only the laches.

(viii) The lower Court ought to have convicted the respondents 2 to 4 on the basis of evidence of P.W.18 and the evidence of P.W.14. Further, the evidence of P.W.14 ought to be considered relevant in view of res-gestae.

(ix) The lower Court went against Law and Judicial Precedents to disbelieve the evidence of P.W.11 on the ground that she is the relative of P.W.14.

(x) The lower Court ought to have taken judicial notice that the deceased Iyyapan was important witness in a criminal case pending against the respondents 3 and 4 by invoking Section 165 of Indian



Evidence Act, 1972 (amended).

WEB COPY

(xi) The lower Court ought to have convicted the respondents 2 to 4 on the ground that the evidence of P.W.9 to P.W.11 as sufficient for last seen theory.

(xiii) The lower Court after allowing the prosecution to dispense with listed witnesses mechanically and later, acquitted the respondents 2 to 4 on that evidence.

(xiv) The lower Court wrote the judgment in a causal way and illegally held that the evidence of P.W.4, P.W.19, P.W.17, P.W.5, P.W.7, P.W.8, P.W.9, P.W.20, P.W.21 and evidence of P.W.11, P.W.14 and P.W.15 is not sufficient to prove the case without discussing their evidence within the test of Indian Evidence Act, 1872 (as amended).

(xv) The lower Court failed to exercise the provisions of Sections 357A(3) Criminal Procedure Code, 1973 (as amended) and awarded compensation to appellant / victim.

(xvi) The lower Court ought to have described the entire deposition of prosecution witness before discussing issues as to whether the prosecution proved their case or not. This deliberate omission warrants the de-novo trial since the entire trial conducted by the lower



Crl.A(MD) No.114 of 2021

Court seems to be not participatory to administer justice. The lower Court tolerated all lapses on the part of prosecution as silent spectator and later acquitted the respondents 2 to 4 conveniently.

4. The learned counsel for the appellant argued that the lower Court did not compel the prosecution to examine Senthil Kumar, who is the key witness, but, allowed the prosecution to dispense with. The lower Court failed to consider the evidence of P.W.14. The prosecution failed to peruse the case records against the respondents 3 and 4, in which, the deceased Iyyapan was an important witness. The lower Court failed to take into consideration the evidence of P.W.9 and P.W.11, who had last seen the accused and the deceased. The prosecution dispensed with a number of witnesses mechanically and that was not questioned by the lower Court. The lower Court failed to exercise the provisions of Section 357 Cr.P.C and award compensation to the appellant / victim.

5. The learned Additional Public Prosecutor, who appeared for the first respondent argued that the prosecution produced all the material witnesses before the Court and also marked important exhibits and



Crl.A(MD) No.114 of 2021

Material Objects. Since the important witnesses turned hostile and some of the key witnesses, who had accompanied the deceased and are alleged to have witnessed the occurrence were not examined as they were not found and for that the prosecution could not be found fault. Important witnesses turned hostile and did not support the prosecution case and based on the available evidence and materials, the lower Court acquitted the accused and prayed to dismiss the appeal.

6. Heard both sides.

7. After careful perusal of the entire case records, it reveals that though prosecution cited 29 witnesses, during trial, 21 witnesses were examined and witness Nos. 7 to 10, 12 and 23 were dispensed with by the prosecution.

8. The list of witnesses relied upon by the prosecution were given in the charge sheet filed by the Inspector of Police, Kalakadu Police Station, dated 29.05.2004. When perused, it is seen that L.W.1-



Crl.A(MD) No.114 of 2021

Shanmuga Sundaram, brother of the deceased, L.W.2 Annal, wife of deceased were cited as witnesses, in order to prove the motive for the crime.

9. Thiru.Shanmuga Sundaram – L.W.1 had been examined as P.W.11, who is the brother of the deceased Iyyapan and L.W.2 Smt.Annal had been examined as P.W.14, who is the wife of the deceased. During trial, P.W.11 stated that he was informed by one Raja S/o.Chandran that his brother was found with blood injuries in a mud road near Mavadi. He went to the place of occurrence with his brother Yovan and found his brother Iyappan with injuries. He brought a Van and kept him inside the Van and took him to a 15 meter distance and switched on the light and found that he was dead. Therefore, they left the vehicle with dead body and went to the police station and lodged a complaint on 22.03.2004, midnight 3 O' clock. Through him, the complaint has been marked as Ex.P14. He further deposed that on enquiry, he came to know that due to previous enmity, his brother was kidnapped and murdered by A1. He was also informed by Selvaraj and Baskar that on 23.03.2004 at 5 O' clock, Accused Nos. 1 to 3 hatched



Crl.A(MD) No.114 of 2021

conspiracy to kill his brother and Accused No.2 handed over a bundle of cash to A1 and A1 assured that he will do away his brother and get the remaining money. During trial, he had not spoken anything about the motive and did not state that he was informed by Selvaraj and Baskar about the conspiracy hatched between the accused.

10. However, it reveals from his evidence that he is not an eyewitness to the conspiracy. Further, the prosecution had not cited the informant Baskar and Selvaraj as witnesses in the charge sheet, but, subsequently added Selvaraj as witness No.29. He was examined as P.W.18. Likewise, P.W.14 wife of the deceased Annal deposed that Selvaraj and Baskar informed her about the conspiracy between Accused Nos.1 to 3 and that cash was handed over by A2 to A1. She was also not an eyewitness to the conspiracy, but hearsay witness. She had not spoken anything about motive to the occurrence.

11. P.W.14, in her evidence deposed that Selvaraj and Baskar informed about the conspiracy to her on 05.04.2004. However, during cross examination, she admitted that she had not stated anything about



Crl.A(MD) No.114 of 2021

the same to the police. However, P.W.11 during cross examination stated that he had informed the police about the information given by Selvaraj and Baskar. But, it was not recorded in his Section 161 Cr.P.C. Further, the evidence of P.W.11 and P.W.14 are totally contra to their statement recorded under Section 161 Cr.P.C. In the 161 Cr.P.C. statement, P.W.11, stated that on 22.03.2004, he was informed by one Raja that himself, his brother Iyappan and A1 were attending a marriage at Kattalai and returned in a two wheeler at 11.45 hours. He then found Iyaappan's dead body on South Road, on the southern side. After hearing the same, he along with his relatives had gone to that place and thereafter, he had informed the same to Annal P.W.14 and lodged the complaint that his brother was killed by an unknown person. He stated in his statement about the conspiracy between the accused Nos.1 to 3. Likewise, in the 161 Cr.P.C statement of P.W.14 there was no whisper about the conspiracy. But during trial, both P.W.11 and P.W.14 made improvements in their evidence by stating that the conspiracy between the accused was informed by Selvaraj and Baskar. The said Selvaraj had been examined as P.W.18. He stated that on 20.03.2004, evening 05.00 p.m., when he was standing in his residence, he witnessed the conspiracy.



Crl.A(MD) No.114 of 2021

A3 informed A2 that A1 is the Fit Person to do away Iyaappan. A2 handed over cash to A1. A1 assured that he would complete the mission within 5 days. Since his conscious pricked him, he informed the same to Annal on 05.06.2005. During cross examination, he admitted that he is the own brother of Annal. He also admitted that he had not informed about the conspiracy to the police soon after hearing the same, for which, he replied that due to fear, he had not informed the same to police. Further, he had not deposed in his evidence that he had informed about the conspiracy to P.W.11 Shanmugasundaram.

12. The evidence of the above witness is not credible, as deceased Iyaappan is the husband of his own sister. When he heard that his own brother-in-law's life is danger, it is not possible to keep silence for one year. Even after the death of Iyappan also, he had not stated anything to the police and he kept silent for one year and then, during trial stated that he witnessed the conspiracy. The prosecution not stated any plausible explanation for the delay.

13. Further, he has not spoken about place where the conspiracy



Crl.A(MD) No.114 of 2021

took place. In this regard, investigating officer did not record further statement of P.W.11 and P.W.14. Therefore, the evidence of P.W.11, P.W.14 and P.W.18 about the conspiracy among A1 to A3 is not reliable. Likewise, L.W.5, L.W.6, L.W.7 were also cited as witness to prove the conspiracy. L.W.5 - one Suresh and L.W.6 - one Thangaraj have been examined as P.W.1 and P.W.2. Both turned hostile and did not support the prosecution case. One Yovan – L.W.11 had been examined as P.W. 12, to prove the motive. During chief examination, he had stated that himself and accused Iyappan were cited as witnesses in Guruswamy case. Accused Nos.2 and 3 threatened him on 03.03.2004, at night 01.45 a.m., not to depose evidence against them in that case or they will do away with them and on 22.03.2004, murdered Iyappan. Therefore, he called A2 and A3 viz., Mahalingam and Kannan through phone and questioned them why they murdered Iyappan, for which, both asked whether they wanted to do the same to him, and immediately, he kept the phone. He had lodged a complaint before the Thirukurunkudi Police Station for self protection. However, no such complaint or phone call details had been produced by prosecution to prove that a complaint was lodged by P.W.12. His statement was contrary to his statement under Section 161



CrI.A(MD) No.114 of 2021

Cr.P.C. In that statement, he had not stated about the complaint lodged against the accused before the Police Station and that he was not an eyewitness to the occurrence.

14. P.W.6 Thanjarajan, who was cited as witness for recovery of weapon from the accused did not support the prosecution case and turned hostile. Confession and recovery has not been proved by prosecution. L.W.4 - one Tr.Gopalakrishann was cited as eyewitness, who had accompanied the accused, but, he was not examined as he was not found in his address which is evident from V.A.O. Report, in the case records.

15. P.W.9 is an important witness, who had last seen the witness and accused together on the date of occurrence. He stated that he saw the first accused and the deceased - Iyyapan in a vehicle bearing Registration No.TN-74-B-5753 and the said vehicle was followed by another vehicle bearing Registration No.TN-72-V-8988, in which, witnesses viz., Gopalakrishnan, Harikrishnan and Jayakumar were travelling. When he



Crl.A(MD) No.114 of 2021

was under surveillance, both the vehicles came near him and he stopped both the vehicles, but, the vehicle bearing Registration No.TN-74-B-5753, where the accused and deceased were travelling did not stop. He stopped the vehicle wherein Gopalakrishnan and others were travelling bearing Registration No.TN-74-V-8988. He asked Gopalakrishnan to bring the first accused, deceased and other witness. Thereafter, he received intimation that Iyyapan's body was found with blood injuries. Since the jurisdiction of the said place comes under the Kalakadu Police, they came to the place of occurrence. He also went and saw the dead body of Iyappan in a Maxi Cab, kept behind the driver seat and also found blood strains near 60 feet away. He stated that the said Iyyapan deposed against the accused Nos. 2 and 3 in Crime No.49 of 1999. But, no such case details were marked on the side of the prosecution.

16. Important witnesses, viz., Gopalakrishnan and Jayakumar were not examined by the prosecution during trial. Harikrishnan and Raja, who were accompanying the accused, were not cited as witness.



Crl.A(MD) No.114 of 2021

17. The prosecution relied upon L.W.8, L.W.9, L.W.10 to prove that the 1st accused made the deceased to consume alcohol, but, none of the witnesses were examined by the prosecution. Normally, the trial Court would allow the prosecution to dispense the witness, but, the Court has the power to examine the witness, if their evidence is vital, if the prosecution fails to do and the Court can consider if necessary in the interest of justice to call the witnesses without the consent of prosecution or defence. The trial Court had not taken any steps to call the witness.

18. The lower Court mentioned in the judgment that the investigating officer conducted the investigation in a hazard manner and also mentioned that there is no use for reinvestigation as the matter was of the year 2004.

19. In this case, except the close relatives, none of the witness supported the case, but, the relative witnesses were not credible. In this case, it is true that there are lapses in investigation. The Investigating Agency did not conduct an investigation in a tainted and unfair manner.



Crl.A(MD) No.114 of 2021

The Supreme Court in the case of ***V.K. Sasikala Vs. State reported in (2012) 9 SCC 771*** has held as under :-

"12. The parameters governing the process of investigation of a criminal charge, the duties of the investigating agency and the role of the courts after the process of investigation is over and a report thereof is submitted to the court is exhaustively laid down in the different Chapters of the Code of Criminal Procedure, 1973 (CrPC). Though the power of the investigating agency is large and expansive and the courts have a minimum role in this regard there are inbuilt provisions in the Code to ensure that investigation of a criminal offence is conducted keeping in mind the rights of an accused to a fair process of investigation. The mandatory duty cast on the investigating agency to maintain a case diary of every investigation on a day-to-day basis and the power of the court under Section 172(2) and the plenary power conferred in the High Courts by Article 226 of the Constitution are adequate safeguards to ensure the conduct of a fair investigation."

88. The expression "fair and proper



investigation" in criminal jurisprudence was held by this Court in Vinay Tyagi v. Irshad Ali (2013) 5 SCC 762 to encompass two imperatives; firstly, the investigation must be unbiased, honest, just and in accordance with law; and secondly, the entire emphasis has to be to bring out the truth of the case before the court of competent jurisdiction.

89. Prior thereto, in the same vein, it was ruled in Samaj Parivartan Samudaya v. State of Karnataka (2012) 7 SCC 407 that the basic purpose of an investigation is to bring out the truth by conducting fair and proper investigation in accordance with law and to ensure that the guilty are punished. It held further that the jurisdiction of a court to ensure fair and proper investigation in an adversarial system of criminal administration is of a higher degree than in an inquisitorial system and it has to take precaution that interested or influential persons are not able to misdirect or hijack the investigation, so as to throttle a fair investigation resulting in the offenders, escaping the punitive course of law. Any lapse, it was proclaimed, would result in error of jurisdiction.



Crl.A(MD) No.114 of 2021

20. However, it is noted that the complainant did not challenge the non examination of witness and improper investigation, before the trial Court. On careful perusal of records, the Court finds that the lapse on the part of investigating agency alone is not ground to acquit the accused by the lower Court, but the lower Court must considered whether no material was available against the accused. The lower Court then acquitted the accused.

21. In **2008 10 SCC 450, Ghurey Lal vs the State of Uttar Pradesh**, the Hon-ble Supreme Court had laid down the principles to overrule or otherwise disturb a trial Court judgment of acquittal. In para 17, it had been held as follows:

“70.In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has “very substantial and compelling reasons” for doing so.

A number of instances arise in which the appellate court would have ?very substantial and compelling reasons? to



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discard the trial court-s decision. “Very substantial and compelling reasons” exist when:

- (i) The trial court-s conclusion with regard to the facts is palpably wrong;*
 - (ii) The trial court-s decision was based on an erroneous view of law;*
 - (iii) The trial court-s judgment is likely to result in ?grave miscarriage of justice?;*
 - (iv) The entire approach of the trial court in dealing with the evidence was patently illegal;*
 - (v) The trial court's judgment was manifestly unjust and unreasonable;*
 - (vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.*
 - (vii) This list is intended to be illustrative, not exhaustive.*
- 2. The appellate court must always give proper weight and consideration to the findings of the trial court.*
- 3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.”*

22. When a case rests on circumstantial evidence, motive is a key



Crl.A(MD) No.114 of 2021

link in the chain of circumstances that can help to establish the guilt of the accused. But, even the motive was not established by the prosecution.

Absence of motive can weigh in favour of the accused and in the absence of motive, prosecution cannot prove the case. The prosecution failed to prove conspiracy between the accused. There are contradictions in the statements recorded under Section 161 Cr.P.C and the deposition by the witness during trial. The last seen theory was spoken to, but, witness, who accompanied the accused and deceased were not examined. The arrest, confession and recovery were not established. Except the official witness, no materials are available to connect the accused with the crime.

23. As far as compensation under Section 357 Cr.P.C. for the wife of the accused is concerned, it is evident that she lost her husband and even if the case is acquitted against the accused, she is entitled for compensation. She is at liberty to approach the District Legal Services Authority for award of compensation.

24. Since there no ground is available to interfere with the judgment of the lower Court, this Court cannot interfere with the order of



Crl.A(MD) No.114 of 2021

the lower Court to set aside the same unless it is established that the judgment is arbitrary, irrational or improper. Hence, there is no ground to set aside the judgment of the trial Court. There are no grounds to allow the appeal. The Criminal Appeal is hereby dismissed.

(C.V.K.J) & (R.P.J)

19.10.2024

Index :Yes
Internet:Yes
NCC : Yes
LS

To

- 1.The III Additional Sessions Judge,
Tirunelveli
- 2.The Inspector of Police,
Kalakadu Police Station,
Tirunelveli District
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

23/24



Crl.A(MD) No.114 of 2021

C.V. KARTHIKEYAN,J.
AND
R. POORNIMA,J.

LS

Pre-delivery judgment made in
Crl.A.(MD)No.114 of 2021

19.10.2024