

**Kumar and Another Vs. The Inspector of Police, Dharmapuri District**

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**Court :** Chennai

**Decided On :** Jun-30-2016

**Judge :** S. Nagamuthu & V. Bharathidasan

**Appeal No. :** Criminal Appeal No. 59 of 2015

**Appellant :** Kumar and Another

**Respondent :** The Inspector of Police, Dharmapuri District

**Judgement :**

(Prayer: Appeal filed under Section 374 of the Code of Criminal Procedure against the judgment passed by the learned Principal Sessions Judge, Dharmapuri in S.C.No.96 of 2014 dated 21.11.2014.)

**S. Nagamuthu, J.**

1. The appellants are the accused 1 and 3 in S.C.No.96 of 2014 on the file of the learned Principal Sessions Judge, Dharmapuri. The second accused in this case was one Mr.Raju and the fourth accused is one Ilayaraman. The trial Court framed as many as six charges against the accused as detailed below:

<b>Serial Number of charge</b>	<b>Charge(s) framed against</b>	<b>Charge(s) framed under Section</b>
1	A1	302 of IPC
2	A3 and A4	302 r/w 34 of IPC
3	A1, A3 and A4	364 of IPC
4	A1, A3 and A4	201 of IPC
5	A2	25(1)(b) of Arms Act
6	A2	202 of I.P.C.

By judgment dated 21.11.2014, the Trial Court convicted the appellants / accused 1 and 3 alone and acquitted the accused 2 and 4. The trial Court convicted the first accused under Section 302 I.P.C. and sentenced him to undergo imprisonment for life and pay a fine of Rs.5,000/- in default to undergo rigorous imprisonment for three months and convicted the third accused under Section 302 I.P.C r/w Section 34 I.P.C. and sentenced him to undergo imprisonment for life and pay a fine of Rs.5,000/- in default to undergo rigorous imprisonment for three months. Challenging the said conviction and sentence, the appellants are before this Court with this appeal.

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

2.1. The wife of the first accused is one Mrs.Sridevi. The deceased in this case was one Mr.Shankar. It is alleged that Mr.Shankar had illicit intimacy with Sridevi. When this came to the knowledge of the first accused, he warned his wife as well as the deceased to give up such kind of illicit intimacy, but they did not stop. This has resulted in a very strong enmity between the accused and the deceased. In pursuance of the same, it is alleged that the first accused decided to do away with the deceased. He took the help of his brother, the fourth accused and his friend the third accused for the said purpose.

2.2. It is further alleged that with the help of the accused 3 and 4, the first accused took the deceased to Senguttai hill. The second accused, had given his unlicensed gun to the first accused. The first accused, shot the deceased on his chest once at Senguttai hill and caused his death. Then, the accused 1, 3 and 4 threw the dead body into Senguttai odai with a view to erase the evidence. On these allegations, final report was filed by the respondent police.

2.3. So far as the second accused is concerned, the accusation is that he was in possession of an unlicensed gun which is an offence punishable under Section 25(1)(b) of the Arms Act.

2.4. On 25.08.2009 at 09.00 p.m. when the occurrence had happened no one witnessed the same. P.W.1 was a Forester working at Kottapatti Forest Range. On 28.08.2009 at 03.00 p.m. when he was on rounds into the forest area at Thumbal Beat, he heard from the general public that there was a dead body of a male lying in Senguttai odai. He rushed to the said place at 04.00 p.m. and found the dead body in a highly decomposed condition. Maggots were crawling all over the body. He enquired the people who arrived at the scene of occurrence about the identity of the dead body. They told that the dead body was that of the deceased Shankar.

2.5. Then, after asking his Forest Watch to guard the dead body, P.W.1 went to Kottapatti Police Station and made a complaint at 09.00 p.m. on 28.08.2009. P.W.8, the then Head Constable, on receipt of the said complaint under Ex.P1, registered a case in Crime No.239 of 2009 under Section 174 Cr.P.C. Ex.P12 is the F.I.R. He forwarded both the documents to the Court and the same was received by the learned Magistrate at 03.00 p.m. on 29.08.2009.

2.6. P.W.9, the then Inspector of Police, Kottapatti Police Station took up the case for investigation. He proceeded to the place of occurrence at 07.00 a.m. on 29.08.2009 and prepared an observation mahazar and a rough sketch in the presence of witnesses. Then, he conducted inquest on the body of the deceased and sent the body for postmortem.

2.7. P.W.6 Dr.Balasundaram conducted autopsy on the body of the deceased on 29.08.2009 at 03.00 p.m. He found the following injuries:

"External injuries: (1) Multiple holes (entrance wound) present over the right chest. (2) An entrance wound about 3x2x2cm over the right side of the chest. (3) Multiple entrance wound about 1x1 cm on right side of chest.

Internal Examination: (4) A pellet exist in right side of the sternum bone. (5) ribs: right side 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> fracture. 3<sup>rd</sup> rib cut and separated near the interior side of right side lung. (6) Hyoid bone intact. (7) Heart is semisolid an entrance wound present, 4 (four) pellets present in heart chambers. (8) Lungs multiple entrance wound present right side lobe and 2 (two) pellets present (9) Liver, Kidney c/s congested semisolid. Stomach empty, skull skull bones intact. Brain semisolid."

Ex.P.11 is the postmortem certificate. He gave opinion that the death of the deceased would have occurred within 72 - 80 hours prior to the conduct of the postmortem. Further he opined that the death of the deceased was due to the pellets injuries.

2.8. After getting the opinion from the doctor, who conducted autopsy, P.W.9 altered the case into one under Section 302 I.P.C. He examined many more witnesses and recorded their statements.

2.9. On 02.09.2009, at 07.00 a.m. when P.W.3 the then V.A.O. of Sittling village was on duty, the first accused appeared before him and gave a voluntary confession. P.W.3 reduced the same into writing (vide Ex.P4). Then he prepared a report under Ex.P3 and he took the accused along with Exs.P3 and P4 and produced him before P.W.9 at 09.15 a.m on the same day. P.W.9 arrested him and while in custody, the first accused at 09.30 a.m. gave a voluntary confession, in which he disclosed the place where he had hidden a gun, torch light and Koduval. P.W.9, recorded the same in the presence of P.W.3 and another witness. In pursuance of the said disclosure statement, the first accused took the police and the witnesses to his house and from the place of hideout, he produced the Material Objects 1 to 3. P.W.9 recovered the same under a mahazar and returned to the police station. He forwarded the first accused for judicial remand and handed over the material objects 1 to 3 also to Court. Then, he altered the case into one under Sections 364, 201, 203 I.P.C. and 79(e) r/w 25(1)(b) of the Arms Act.

2.10. On 03.09.2009 at 07.45 a.m. he arrested the second accused. The doctor who conducted autopsy had collected seven pellets from the body of the deceased. P.W.9 made a request to forward the said pellets along with the gun to the forensic lab for ballistic expert's opinion.

2.11. The investigation was taken over by P.W.10, his successor. On completing the investigation he laid the chargesheet against the accused.

2.12. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgment, which the accused denied. In order to prove the case, on the side of the prosecution, as many as 10 witnesses were examined, 17 documents and 3 material objects were marked.

2.13. Out of the said witnesses P.Ws.1 and 2 who are forest officials has stated that they found the dead body of the deceased on 28.08.2009 at 04.00 p.m. at Senguttai Odai in a highly decomposed condition. They found that maggots were crawling all over the dead body. P.W.1 made a complaint to the police. P.W.3 the then V.A.O., Sittling village has spoken about the preparation of observation mahazar and rough sketch at the place of occurrence. He has further stated that on 02.09.2009, at 07.00 a.m. the first accused appeared before him and made a voluntary confession. He has further stated that he produced the first accused before P.W.9 and P.W.9 took him into custody. While in custody, the first accused made a voluntary confession and out of which M.Os.1 to 3 were recovered. P.W.4 the Head Clerk of the Court had stated that he forwarded the material objects to the forensic lab for examination. P.W.5 the ballistic expert from the Tamil Nadu Government Forensic Science lab has stated that the seven pellets recovered from the dead body was made of iron. He has further stated that these seven pellets could have been fired from a smooth bore firearm. He has further stated that M.O.1 was in a working condition. P.W.6 Dr.Balasundaram has spoken about the postmortem conducted by him and his final opinion regarding the cause of death. P.W.7 the head constable has stated that he took the dead body from the place of occurrence and handed over the same to the Doctor for conducting postmortem. P.W.8 has spoken about the registration of the case on the complaint made by P.W.1. P.Ws.9 and 10 have spoken about the investigation done and the

final report filed.

3. 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 witness nor mark any document on their side. Their defence was a total denial. Having considered all the above, the trial Court convicted the accused 1 and 3 alone as detailed in the first paragraph of this judgment and that is how, they are before this Court with this appeal.

4. We have heard the learned counsel appearing for the appellants and the learned Additional Public Prosecutor appearing for the State and also perused the records, carefully.

5. As we have already pointed out, there is no eyewitness account to prove the occurrence. The prosecution relies only on circumstantial evidence. P.Ws.1 and 2 are forest officials, who had seen the dead body on 28.08.2009 at 03.00 p.m. P.W.6 Dr.Balasundaram has given opinion that the death was due to the pellet injuries. From this, the prosecution has proved that the deceased had died before 04.00 p.m. on 28.08.2009 due to pellet injuries. But, absolutely there is no evidence either from the family members of the deceased or from anybody else as to when the deceased was lastly seen alive. No investigation whatsoever was done to ascertain as to when the deceased was lastly seen alive and where. Because of this flaw in the case of the prosecution it is difficult to even ascertain the time of death of the deceased. The Doctor P.W.6 has given opinion that the deceased would have died within 72 to 80 hours prior to the time of postmortem. The postmortem was conducted at 03.00 p.m. on 29.08.2009. Assuming that some weightage could be given to the opinion of the doctor, in respect of the time of death, the deceased would have died either on 24.08.2009 or 25.08.2009. Whether on 24.08.2009 or 25.08.2009, the deceased was alive and whether he was seen alive has not been proved by the prosecution at all by examining any witness. It is surprising that even the family members of the deceased have not been examined to speak about the above vital fact. In this case, the opinion of the doctor in respect of the time of death is approximate. Further the opinion of the doctor should be supported by materials which are the foundation of the said

opinion. It is the admitted case that maggots were crawling all over the dead body. It is not known as to why the maggots were not collected and sent for examination by an expert in the filed to ascertain the age of the maggots, so as to precisely fix the time of death. At any rate, the serious flaw in not proving as to when the deceased was lastly seen alive creates doubt in the case of prosecution.

6. The prosecution depends solely on the extra judicial confession said to have been given by the accused to P.W.3. Absolutely, there is no other evidence against either the first accused or the third accused. It is the settled law that the confession of a co-accused cannot be the foundation to convict the other. As has been held by the Hon'ble Supreme Court in *Kashmira Singh Vs. State of Maharashtra* reported in 1952 AIR SC 159. The proper approach is to marshal all the other evidences against the accused and on such marshalling, if the Court is able to come to the conclusion that the accused is guilty, then in order to draw strength to the said conclusion, as a last resort, the Court may take into consideration the confession of the co-accused also. In other words, in the absence of any other evidence, solely based on the confession of the co-accused, the other accused cannot be convicted.

7. In the instant case, as against the third accused, absolutely there is no evidence. Therefore, even assuming that the first accused had given an extra judicial confession to P.W.3, that cannot be the sole foundation to convict the third accused. Therefore, the conviction of the third accused deserves to be set aside.

8. Now turning to the case against the first accused, as we have already pointed out, the prosecution relies on only two circumstances. The first is that he gave a voluntary confession. The learned counsel for the appellant would submit that the first accused had no acquaintance with P.W.3 and therefore the first accused would not have gone to P.W.3 at all to make such an extra judicial confession. We find force in the said argument. P.W.3 was involved in the investigation along with P.W.9. He was a witness for the observation mahazar and rough sketch. When that be so, in the absence of any prior acquaintance, it is doubtful whether the first accused would have gone to P.W.3 to make such a voluntary confession. This creates doubt in the said extra judicial confession.

9. It is the settled law that if an extra judicial confession is shrouded with doubt, since such an extra judicial confession by its very nature is a very weak piece of evidence, the same cannot be the foundation for conviction and instead, the Court should look for corroboration from independent sources. Here, in this case, we find no such corroboration from any other independent source. As a matter of fact, the prosecution has failed even to prove the time of the occurrence by proving as to when the deceased was lastly found alive. The time of death has not been proved by the prosecution so as to corroborate his extra judicial confession.

10. The prosecution next relies on the recovery of M.O.1 gun based on the disclosure statement made by the first accused. It is the case of the prosecution that M.O.1 is an unlicensed gun and the same belonged to the second accused. The second accused was charged for possessing the said gun in violation of the Arms Act. But the trial Court has acquitted him for want of evidence. When we doubt the appearance of the first accused before P.W.3 and when we doubt the so called extra judicial confession said to have been given by the first accused to P.W.3, as a corollary, the recovery of M.O.1 on the alleged disclosure statement made by the first accused also becomes doubtful. Above all, though the ballistic expert has stated that M.O.1 was in a working condition, he did not find any substance to even infer that the said gun had been used recently before the recovery of the same. No gun power or any other chemical was noticed in the barrel of the gun indicating use of the same recently. Though the seven pellets found in the dead body of the deceased could have been fired from a gun like M.O.1, it cannot be precisely said that they were fired from M.O.1. It is only a general opinion that these pellets could have been fired from any gun like M.O.1. Thus, it is difficult to believe the alleged recovery of M.O.1 from the possession of the first accused and the prosecution has failed to establish the link between the occurrence and M.O.1.

11. As we have already pointed out, there are lots of flaws in the case of the prosecution. The prosecution has not let in sufficient evidence so as to prove the guilt of the the accused. The evidence let in are either unbelievable or insufficient to sustain conviction. In fine, we hold that the prosecution has failed to prove the charges against these appellants and therefore they are entitled for acquittal.

12. In the result, the appeal is allowed and the conviction and sentence imposed by the learned Principal Sessions Judge, Dharmapuri in S.C.No.96 of 2014 dated 21.11.2014 on them are set aside. The fine amount, if any, paid by them shall be refunded.

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