

(2016) 03 MAD CK 0267

In the Madras High Court

Case No : Criminal Appeal Nos. 402 & 445 of 2012

Suresh and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 15-03-2016

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 30

Penal Code, 1860 (IPC) — Section 147, Section 148, Section 149, Section 201, Section 302

Citation : (2016) 3 MLJ Criminal 305

Hon'ble Judges : M. Jaichandren and S. Nagamuthu, JJ.

Bench : Division Bench

Advocate : A. Raghunath, Senior Counsel for K. Selvakumaraswami, for the Appellant; M. Maharaja, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S. Nagamuthu, J.—1. Accused 1,2,4,5 to 9 in S.C. No. 153 of 2011 dated 22.06.2012 on the file of the learned II Additional District Sessions Judge, Salem are the appellants in CrI.A. No. 402 of 2012. A.3 in S.C. No. 153 of 2011 dated 22.06.2012 on the file of the learned II Additional District Sessions Judge, Salem is the appellant in CrI.A. No. 445 of 2012. The trial Court framed charges under Section 148 I.P.C., against A.1 and A.2; for offence under Section 147 I.P.C., against A.3 to A.9 and for offence under Sections 302 r/w 149 and 201 I.P.C., against A.1 to A.9. By judgment dated 22.06.2012, the trial Court convicted the accused under all the charges and sentenced them as under:-

Challenging the said conviction and sentence, the appellants are before this Court with these Criminal Appeals.

2. The case of the prosecution, in brief, is as follows:-

The deceased in this case was one Mr. Sidhan. The appellants are the residents

of Elumanathanoor Village in Salem District. The deceased also hailed from the same village. The deceased was a known rowdy element and he had lot of cases against him. He was causing immeasurable problems to the Villagers. On 08.11.2010, when A.1 and A.2 were taking food in a local hotel known as "Srinivasa Hotel", the deceased came there, developed a quarrel with A.1 and attacked him with knife on his head. After the said incident, A.1 and A.2 had gone to the hospital. After treatment, A.1 and A.2 along with A.7 and A.8 were returned to their village. At about 8.30 pm, when they were nearing Elumanathanoor bus stop, the deceased came there and started attacking A.7 and A.8. Then all the accused went to the village and informed the villagers. With a view to retaliate, A.1 to A.9 started from the village and went in search of the deceased. The deceased was found near the Oodai in the village. It is further alleged that A.1 and A.2 had wooden logs in their hands. On finding the accused at the place of occurrence, A.1 who was having the wooden log attacked the deceased on his head, right elbow, nose, right knee and the other parts of the body. A.2 attacked the deceased with the wooden log on his head, face, left shoulder, left elbow and other parts of the body. A.3 attacked the deceased with a leaf stalk of coconut tree (thennai muttai). A.4 attacked the deceased with hand; A.5 attacked the deceased with legs; A.6 attacked the deceased with hands; A.7 attacked him with hands; A.8 kicked the deceased with legs and A.9 attacked the deceased with a stone. The deceased having sustained injuries at the hands of the accused, died on the spot. Then with a view to cause disappearance of the evidence, all the accused threw the dead body of the deceased into Oodai and disappeared from the place of occurrence.

3. It is alleged that P.Ws.4 to 6 were witnessed the occurrence. P.W.1 is the father of the deceased and P.W.2 is the sister of the deceased. P.W.5 is none else than the husband of P.W.2. On the next day morning at about 7.00 am, P.W.2 came to know that the dead body of the deceased was found lying near Oodai. When she rushed to the place of occurrence, she found already a crowd of villagers witnessing the same. Then she returned to the house and informed P.W.1 (her father) about the occurrence. P.W.1 thereafter went to the place of occurrence and found the dead body of the deceased with multiple grievous injuries. Thereafter, he went to the police station and made a complaint under Ex.P.1.

4. P.W.13, on receipt of the said complaint, registered a case in Crime No. 476 of 2010 for offence under Section 302 I.P.C., at 7.30 am on 09.11.2010. In Ex.P.1, P.W.1 had mentioned that the assailants were not known. Thus, in the F.I.R., (Ex.P.16), the assailants were shown as "unknown". P.W.13, forwarded both the documents to Court and handed over the case diary to P.W.16.

5. P.W.16 took up the case for investigation at 8.30 am on 09.11.2010 and proceeded to the place of occurrence and prepared an observation mahazar and rough sketch in the presence of P.W.9 and another witness. Then he recovered blood stained earth and the sample earth from the place of occurrence under a

mahazar in the presence of same witnesses. Then he conducted inquest on the body of the deceased in the place of occurrence and then he forwarded the body for post mortem.

6. P.W.14, the Doctor conducted post mortem on the body of the deceased and found the following injuries:-

"Injuries:- Abrasions Dark Reddish Brown in Colour

1. 5x4 cm over upper part of right forehead
2. 4x2.5 cm over right forehead extends from medial aspect lower part of right eyebrow with a laceration M-1.5x0.75x0.25 cms over the eyebrow
3. 1.5x1ms over right side root of nose
4. 1x1cm over infra orbital region
5. 1.25x0.75 cms over left side upper part of cheek and it lies 2.5cms lateral to the previous injury
6. 1.25 x 0.75 cms over right cheek
7. 1.25 x 0.75 cms over right side cheek towards right side nostrils
8. A curve linear nail mark seen over right side cheek M-1.25 cms and it is dark reddish brown colour
9. A curve linear nail mark seen over lower aspect of right side mandibular region at the level of angle of mandible 1.25 cms
10. 2x1, 1x3, 3x1cms over back of right elbow
11. Grazed abrasion 4x4.5 cms over outer aspect of middle 3rd of right arm
12. Grazed abrasion over upper part of outer aspect for right arm M-6x4x0.25 cms
13. 8x2.5cms over right side hypochondrial region just below the epigastric region
14. 3x1cms over top of left shoulder
15. 4x1.5 cms over left supra scapular region
16. 4x1.5cms over lower aspect of back of left arm
17. Linear abrasion over middle 3rd of left forearm 5x0.25 cms
18. 1x1, 2x1cms over front of left knee
19. 7x3cms over inner aspect middle 3rd of left leg
20. 4x3, 3x4 2x1 cms over back of upper part of right abdomen
21. Multiple small abrasion over the back of lateral wall of back side of chest and

abdomen

22. A incised wound over M-3.5x0.5x0.5 cms over back of upper 3rd of right forearm and it is situated 6cms above right elbow and 19.5 cms above right wrist

23. A incised wound over at the level of the back of the right elbow M-4x1.5x0.5cms

24. A punch out injury over right middle forearm M-0.75x0.75xbone deep

25. A incised wound over the outer aspect of upper part of right knee 2.x0.25x0.25 cms and it is situated 62 cms above right foot

26. A incised wound over front of upper 3rd of right leg M-1.5x0.25x0.25 x bone deep and it is situated 3cms below right knee and 40 cms above right foot

27. A punched out injury over inner aspect of middle 3rd of right leg 0.75x0.75x0.25 cms and it is situated 3cms below right knee nad 40 cms above right foot

28. A incised wound over front of middle 3rd of right leg - M-1x0.25 x bone deep

29. A incised wound just below previous injury 3.5x0.25x0.25cms and it is situated 26 cms above right foot.

30. A incised wound over front of lower 3rd of right leg 3x0.25x0.25 cms and it is situated 15 cms above right foot

31. A punched out wound over the inner aspect of lower 3rd of right leg 0.75 x 0.25x0.25x0.25 cms and it is situated lateral to the previous injury and 15 cms above right foot.

32. Lacerated injury over back of right soul M-0.75x0.5x0.25 cms

33. A punched out wound over lower aspect of back of left arm M-0.75x0.75x0.5x0.75 cms and it situated 8cms above left elbow and 29 cms below acromilal process

34. A punched out injury over back of lower 3rd of left arm M-0.75x0.5x0.5 cms and it lies 6cms parallel and medial to the previous injury

35. A punched out injury over inner aspect of back of left elbow joint 0.75x0.5x0.5 cms.

36. A punched out wound over back of left elbow M-0.75x0.5x0.5 cms and it lies 2cms below the previous injury

37. A punched out injury over inner aspect of lower 3rd of left knee 0.5x0.5x0.5cms

38. A incise wound over front of upper 3rd of left leg M-1.5x0.5x0.5 cms bone deep and it is situated 4cs below left knee and 38cms above left foot

39. Swelling with deformity over upper 3rd of left forearm O/D fracture involving upper end of left radius and ulna with surrounding soft tissue contused.

40. A incised wound over left side posterior parietal region 3x0.5x5 bone deep and it is situated 11 cms above and lateral to the occipital protuberance"

P.W.14 opined that these injuries could have been caused by assault with wooden logs and also with hands and legs. He further opined that the death was due to shock and hemorrhage due to multiple injuries. Ex.P.17 is the post mortem certificate.

7. When the investigation was in progress, it is alleged that A.1 appeared before P.W.9, the then Village Administrative Officer on 10.11.2010 at 9.30 am and made a voluntary confession, in which, he disclosed that he along with A.2 to A.9, had committed the murder of the deceased and threw the dead body into Oodai. Ex.P.4 is the said extra judicial confession said to have been made by A.1. Then, by 10.30 am on 10.11.2010, he produced A.1 to the Inspector of Police (P.W.16) along with Ex.P.4 and his report under Ex.P.5. P.W.16 arrested A.1 and on such arrest, he gave a voluntary confession in which, he disclosed the place where he had hidden the wooden log. In pursuance of the same, he took P.W.16, P.W.9 and another witness to his house and produced the wooden log. On the same day, at 1.30 pm, P.W.16 arrested A.2,3,4, 7, 8 & 9. On such arrest, A.2 gave a voluntary confession, in which, he disclosed the place where he had hidden the wooden log. In pursuance of the same, he took P.W.16 and another witnesses to his house and produced a wooden log from the backyard of his house. P.W.16 recovered the same under a mahazar at 4.10 pm; A.3 gave a voluntary confession out of which, he produced the leaf stalk of coconut tree (thennai muttai). Then P.W.16 altered the case into one under Sections 147, 148 & 302 I.P.C., and submitted an alteration report to the Court. He forwarded all the accused to Court for judicial remand. At his request, the recovered material objects were sent for chemical examination. The report revealed that there was no blood stains on any of the material objects allegedly recovered from the accused. Then the investigation was taken up by his successor (P.W.17). P.W.17 continued the investigation and laid a charge sheet against all the accused.

8. Based on the above materials, the trial Court framed the charges as stated in the first paragraph of this judgment. The accused denied the same. In order to prove the case of the prosecution, on the side of the prosecution, as many as 17 witnesses were examined and 24 documents were exhibited, besides 8 Material Objects.

9. Out of the said witnesses, P.Ws.1 & 2 have stated that they found the dead body of the deceased near Oodai and P.W.1 has stated that he gave the complaint to the Police. P.Ws.3 & 4 have turned hostile and they have not supported the case of the prosecution in any manner, though they were examined as eye witnesses to the occurrence. P.W.5, the brother-in-law of the deceased has stated that he saw the entire occurrence at about 9.00 am on

08.11.2010 and after that, he went to his house and slept without informing the same to anybody. P.Ws.6, 7 & 8 have turned hostile and they have not supported the case of the prosecution in any manner. P.W.9 is a star witness for the prosecution. He has stated that at 8.00 am on 09.11.2010, he visited the place of occurrence and witnessed the preparation of observation mahazar, rough sketch and the recovery of blood stained earth and the sample earth by P.W.16 and also assisted P.W.16. He has further stated that at 9.30 am, on the next day, when he was in his office, A.1 appeared before him and gave a voluntary confession. It was reduced into writing by him and Ex.P.4 is the said extra judicial confession. Thereafter, according to him, he produced A.1 to P.W.16 along with his special report (Ex.P.5). On such production, P.W.16 arrested A.1 and while in custody, A.1 gave a disclosure statement out of which, a wooden log was recovered. He further stated about the arrest of A.2 and A.3 and on whose confession, yet another wooden log and leaf stalk of coconut tree (thennai muttai) were recovered. P.W.10 has spoken about the arrest of A.9 and on his confession, a stone was recovered. P.W.11, a Constable attached to the respondent police has stated that he handed over the F.I.R., at 9.30 pm on the same day. P.W.12 is the Constable who carried the dead body to the hospital for post mortem. P.W.13 has spoken about the registration of the case. P.W.14 has spoken about the post mortem conducted by him and his final opinion regarding the cause of death of the deceased. P.W.15 is the Constable who took the material objects to the Court and handed over the same. P.Ws.16 & 17 have spoken about the investigation done and the final report filed.

10. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., they denied the same as false. However, they did not choose to examine any of the witnesses nor did they marked any documents on their side. Their defence was a total denial.

11. Having considered all the above, the trial Court found the accused guilty under the said charges and accordingly, sentenced them as detailed in the first paragraph of this judgment. Aggrieved over the same, the accused/appellants are before this Court with these Criminal Appeals.

12. We have heard Mr.A.Raghunathan, the learned Senior Counsel appearing for the accused 1,2,4 to 9/appellants in CrI.A. No. 402 of 2012; Mr.C.Vijaya Kumar, the learned counsel appearing for A.3/appellant in CrI.A. No. 445 of 2012 and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

13. Admittedly, in this case, the deceased was a rowdy element. His dead body was found by P.W.2 on 09.11.2010 at about 7.00 am near Oodai in the Village. On her information, P.W.1 came to the place of occurrence and found the dead body of the deceased and then he went to the Police Station and made the complaint at 7.30 am on 09.11.2010. In the F.I.R., it is mentioned that the assailants were not known, which means till 7.30 am, the assailants were not known.

14. In order to prove that the assailants are the accused herein, the prosecution mainly relies on the eye witness account of P.W.5. P.W.5 has stated that he witnessed the entire occurrence. P.W.5, in a vivid fashion, has described the overt acts of each accused. The learned Senior Counsel appearing for accused 1,2,4 to 9/appellants in CrI.A. No. 402 of 2012 would assail the evidence of P.W.5 and would state that the conduct of P.W.5 is highly un-natural, which makes it to disbelieve his evidence. Since after seeing the above occurrence, in which, his own brother-in-law was done to death, he quietly went to his house and slept for the whole night on 08.11.2010 and he not even disclosed the same to his wife, who happens to be the sister of the deceased though she was very much available in the house for whole night. But P.W.5 did not chose to inform about the above occurrence to P.W.2. Neither he went to his father-in-law (P.W.1) to inform about the occurrence. On the next day morning, by about 7.00 am, P.W.2 saw the dead body lying near the Oodai. Even before, she could reach the place of occurrence, there was a huge crowd of people. She was not aware of the assailants. She came and informed P.W.1. Certainly, had it been true that P.W.5 had seen the occurrence, he would have informed at least at that point of time either to P.W.1 or to P.W.2 about the same, in which case, the names of the assailants should have been mentioned in the complaint. The very fact that in Ex.P.1, P.W.1 had mentioned that the assailants were not known, would go a long way to show that P.W.5 did not inform either P.W.1 or P.W.2 about the above occurrence. This conduct of P.W.2 is highly unnatural. Absolutely, there is no explanation as to why he did not disclose about the occurrence to anybody including P.Ws.1 & 2 on 08.11.2010. This conduct, in our considered view raises enormous doubts about his credibility. We hold that P.W.5 would not have seen the occurrence at all and he has been later on planted by the Police as though he saw the entire occurrence. Therefore, we are inclined only to reject the evidence of P.W.5. If once the evidence of P.W.5 is rejected, then what remains for the prosecution is the reliance on the extra judicial confession said to have been made by A.1 to P.W.9 on 10.11.2010 at his office.

15. The learned Senior Counsel appearing for the accused 1,2,4 to 9/appellants in CrI.A. No. 402 of 2012 would submit that P.W.9 is not an independent person as he had fully involved in the matter of investigation along with P.W.16 from the time when the dead body was found near Oodai.

16. We have considered the above submissions.

17. A perusal of the evidence of P.W.9 would go to show that on 09.11.2010, he visited the place of occurrence as the Village Administrative Officer of that village and he assisted P.W.16 for preparing observation mahazar and rough sketch and for recovery of blood stained earth and the sample earth. Thus, he associated with P.W.16 for the whole day. It is quite surprising that on the next day suddenly at 10.30 am, A.1 allegedly appeared before him and made a voluntary confession. It is common knowledge that if a person likes to confess, he would generally chose a person in whom he has confidence. It is quite un-likely that A.1

would have chosen P.W.9, a total stranger, to confess his guilt. In our considered view, the extra judicial confession said to have been given by A.1 to P.W.9 cannot be believed at all.

18. Assuming that the said extra judicial confession could be believed, the same cannot be treated as a substantive evidence against A.2 to A.9, as per Section 30 of the Indian Evidence Act. Section 30 of the Indian Evidence Act has been interpreted on many occasions by the Hon"ble Supreme Court in particular, in *Kashmira Singh v. State of Madhya Pradesh* (, 1952 AIR 159) wherein, the Hon"ble Supreme Court has held that an extra judicial confession of the co-accused is not a substantive evidence against the other accused and the proper approach to the confession of the co-accused is to keep the same aside first and then, to marshal the other evidences available against the accused excluding the confession altogether from consideration and on such marshaling and on such appreciation, if the court is able to come to the conclusion that the accused has committed the said offence, the court can look into the confession given by the co-accused as a last resort to add strength to the said conclusion. In the instant case, as against A.2 to A.9, absolutely there is no other evidence so as to arrive at a conclusion that they have committed the crime as charged. Therefore, the extra judicial confession said to have been given by A.1 to P.W.9 cannot be the sole basis for convicting accused Nos. 2 to 9.

19. So far as A.1 is concerned, assuming that the extra judicial confession could be taken into consideration, in our considered view, as per the settled law, since an extra judicial confession by its very nature is a very weak piece of evidence, unless the same inspires the fullest confidence of the Court as there are evidences from other sources to corroborate the said extra judicial confession, it is not safe to rely on the doubtful extra judicial confession and to convict the maker of the confession. In this case, as we have already pointed out, the extra judicial confession said to have been given by A.1 to P.W.9 is highly doubtful and since there is no other evidence available on record to corroborate the said extra judicial confession, it is not safe to act upon the same, so as to convict A.1.

20. Apart from the above, reliance is made on the recovery of the material objects namely the wooden logs, leaf stalk of coconut tree (thennai muttai) and a stone, at the instance of some accused. But, there is no link between these material objects and the crime and therefore, they would not come to the help of the prosecution in any manner to sustain the conviction.

21. In view of the foregoing discussions, we hold that the prosecution has failed to prove the case beyond reasonable doubts. As it has been guaranteed under Article 21 of the Constitution of India life and liberty of an individual cannot be deprived of without following the procedure established by law. The Court of law, cannot convict an accused on mere surmises and conjectures. Suspicion however strong it may be, it cannot take the place of proof. In this case, the prosecution has not even able to succeed in creating a very strong suspicion against these accused. At any rate, we hold that the conviction and sentence imposed on the

appellants are not sustainable and hence, the same are liable to be set aside.

22. In the result, the Criminal Appeals are allowed and the conviction and sentence imposed on the accused 1 to 9/appellants by the learned II Additional District Sessions Judge, Salem in S.C. No. 153 of 2011, dated 22.06.2012, is set aside and the accused 1 to 9/appellants are acquitted. The fine amount, if any paid, shall be refunded to them. The bail bond, if any, executed by the accused 1 to 9/appellants, shall stand discharged.