



Crl.A.(MD)No.132 of 2020

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
28.02.2024	19.03.2024

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE C.KUMARAPPAN**

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Vinoth

... Appellant/ A2

VS.

The State Rep. by
The Inspector of Police,
East Police Station,
Kumbakonam,
Thanjavur District.
(Crime No.122 / 2017)

... Respondent / Complainant

PRAYER : Criminal Appeal filed under Section 374 of Cr.P.C., to call for the records relating to the judgment in S.C.No.129 of 2017, dated 11.02.2020, on the file of the Additional District and Sessions Judge-cum-Special Court under the EC Act cases, Thanjavur, and set aside the same and allow this Criminal Appeal.



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For Appellant

: Mr.N.Anantha Padmanaban
Senior Counsel
for Mr.N.Mohan

For Respondent

: Mr.R.Meenakshi Sundaram
Additional Public Prosecutor

JUDGMENT

**DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.**

Appeal against the judgment of conviction by the trial Court.

2. This is a case of murder in a public place which occurred on 14.04.2017 at about 06.00 p.m.

3. One of the accused was a money-lender and the another accused is his brother. The deceased also a money-lender was called to the second accused place and was done to death.

4. Though the de-facto complainant, who accompanied the deceased to the accused place and also sustained injuries in the incident, turned hostile, the trial



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Court relying upon the statement of this witness before the Magistrate, who recorded his statement under Section 164 (1) of Cr.P.C. during the investigation, the injuries found on his body and his statement to the doctor, who treated him for those injuries, and the evidence of P.W.5 and P.W.6, who are the other eyewitnesses to the occurrence besides the recovery of incriminating objects on the information given by the accused were taken into consideration and held the second accused guilty of the offence punishable under Section 302 I.P.C. As far as the first accused, the charge got abated, since he died pending trial.

5. The appeal by the second accused is on the ground that, the contradiction in the evidence of P.W.5 regarding the time of occurrence, the place from which he saw the occurrence and the sequence of attack would show that he is not an ocular witness. Further, his statement under Section 161(3) Cr.P.C. sent to the Court after a long delay and the delay not explained. P.W.1 having disowned his complaint Ex.P2, his previous statement recorded by the Magistrate has no evidentiary value, since the Magistrate who recorded the statement did not ensure the statement given on own will and volition. The maker of the statement (P.W.1) has not signed in each and every page of the statement, which is mandatory.



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Reliance on P.W.6's evidence, who was eventually treated a hostile witness, is erroneous. The confession leading to recovery of Material Objects is highly doubtful.

6. The learned Senior Counsel for the appellant, while canvassing the merits of the appeal grounds extracted above, submitted that the trial Court also failed to note that all recovery of incriminating materials based on the confession of the co-accused cannot be used against the appellant. The only witness, who speaks about the overt act of this appellant/A2 is P.W.5, but his testimony bristles with contradictions not only regarding time, sequence of attack and also the place of occurrence. The Rough Sketch [Ex.P22] prepared by the Investigating Officer does not corroborate with the testimony of P.W.5 makes his alleged presence at the scene of crime doubtful. The flaw in the prosecution case entails the appellant acquittal.

7. The learned Additional Public Prosecutor for the State submitted that, men may lie, but not the circumstances. The deceased and the accused persons were in money lending business and musclemen. The witness, Bharathi @



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Bharathidasan [P.W.1], who is friend of the deceased, turned hostile, though he sustained injuries in the incident and got treatment for the injuries. Dr.Anbu [P.W.17] had deposed about the admission and treatment given to P.W.1. The history of assault as disclosed by P.W.1 finds place in the Accident Register [Ex.P13]. However, in the Court, during the examination on oath, he had given a different reason for the injuries. Likewise, Selvaganapathi [P.W.6] another eyewitness, who took the injured [P.W.1] to the hospital turned hostile, however, the prosecution case has not impaired in any manner. Since the other evidences are cogent and without any break in link leading to guilt of the appellant without any doubt. The blood stained cloth of this appellant recovered along with the blood stained cloth of his brother the co-accused from the haystack kept near the house of their uncle Murugesan on the information provided by his brother, the co-accused, is one of the incriminating piece of evidence against this appellant, which lends credence to the prosecution case as spoken by P.W.5, P.W.17 and P.W.9. Therefore the learned Additional Public Prosecutor sought for dismissal of the appeal.

8. Heard the learned counsels. Records perused.



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9. The case of the prosecution as unfurled through its witnesses:-

9.1. On 14.04.2017 at about 19.00 hours, Ms.Sudha, Sub-Inspector of Police (P.W.23) attached to Kumbakonam East Police Station, received intimation from the Government Hospital, Kumbakonam about the medico legal case. She proceeded to the hospital and recorded the statement of Bharathidasan (P.W.1), who was admitted in the casualty ward. Based on his statement [Ex.P1], she came to the Station and registered F.I.R. (Ex.P21) in Crime No.122 of 2017 under Sections 324 and 302 I.P.C. against Sathish @ Sullan Sathish (A1) and Vinoth (A2) at about 20.30 hours. The F.I.R. copy was forwarded to the Judicial Magistrate No.II, Kumbakonam, through Karunanithi, Special Sub-Inspector of Police (P.W.20) at about 21.30 hours, which was received by the learned Judicial Magistrate at about 22.00 hours. P.W.23, placed the case file to Periyasamy (P.W.24), Inspector of Police for further action.

9.2. The information furnished by P.W.1 disclosed that, both the deceased and the appellant / second accused are in money lending business. One Newsath Ali borrowed Rs.3.50 Lakhs from the deceased. He without discharging the debt, sold his property to the first accused, who is the brother of the second



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accused. The first accused promised to the deceased that he will settle the debt of his vendor Nowsath Ali, but did not keep up his promise. At the same time, one Suresh, who owe money to the second accused evading repayment, knowing that, the deceased had interfered in that matter and called the appellant/second accused and told the appellant/second accused that he (deceased) will arrange for the recovery of the money, which Suresh owe to the appellant/second accused. The appellant/second accused retaliated saying he knew how to recover his due and told the deceased not to interfere in his matter. Both the accused, who are brothers had entertained suspicion that the deceased may collect money from Suresh, which he owe to the appellant/second accused and keep it for himself for the money promised to be paid by the first accused. Therefore, on 14.04.2017, the first accused called the deceased at about 05.00 p.m. and shouted at him for interfering in his brother matter and challenged the deceased to come in person, if he has any guts. Accepting the challenge, the deceased along with his partner in the finance business Bharathidasan (P.W.1) with whom he was from 02.30 p.m. at V.P.V. Lodge went in a two wheeler bearing registration No.TN-68-M-8742 to the A2 shop at Kothandapani Street. Sathish (A1) and Vinoth (A2), who were present armed with weapons, attacked the deceased and P.W.1.



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9.3. As per the complaint, A2 stabbed the deceased on his neck.

When P.W.1 tried to push A2, A1 attacked P.W.1 from behind with Aruval on his back and shoulder. A1 and A2 attacked the deceased with their weapon repeatedly over the neck and face. When P.W.1, Saravanan (not examined) and others raised alarm, A1 and A2 fled. Vickram (the deceased) was taken to the hospital in an Auto. The doctor, who examined him declared brought dead. The auto driver Suresh was examined as P.W.11. The doctor, who first examined Vickram and declared brought dead, is P.W.15. The Accident Register copy is Ex.P12. He also gave treatment to P.W.1 and the Accident Register for P.W.1 was marked as Ex.P13. The requisition for autopsy of Vickram body was sent by the Investigating Officer through Anandkumar, Head Constable [P.W.21]. Dr.Kamaruddin [P.W.16], who conducted autopsy, had given the postmortem certificate [Ex.P14] along with his opinion which reads as below:-

"1. Cut injury measuring about 28 x 2 c.m. in the neck extending from one side of ear to the other with injury to the underlying hyoid bone, trachea, carotid arteries and jugular veins.

2. Cut injury measuring about 17 x 2.5 c.m. one inch above the injury No.1 with damage to the underlying vessels.

3. Cut injuries measuring about 8 x 2 c.m. one inch above the



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injury No.2.

4. Cut injury in the face extending from one side of the eye to the other side of the eye.

5. Cut injury measuring about 8 x 2 x 1 c.m. in the right arm.

6. Cut injury measuring about 3 x 2 c.m. in the right shoulder.

7. Cut injury measuring about 3 x 2 c.m. in the left arm.

8. 6 patterned abrasions over the chest and abdomen.

Ribs: intact. Lung measuring about 550 & 500 gms.

C/s. – Pale. Heart intact – 250 gms. Chambers empty.

Stomach contains undigested food material about 200 ml and Intestine empty.

Liver 150 ml. C/s. Pale.

Spleen 90 gms. Kidney 110 gms. Each. C/s. Pale.

Bladder : empty. Skull scalp : normal.

Brain substances : Normal.

The viscera are preserved and sent to Chemical Analysis of any toxic substances.

The death would have occurred 12 - 24 hours prior to postmortem.

The opinion is the death would have occurred due to vital organ including carotid vessels and hypovolemic shock. Herewith final opinion is reserved pending the report of Chemical Analysis of viscera.

Final Report:-

The Arteries, stomach, intestine, liver kidney and preservatives



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were examined. But, alcohol or other poison was not detected in any of them. Hence, the probable cause of death is injury to the major blood vessels. Carotids and jugular veins and the respiratory hypovolemic shock."

9.4. Periyasamy, Village Administrative Officer, [P.W.9] had deposed that on 17.04.2017 at about 10.30 a.m., while he was in duty along with his Assistant Subbarao, Satheesh [deceased - A1] came to the Office and expressed his voluntariness to confess about the crime. He took him to the Police Station and in his presence, A1 gave his statement. He sent a special report to the Police Department about recording of A1's confession statement. Based on the confession, Aruval [M.O.1] and Knife [M.O.2] were recovered under the Avoor River Bridge. The recovery mahazar [Ex.P7], in which, P.W.9 and his Assistant had signed.

9.5. From the pump set of one Kasinathan [P.W.10], Honda CB Unicorn two wheeler bearing Registration No.TN-68-M-8742 was recovered under Mahazar [Ex.P8]. The blood stained clothes of A1 as well as A2 were recovered from haystack near the residence of one Murugesan, who is the uncle



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of the accused. The Mahazar for the recovery of blood stained clothes is marked as Ex.P9. In all the recovery mahazars, P.W.9 has signed as one of the witnesses. The other witness Subbarao, who is the Assistant of the Village Administrative Officer not examined. Kasinathan from whose pump set, the vehicle recovered, was examined as P.W.10. P.W.10 had deposed that the vehicle was parked in his pump set and that was recovered by the Police, but he had deposed that no Mahazar was prepared at that spot. The Photographer, who has captured the scene of occurrence on the request of the Investigating Officer, was examined as P.W.12 and the photographs were marked as Ex.P10 series.

9.6. P.W.14 Mr.Saravana Bhavan, learned II Additional District Munsif-cum-Judicial Magistrate No.I, Kumbakonam, who has recorded the statement of P.W.1 under Section 164(1) of Cr.P.C., had identified his statement handwritten by him. The said statement was marked as Ex.P11. In the cross-examination, though P.W.2 had said that there is no indication that P.W.1 gave his statement without any inducement and he has not obtained the signature of the statement maker [P.W.1] for each answers, from the perusal of the original statement recorded by P.W.14, this Court finds that for 24 typed questions, which are introductory in nature, the accused has answered and his signature is obtained



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in the bottom of the each page. The 24th question is about the narration of event by Bharathidasan. After completion, P.W.14 has certified saying that based on the summon issued to witness Bharathidasan [P.W.1], he appeared and after giving adequate warning and being satisfied that he is fit to give evidence, the statement was recorded with consent. After recording the statement, he has read over the content to the deponent and thereafter, the deponent affixed his signature in the statement.

9.7. In the light of the above certificate and the admission of the signature found in the statement, marked as Ex.P2, the veracity of the content in their statement gains credibility. Therefore, the contention of the learned Senior Counsel for the appellant that 164 Cr.P.C. statement recorded by P.W.14, has no evidentiary value, since required certificate not appended is found to be incorrect. No doubt, P.W.1 the maker of the statement has disowned the statement recorded by the learned Magistrate stating that somebody has asked him to depose so and therefore, he has stated before the learned Magistrate.

9.8. Regarding the injuries, which P.W.1 sustained and noted by the doctor at Government Hospital, Kumbakonam, in the Accident Register [Ex.P13] as well as the further statement given to P.W.1 at Sugam Multi Speciality Hospital



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as found in Ex.P15, the history of assault says he was attacked by two known persons with Knife and Stickle. Whereas, P.W.1 before the Court contrary to the medical record and his own previous statement recorded by the learned Magistrate under Section 164 Cr.P.C. had deposed that he fell down from the vehicle accidentally and lost his conscious and he did not know what happened. Therefore, he was declared as hostile witness and cross examined. Though he was the friend of the deceased and accompanied him to the scene of crime, he turned hostile while examined by the Court after 3 ½ years of the occurrence. The hostility of these two witnesses *qua* the evidence of P.W.5 [ocular witness] and P.W.11 [Auto driver], the trial Court had believed the evidence of P.W.5 as reliable. The evidence of P.W.1, who has turned hostile retracting his earlier statement given to the learned Judicial Magistrate is an unreliable. However, the other circumstances clearly strengthens the case of the prosecution.

10. On considering the evidence of prosecution, there is nothing to suspect the credibility of P.W.5. He is a resident of Kumbakonam Town. He know both the victim and the accused persons and his presence at the scene of occurrence been well explained by P.W.5. In the cross examination, he had deposed that from



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the tea shop, the place of occurrence was 25 feet away. His house and the tea shop is about one kilometre away. He had naturally deposed that about 50 persons were near the place of occurrence and only on seeing the injured person, he was able to identify the deceased. In the chief examination, he had spoken about the arrival of the deceased and P.W.1 in a motorcycle. He witnessed the altercation between the deceased and the accused persons and also the attack on the deceased by Viond and Satheesh. Because two of the eyewitnesses have retracted their earlier statement, there is no reason to disbelieve the testimony of P.W.5, who withstood the cross examination. P.W.1 is the person, who has set the law into motion and an injured witness. He would have become scared to depose against the accused and had turned hostile. However, the injuries he sustained and the contemporaneous document, which has recorded his injuries in the same transaction will not lie. The presence of the appellant along with his brother [since deceased] as spoken by P.W.5 is sufficient to hold that the prosecution has proved the case beyond doubt. It is the unimpeachable quality of the witness P.W.5 inspired the confidence of the Court to deliver the verdict of guilty.



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11. The contention of the learned Senior Counsel for the appellant is that the recovery of blood stained shirt based on the confession given by Satheesh @ Sullan Satheesh, but not tried together, cannot be put against the appellant.

12. At this juncture, it is relevant to refer Section 30 of the Indian Evidence Act, which reads as under:-

"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.

Explanation.- "Offence" as used in this section, includes the abetment of, or attempt to commit, the offence.

Illustrations

(a) A and B are jointly tried for the murder of C. It is proved that A said – "B and I murdered C". The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said - "A and I murdered C".



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This statement may not be taken into consideration by the Court against A, as B is not being jointly tried."

13. A plain reading of the above said Section clearly presupposes a joint trial of the maker of the statement and the other accused. In the present case, when charges were framed against A1 and A2 on 6th September, 2019, A1 was not alive. From the records, this Court finds that A1 died before framing of charges. Since he was not tried due to abatement, the confession given by the deceased co-accused and the recovery based on the confession cannot be used against the appellant herein. However, from the evidence of P.W.5 Prakash, the ocular witness, which stands unimpeached and inspires the confidence of the Court, the trial Court's conviction holds good, since this Court, on re-appreciation of the evidence, unable to arrive at any other different view.

14. P.W.1 having set the law into motion and given voluntary statement before the learned Magistrate, had later developed cold feet to turn hostile. However, his reason for giving the statement despite affixing his signature in each page of the statement, previous statement to the learned Judicial Magistrate



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appears to be more credible, though it may not be a substantial piece of evidence.

The *ipse dixit* explanation given by P.W.1 for the injury also in contrary to the ocular evidence of P.W.15 and Ex.P15.

15. On cumulative assessment of the witnesses, this Court holds that the trial Court has rightly arrived at conclusion of guilty. Neither the hostility of P.W.1 nor the minor discrepancies or the lack of corroboration to P.W.5 ocular evidence does not make any dent in the conclusion.

16. In fine, this Criminal Appeal is dismissed. The conviction and sentence imposed on the appellant / A2 by the learned Additional District and Sessions Judge / Special Court under EC Act Cases, Thanjavur, in S.C.No.129 of 2017, dated 11.02.2020, stands confirmed.

17. In view of dismissal of this appeal, the bail bond executed by the appellant shall stand cancelled. The appellant shall surrender before the trial Court within 15 days from today, to undergo the remaining period of sentence.



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Failing which, the respondent Police shall secure him and commit him to prison to undergo the remaining period of sentence.

Index : Yes
NCC : Yes
smn2
To

[G.J., J.] & [C.K., J.]
19.03.2024

- 1.The Additional District and Sessions Judge-cum-Special Court under the EC Act cases, Thanjavur.
- 2.The Inspector of Police, East Police Station, Kumbakonam, Thanjavur District.
- 3.The Section Officer, Criminal Records, Madurai Bench of Madras High Court, Madurai.
- 4.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.



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and
C.KUMARAPPAN, J.

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PRE-DELIVERY JUDGMENT MADE IN
CrI.A.(MD)No.132 of 2020

19.03.2024