

**1.Kumar @ Nagarajan Vs. The State Rep. by The**

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**Court :** Chennai

**Decided On :** Aug-04-2015

**Judge :** S.Nagamuthu

**Appellant :** 1.Kumar @ Nagarajan

**Respondent :** The State Rep. by The

**Judgement :**

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

04. 08.2015 CORAM THE HONOURABLE MR.JUSTICE S.NAGAMUTHU and THE HONOURABLE MR. JUSTICE V.S.RAVI CrI.A(MD)No.353 of 2010 1.Kumar @ Nagarajan 2.Kannan 3.Thirumal Pillai .. Appellants/Accused 1 to 3 Vs. The State rep. by the Inspector of Police, Chanarpatti Police Station, Dindigul District. (Crime No.330 of 2004) .. Respondent/Complainant PRAYER Criminal Appeal filed under Section 347(2) of Cr.P.C. against the conviction and sentence, dated 30.06.2010, made in S.C.No.56 of 2010, by the Additional District and Sessions cum Fast Track Court, Dindigul. For appellants : Mr.Gopala Krishna Laxmanaraju, Senior Counsel for Mr.R.Venkateshwaran For respondent : Mr.A.Ramar, Additional Public Prosecutor :

**JUDGMENT**

(Judgment of the Court was made by S.NAGAMUTHU, J.) The appellants are the accused 1 to 3 in S.C.No.56 of 2010 on the file of the Additional District and

Sessions Judge cum Fast Track Court, Dindigul. They stood charged for the offences under Section 120-B, 364, 302 r/w 34, 506(ii) and 201 r/w 302 IPC. By judgment dated 30.06.2010, the trial Court has convicted and sentenced them as follows; Accused Conviction U/s. Sentence A1 to A3 120-B IPC Rigorous imprisonment for 2 years. A1 to A3 364 IPC Rigorous imprisonment for 7 years. A1 302 IPC Imprisonment for Life and to pay a fine of Rs.2,000/-, in default to undergo rigorous imprisonment for 6 months. A2 & A3 302 r/w 34 IPC Imprisonment for Life and to pay a fine of Rs.2,000/- each, in default to undergo rigorous imprisonment for 6 months. A1 to A3 201 r/w 302 IPC Rigorous imprisonment for 7 years. 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; (a)The deceased in this case was one Mr.Sakthivel. PW1 ?. Mrs.Valli is his wife. But, PW1 had illicit intimacy with the first accused. The deceased, on coming to know of the said illicit affair, reprimanded the first accused. Six months prior to the occurrence, it is alleged that on account of the above motive, the deceased took his associates to the house of the first accused and attempted to attack him, but the first accused escaped from the said attempt. Even after the said incidence, the deceased was reprimanding the first accused for his illicit intimacy with PW1. According to the further case of the prosecution, provoked by the said motive, the first accused had conspired with the accused 2 & 3 to commit murder of the deceased. (b) In pursuance of the said conspiracy, on 05.06.2004, they planned to do away with the deceased. For that purpose, the accused 1 & 2 took a TVS50Motorcycle belonging to one Mr.Rathinam and went to Dindigul. The deceased was then working as a tailor in a tailoring shop in Natham. The third accused also had joined with them. The accused 1 & 3 waited at Vadakkampatti. The second accused alone was instructed by the first accused to bring the deceased by deceiving him. Accordingly, the second accused went to the shop where the deceased was working and by making a false representation, he took the deceased in the TVS-50 Motorcycle and brought him near a mango grove at Vadakkampatti Thothukombu Medu, where the accused 1 & 3 were lying in wait. (c) Around 11.00 p.m. on 05.06.2004, at the said place, the second accused caught hold the hands of the deceased and the third accused caught hold the legs of the deceased so as

to facilitate the first accused to kill the deceased. The first accused took out a rope which he was readily having and put the same around the neck of the deceased and with the said rope, he constricted the neck of the deceased. Due to the said strangulation, the deceased instantaneously died. At that time, it is alleged that two persons by name Kalimuthu and Rengaraj viz., PW3 and PW23, saw the occurrence and the accused intimidated them not to disclose the above occurrence to anybody. Thereafter, they put the body into a gunny bag and buried the same near one Rajarathinam Pillai Mango grove, by putting the body into a pit which was already made for the purpose of erecting an electric post. Thus, according to the prosecution, the accused committed the offences punishable under Sections 120-B, 364, 302 r/w 34, 506(ii) and 201 r/w 302 IPC. (d) PW1 was in search of the deceased from 05.06.2004 as he did not return from the tailoring shop at Natham. PW1 was enquiring about the deceased even with the first accused. After five or six days of the disappearance of the deceased, PW1 received a cover through post containing Rs.1,000/-. Again, within the next four or five days, yet another cover reached her through post containing Rs.700/-. But, PW1 did not receive the second cover. Since PW1 had suspicion over the first accused on account of the illicit intimacy that she had with him and the fact that the deceased had reprimanded the first accused and since the deceased was not seen for a long time, she made a complaint to the Police. PW29 was the then Sub Inspector of Police, attached to Shanarpatti Police Station, Dindigul District. On the basis of the complaint made by PW1, he registered a case in Crime No.330 of 2004 for man missing. Ex.P40 is the FIR. Then, he forwarded the FIR and the complaint (Ex.P1) to the Court and examined PW1 and a number of persons on various dates, upto 24.11.2004. But, he could not make any progress in the investigation, though he had examined several witnesses. (e) While so, it is alleged that on 24.11.2004 at about 2.00 p.m. the first accused appeared before PW15, who was the then Village Administrative Officer of Shanarpatti Village. On such appearance, he expressed his intention to give a voluntary confession, in respect of the disappearance of the deceased in this case. PW15 agreed for the same. Then, the first accused made a confession statement orally in the presence of one Muthusamy and one Mappillai Kani. PW15 reduced the same to writing. Having gone through the same, the first accused signed the same. Ex.P9 is the

said confession statement. Then, PW15 produced the first accused, along with Ex.P9, and a special report under Ex.P10, to the Police. (f) PW30 - Mr.Jayakumar was the then Sub Inspector of Police, attached to Shanarpatti Police Station. At 1.30 p.m. on 24.11.2004, PW15 produced the first accused before him, along with the confession statement (Ex.P9) and a special report (Ex.P10). Based on the same, he altered the case into one under Section 120-B, 302 and 201 IPC. He forwarded an altered FIR to the Court through a Police Constable. Ex.P43 is the said report. Then, he handed over the case diary to the Inspector of Police for investigation. (g) PW31 - the then Inspector of Police took up the case for investigation. He arrested the first accused. At 3.00 p.m. on 24.11.2004, the first accused gave a voluntary confession. In the said confession, he had disclosed the place where the dead body was buried and the place where he had hidden the rope. Accordingly, he took PW31 and the witnesses to the place of occurrence and identified the place where the dead body had been buried. At about 5.30 p.m. on the same day, he produced the rope from his house, which PW31 recovered under the mahazar in the presence of witnesses. Then, PW31 prepared an observation mahazar and a rough sketch showing the place of occurrence in the presence of witnesses. Then, he examined few witnesses and thereafter, he forwarded the accused No.1 for judicial remand, on the same day. (h) On 25.11.2004, PW31 arrested the accused 2 & 3 at Gopalpatti Bus stop, in the presence of one Sakkarai (PW7) and Sivasubramaniam Pillai (PW8). On such arrest, the second accused gave a voluntary confession at 5.00 p.m. and the same was reduced into writing by PW31. The third accused also gave a voluntary confession at 5.30 p.m. PW31 reduced the same into writing in the presence of witnesses. Ex.P50 is the disclosure statement made by the second accused and Ex.P51 is the disclosure statement made by the third accused. (i) As per the request made by PW31, on 26.11.2004 at 11.45 a.m. the Thasildar (PW16), arrived at the place of occurrence and in the presence of Dr.Natarajan (PW20) and other witnesses, he started exhuming the dead body. At 01.45 p.m., the dead body of the deceased was completely exhumed. The body was in a highly decomposed condition, kept inside a gunny bag. The body was beyond recognition. PW31 had recovered the bloodstained earth from the pit where the body was found and sample earth for chemical examination. Both the hands were found tied together and the legs were

also found tied together. There was a rope around the chest of the deceased. PW31 recovered all these materials under a mahazar in the presence of witnesses. There was a yellow colour talisman attached with black colour rope on the body of the deceased. That was also recovered under a mahazar (vide MO.9). Between 2.00 p.m. to 3.00 p.m. PW31 conducted inquest on the body of the deceased in the presence of witnesses. Though the body was beyond recognition, PW1 and other family members identified the same as that of the deceased from out of the dress materials, talisman, etc. (j) PW20 Dr.Natarajan in whose presence the body was exhumed, conducted autopsy on the body of the deceased. From the appearance of the body, he estimated the age of the deceased as between 30 to 40 years. The doctor found the following in the body of the deceased; ?Decomposed and skelitinized body of a male aged about 35 years. Decomposed muscle masses were found adherent over the chest area in patches. Portion of scalp hair found adherent with skull 6 cms in length black in colour. Eye balls found missing in the orbital sockets. Postmortem disarticulation of all the joints noted. All the limbs are found skelitinized. All the available bones are wet in nature and are belongs to human origin, male, aged about 30 to 40 years. Hyoid bone ?. intact. No evidence of any bone injuries noted in the available bones. Decomposed greesy visceral enmass and soil above, below and sides of the body are collected and sent for chemical analysis.?. He preserved the skull for the purpose of superimposition test. Then, he reserved his opinion pending Chemical Analysis Report. Ex.P19 is the postmortem certificate issued by him. As per the Chemical Analysis Report, no poison detected in the internal organs. Having considered all the above, PW20 gave his final opinion on 28.01.2005 that ?.No definite opinion could be given regarding the cause of death due to advanced decomposition and skelitinization?.. He has further opined that the death would have occurred four to six months prior to autopsy. (k) PW31 collected the photographs of the deceased and made a request for superimposition. The learned jurisdictional Magistrate forwarded the skull and the photographs to the Forensic Lab for superimposition. On conducting the superimposition, the Assistant Director, Tamil Nadu Forensic Science Department, Anthropology Division, Chennai, gave opinion that the skull (item No.1) can very well belong to a male individual seen in the photograph (item Nos.2 & 3). Thus, during the course

of the investigation, it was confirmed that the dead body which was exhumed in the place identified by the first accused was that of the deceased. Continuing the investigation, PW31 examined the Tahsildar, who prepared the exhumation report. He also examined the doctor, who conducted autopsy. He examined the Scientific Assistant, who gave opinion on superimposition and all the other witnesses. Finally, he laid a charge sheet against all the three accused. (l) Based on the above materials, the trial Court framed the charges as detailed in the first paragraph of this judgment, which the accused denied the same. In order to prove the case, on the side of the prosecution, as many as 31 witnesses were examined, 55 documents were exhibited and 12 material objects were marked. (m) Out of the said witnesses examined, PW1 is the wife of the deceased. She has stated about her illicit intimacy with the first accused and the motive between the deceased and the first accused on account of the same. She has further stated that the deceased left her house lastly on 05.06.2004 to Natham on account of the work in the tailoring shop of one Nagulan. She has also stated that he used to return home in the evening, but, on 05.06.2004, he did not return. She has also stated that she received two postal covers containing Rs.1,000/- and Rs.700/-, after few days of disappearance of her husband. She has further stated that she received the first cover containing Rs.1000/- and did not receive the second cover. On the complaint made by her, suspecting the involvement of the first accused, a case has been registered. She has also stated that since there was no action taken, after the complaint, she filed a Habeas Corpus Petition before this Court seeking a direction from this Court to cause the production of the deceased. During the pendency of the same, further action was taken by the police and ultimately, according to her, the dead body of the deceased was discovered. (n) PW2 is the father-in-law of the deceased. He has also stated about the motive between the first accused and deceased. She has further stated the fact that they searched for the deceased from 05.06.2004 onwards. PW3 is the son of PW2 and brother of PW1. He has also stated that the deceased was lastly seen alive on 05.06.2004 and thereafter, he was not seen. He has not spoken about the incriminating acts of the accused. Therefore, he was treated as hostile. PW4 is a co-tailor working along with the deceased, at the shop of Nagulan. He had not stated anything about the facts of this case and therefore, he was also treated as hostile. PW5 is

yet another tailor working along with the deceased. He has stated that on 05.06.2004 at about 7.00 p.m. the second accused came and took the deceased with him. PW6 to PW10 have turned hostile and they have not supported the case of the prosecution in any manner. (o) PW11 is the daughter of the deceased. According to her, during the relevant time, she was studying at Muthalagupatti Higher Secondary School. She has further stated that after the disappearance of her father, she received an inland letter containing Rs.300/-, but the from address was not found in the letter. In that letter, it was written making enquiries about her welfare. From the information found in the letter, she inferred that it was written by her father. Later on, she came to know that it was in fact not written by her father, but somebody else. PW12 has spoken about the observation mahazar prepared before the dead body was exhumed at the place of occurrence. PW13 is the Village menial, who has stated that he was not aware of the incidents as he was working in some other village at the time of the incidents. PW14 is an employee of a Tamil Daily at Dindigul. He has stated that on 16.11.2004, as per the request made by the Sub Inspector of Police, Shanarpatti Police Station, he made a publication in the newspaper that the deceased was found missing. (p) PW15 is the star witness for the prosecution. He was the Village Administrative Officer of Shanarpatti Village. According to him, on 24.11.2004 at about 2.00 p.m. the first accused appeared before him and wanted to give confession in respect of the disappearance of the deceased. Then, he gave an oral confession which, according to PW15, he reduced the same to writing. Having read the same and found the same to be correct, the first accused signed the same. Then, he produced the first accused and the statement of the accused (Ex.P9) and his special report (Ex.P10) to the Police. He has further stated that again the first accused gave confession in his presence to the Police. In the disclosure statement, he had shown place where the dead body was buried. PW16 is the then Tahisldar, who conducted inquest on the body of the deceased. PW17- Village Administrative Officer has turned hostile. He has not supported the case of the prosecution in any manner. (q) PW18 is the son of the deceased, aged about 17 years. He has stated that the first accused identified the place where the dead body was buried. He has further stated that from the dress materials found on the body, he identified the body as that of his father. PW19 ?. Dr.Jainlal Prakash has

spoken about the injury sustained by the first accused in the earlier occurrence. PW20 ? Dr.Natarajan has spoken about the postmortem conducted on the body of the deceased. PW21 is the Head Clerk of the Court, who has spoken about the fact that on the orders of the Magistrate, he forwarded the photographs and the skull for superimposition examination and the other materials for chemical examination. PW22 is the Police Constable, who handed over Express Report, dated 24.11.2004 to the learned Judicial Magistrate at 5.00 p.m. During cross examination, he has stated that all the three accused were kept in the custody of the Police at the Police Station from 7.00 a.m. on 24.11.2004, until they were produced before the Court for judicial remand. PW23 and PW24 have turned hostile and they have not supported the case of the prosecution in any manner. (r) PW25 is an employee of the Tamil Nadu Electricity Board. He has stated that the pit where the dead body was buried was actually made by them for the purpose of erecting an electric post. PW26 is the Constable, who handed over the skull and photographs to the Forensic Lab for examination. PW27 is another constable, who carried the altered FIR to the Court. PW28 has spoken about the registration of the case in Crime No.1014 of 2009, wherein the first accused was the victim at the hands of the deceased. PW29 has spoken about the registration of the case for man missing and the investigation done by him during which no progress has been made, until the Village Administrative Officer has produced the accused, along with the confession, on 24.11.2004. PW30 was the then Sub Inspector of Police who forwarded the express report to the Court and PW31 is the investigating officer, who has spoken about the investigation done in detail. (s) When the above incriminating materials were put to the accused under Sections 313 of Cr.P.C., they denied the same as false. On their side, two witnesses were examined as DWs.1 & 2. DW1 was employed as Assistant in the Tamil Nadu State Marketing Corporation at Dindigul, where the first accused in this case was employed in the said Corporation. According to him, as per the Attendance Register, he was on duty on 05.06.2004 between 9.00 a.m. to 12.00 p.m. DW2 was a co-worker, along with the first accused, who has also spoken about the same fact. Thus, according to these witnesses, the first accused has made an attempt to prove the plea of alibi. Having considered all the above materials, the trial Court convicted the accused, as detailed in the first paragraph of the judgment

and accordingly punished them. That is how they are before this Court with this appeal. 3. We have heard the learned senior counsel appearing for the appellants and the learned Additional Public Prosecutor appearing for the State. We have also perused the records carefully.

4. The learned senior counsel appearing for the appellants, by referring to the grounds of appeal, would submit that in this case, the prosecution relies on the evidence of PW15 and the same cannot be believed in view of the evidence of PW22. The learned senior counsel would point out that though it is alleged by PW15 that on 24.11.2004 at about 2.00 p.m. the first accused appeared before him and made a voluntary confession, PW22 has stated during cross examination that on 24.11.2004, from 7.00 a.m. onwards, all the three accused were kept in the Police Station, until they were produced before the Court for judicial remand. Thus, from the said fact, according to the learned senior counsel, the evidence of PW15 cannot be believed. The learned senior counsel would further submit that though it is stated that there was motive between the first accused and the deceased, that by itself would not go to prove the offence said to have been committed by the accused.

5. The learned senior counsel would next contend that though it is alleged that on 24.11.2004, the first accused identified the place where the dead body was buried, absolutely there is no evidence for that also. The learned senior counsel would point out that PW31 - the Inspector of Police in whose presence the confession was made to the Police by the accused has stated that the first accused alone identified the place of occurrence. But, PW18, who is the son of the deceased, has stated that the place where the dead body was found was identified by all the accused. The learned senior counsel would further point out that the accused were remanded to the judicial custody on 24.11.2004 itself and therefore, on 26.11.2004 it would not have been possible for the accused to identify the place where the deceased was buried. Thus, according to the learned senior counsel, the evidence of PW18 is also not believable and absolutely, there is no evidence as to how the place where the dead body was found buried was identified. The learned senior counsel would further point out that even the photograph of the deceased, which was used for the purpose of superimposition, was not identified by PW1 or any

other relatives. The photograph was marked only through the Investigating officer. Thus, according to the learned senior counsel, the identity of the dead body has also not been clearly established by the prosecution.

6. The learned senior counsel would further point out that though it is stated by the daughter of the deceased (PW11) that when she was in the school, she received an Inland letter with Rs.300/-, as though it was written by the deceased. The said letter was not marked through her, the letter was marked only through the Investigating officer. The letter was not subjected to any handwriting examination by an expert so as to prove as to whether the said letter was really written by the first accused or somebody else. The learned senior counsel would next contend that absolutely there is no evidence against the accused Nos.2 & 3 at all to prove either the conspiracy or any other overtact against them. Thus, according to the learned senior counsel, absolutely there is no evidence to sustain the conviction against the accused and therefore, they are entitled for acquittal. 7. The learned Additional Public Prosecutor would vehemently oppose this appeal. According to him, in the instant case, the motive between the accused and the deceased has been clearly established and the same is also not disputed. He would further point out that because of the said motive, the first accused, in the accompany of the accused 2 & 3, had conspired to kill the deceased and accordingly, they killed the deceased. He would further submit that a co-worker of the deceased has stated that the deceased was taken by the second accused on 05.06.2004. Thus, according to the learned Additional Public Prosecutor, the prosecution has clearly proved that the deceased was lastly taken from the tailoring shop only by the second accused.

8. The learned Additional Public Prosecutor would further submit that the place where the dead body was buried was identified only by the first accused, in pursuance of the disclosure statement made by him. He would further submit that assuming that the place where the dead body was buried was not identified by the first accused, even then the disclosure statement made by the first accused to the Police in the presence of the witnesses would add strength to the case of the prosecution. He would further submit that so far as the identity of the body of the deceased is concerned, the same has been proved through the superimposition

test and it was also not seriously disputed by the defence. He would further submit that though the Doctor, who conducted autopsy, was not in a position to find out the cause of death, on that score, the fact that the deceased was done to death cannot be disbelieved.

9. The learned Additional Public Prosecutor would further point out that both the hands and both legs of the deceased were tied with rope and there was a rope around the chest and the body was in a gunny bag. These facts would go to show that it was a clear case of murder done with the intention to do away with him. From these facts, according to the learned Additional Public Prosecutor, the prosecution has proved that it was a case of homicide and the same was committed by these three accused which have been proved by means of circumstantial evidence. Therefore, according to the learned Additional Public Prosecutor, the judgment of the trial Court does not require any interference at the hands of this Court. 10. We have considered the above submissions. At the outset, we should say that in a case based on circumstantial evidence, it is the settled law that the circumstances pleaded by the prosecution are to be proved beyond reasonable doubts and every such proved circumstances should act as a link so as to form a complete chain of circumstances unerringly pointing to the guilt of the accused and there should not be any other hypothesis, which will be inconsistent with the guilt of the accused. Applying the said principles to the facts of the case, let us now examine as to what are all the circumstances proved by the prosecution and also to see whether such proved circumstances would clearly go to prove the guilt of the accused.

11. The foremost circumstance is that there was strong motive between the first accused and the deceased. This is not seriously disputed by the first accused. PW1 herself has stated that there was illicit intimacy between herself and the first accused. This was questioned by the deceased, which resulted in registration of the case against the deceased. In that occurrence, the first accused was the injured. Thus, the prosecution has clearly established that there was sufficient motive for the first accused. But, a motive is always a double edged weapon and therefore, based on the motive, we cannot rush to the conclusion that the first accused would have committed the murder of the deceased.

12. The next circumstance is that the deceased was found alive lastly on 05.06.2004. PW1 and other family members have categorically stated that on 05.06.2004 in the morning the deceased left his house to go to Natham on account of his job in the tailoring shop of Nagulan. The co-worker of the deceased has stated on 05.06.2004, he was working in the shop. This is also not seriously disputed. On 05.06.2004, in the evening, according to the case of the prosecution, the second accused took the deceased from the tailoring shop to the place of occurrence. This has been spoken to by the co-tailor Mr.Selvam (PW5). According to him, on 05.06.2004 at 7.00 p.m. the second accused ?. Mr.Kannan came and took the deceased from the shop. But, during the cross examination, he has given a complete go by to the same, inasmuch as he has stated that he did not know as to who Mr.Kannan was. According to him, he has not seen Mr.Kannan prior to the occurrence. There was no identification parade also held. Therefore, the answer elicited during the cross examination has completely washed off the incriminating materials given against him during the course of chief examination. Thus, absolutely there is no evidence at all to show that on 05.06.2004, the second accused took the deceased from the tailoring shop.

13. The next circumstance is the receipt of the Inland letter by the daughter of the deceased viz., PW11. She has stated that when she was in the school, she received an Inland letter, after few days of disappearance of her father. That letter was marked as Ex.P42. A perusal of the said letter would go to show that the wordings would give the inference that the said letter was written by her father. Obviously, this letter would not have been written by the deceased. At any rate, it is unfortunate that the said letter was not proved through PW11. But, the same has been marked only through the investigating officer. The said letter has not been proved as required under law by the prosecution. Apart from that, the said letter was not sent for any examination by a Handwriting Expert with that of the handwriting of the first accused. Thus, there is no evidence as of now to show that the said letter was written only by the first accused to PW11. Similarly, the two covers (MO.41) were received by PW1 few days after the disappearance of the deceased. The said covers were also not marked through PW1. They were marked only through the investigating officer. Thus, they were also not proved at all as required under law. Further, the handwriting has not been proved to be that

of the first accused by sending the same for expert opinion. Thus, absolutely there is no evidence that the first accused had written any letter either to PW1 or to PW11, after the disappearance of the deceased.

14. The next comes to the vital evidence of the prosecution viz., Ex.P9, the confession statement said to have been given by the first accused on 24.11.2004 to PW15. PW15 was the then Village Administrative Officer. He has stated that on 24.11.2004 at 2.00 p.m. when he was at his office, along with one Muthusamy and Mappillai Kani, the first accused appeared before him and gave a confession orally and the same was reduced to writing. According to him, Ex.P9 is the said confession. First of all, it is doubtful whether the first accused would have chosen a person who was not known to him previously to confess. Apart from that, assuming that the said reasoning will not carry any weightage, the evidence of PW22 - Mr.Murugesan completely belies the same. PW22 was the Head constable working at Shanarpatti Police Station during the relevant time. According to him, on 24.11.2004, he went to the Police Station for duty. He has further stated that till 3.00 p.m. he was in the Police Station, attending to his duty. At 3.00 p.m. an emergent letter was given by the Inspector to him to hand over the same to the Court and he handed over the same to the Court at 5.00 p.m. Ex.P21 is the passport given to him to prove the fact that he was not available in the Police Station at 5.00 p.m. But, during the cross examination, he has stated that when he went for duty at the Police Station on 24.11.2004 at 7.00 a.m. he found all the three accused in the custody of the Police in the Police Station. He has also further stated that the Sub Inspector of Police came to the Police Station by about 12.00 noon and from morning 7.00 a.m. onwards all the three accused were kept only in the Police Station. If this was not true, the prosecution ought not to have relied on the evidence of this witness. But, the prosecution still wants to rely on this evidence. If this evidence is believed, then, the evidence of PW15 that the first accused appeared before him on 24.11.2004 at 2.00 p.m cannot be true at all.

15. Now, the question is whether to believe the evidence of PW5 or PW22. It is a well settled law that when there are two contrary evidences, the version in favour of the accused is to be preferred. Applying the said standard norms, we have to take into consideration only the evidence of PW22 and if that is done, the case of

the prosecution that the first accused appeared before PW15 on 24.11.2004 and made a confession at 2.00 p.m. is to be simply rejected.

16. The next circumstance relied on by the prosecution is that PW15 produced the first accused before PW30 on 24.11.2004 and thereafter, PW31 arrested the first accused on the same day. On such arrest, it is stated that he gave a voluntary confession. In that confession itself, it is stated that the dead body was buried in a particular place. This has been admitted in evidence by invoking Section 27 of the Indian Evidence Act as Ex.P11. In our considered view, the said statement is not at all admissible in evidence because it is not earliest in point of time. Before this statement, the confession was recorded by PW15 in which itself there is disclosure made about the place of occurrence and the place where the dead body was buried. Since we are not prepared to believe PW15, the disclosure statement contained in Ex.P9 also cannot be given any weightage. Thus, virtually, there is no disclosure statement legally admissible in evidence available on record which could be believed by the Court so as to hold that the place where the dead body was buried was found out only from the said disclosure statement. 17. The next circumstance is that the accused No.1 identified the place where the dead body was buried. Neither PW1 nor the Village Administrative Officer has stated that the first accused identified the place from where the dead body was exhumed. Curiously, the son of the deceased - PW18 has stated during the chief examination that the place where the dead body was buried was identified by all the accused. But, his evidence cannot be true for the simple reason that he has only stated that as soon as such identification was made by all the accused, the dead body was exhumed. But, the fact remains that the dead body was exhumed only on 26.11.2004, whereas the first accused was remanded to the judicial custody on 24.11.2004 itself. Therefore, on 26.11.2004, just before the body was exhumed, the first accused would not have identified the place from where the body was exhumed. Thus, the evidence of this witness also cannot be believed.

18. Now, turning to the cause of death, we are of the view that the defence has no case. As rightly pointed out by the learned Additional Public Prosecutor, in a case where the dead body is highly decomposed, the cause of death may not be found out by the doctor, who conducts the postmortem examination. Even in a case

where the corpus delicti is not found, homicide can be proved by means of other circumstances. In this case, though the Doctor, who conducted autopsy, could not give any positive opinion regarding the cause of death as the dead body had undergone decomposition, on that score, we cannot come to the conclusion that it was not a homicide. The very fact that both the hands and both the legs of the deceased were tied and there was a rope around the chest and the dead body was in a gunny bag, would all go to prove that it was a homicide. To that extent, we agree with the case of the prosecution.

19. The next circumstance is regarding the identity of the dead body. Admittedly, the dead body was beyond recognition due to decomposition and therefore, nobody could identify. But, the family members of the deceased can identify the dead body from and out of the materials found on the body. The prosecution next relies on the superimposition result. It is true that the scientific expert has given opinion that the photograph sent to him tallied with the skull when superimposition examination was conducted. But, unfortunately, the photograph, which was sent for superimposition, was not identified by any one of the family members of the deceased. This is a serious flaw committed by the learned Public Prosecutor, who conducted the case in the trial Court. He ought to have invited the persons, who knew the deceased and made him to identify the photograph. But, on this score alone, we are not prepared to say that the prosecution has not proved that the dead body was not that of the deceased. As we have already pointed out, the family members have identified the body from and out of the talisman, dress materials, etc. Therefore, we hold that the dead body has been proved by the prosecution as that of the deceased. On this fact, there is no doubt at all.

20. As we have already narrated hereinabove, except the circumstances relating to the motive and the identity of the dead body, there is no other circumstances proved by the prosecution so as to connect the accused with the homicide of the deceased. In other words, we are impelled to hold that the prosecution has not proved the circumstances beyond reasonable doubts pointing unerringly to the guilt of the accused.

21. On the side of the defence, two witnesses were examined as DW1 & DW2 to speak about the plea of alibi. It is the settled law that if once alibi is pleaded, it is only for the person, who pleads the same, should prove the same. If the plea of alibi is proved, then it is for the prosecution to disprove the same. But, in this case, since the initial burden of the prosecution to prove its case beyond reasonable doubts has not been discharged, we need not go into the plea of alibi made by the first accused through DWs.1 & 2. We have to further say that so far as the accused 2 & 3 are concerned, absolutely there is no circumstantial evidence available at all. There was also no motive for the accused 2 & 3 to do away with the deceased.

22. In view of the foregoing reasons, we hold that the prosecution has miserably failed to prove the case beyond reasonable doubts and the trial Court was not right in convicting these accused and therefore, the accused are entitled for acquittal.

23. In the result, this Criminal Appeal is allowed and the conviction and sentence imposed on the appellants/accused is set aside and they are acquitted. The bail bond, if any, executed by them shall stand terminated. The fine amount, if any, paid by them shall be refunded. To 1.The Additional District and Sessions Judge, Fast Track Court, Dindigul. 2.The Inspector of Police, Chanarpatti Police Station, Dindigul District. 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai..

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