IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.6.2022

Delivered on : 28.6.2022

CORAM

THE HON'BLE MR.JUSTICE PARESH UPADHYAY
AND
THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Criminal Appeal No.737 of 2018
and
Crl.M.P.No.15638 of 2018

Dinesh — Appellant

vs.

State by The Deputy Superintendent
of Police, Cuddalore Sub Division,
Cuddalore District. — Respondent

Criminal Appeal filed under Section 374 of Cr.P.C. against the judgment of conviction and sentence in S.C.No.200 of 2016 dated 30.10.2018 passed by the Principal Sessions Judge, Cuddalore.

For Appellant : Mr.C.Prasanna Venkatesh
For Respondent : Mr.Babu Muthumeeran,
Additional Public Prosecutor

JUDGMENT

(By : A.D.JAGADISH CHANDIRA,J.)

Challenging the judgment of conviction and sentence in S.C.No.200 of 2016 dated 30.10.2018 passed by the Principal

Sessions Judge, Cuddalore, the present Criminal Appeal has been filed by the appellant/accused.

2. The allegation against the appellant/accused Dinesh is that he had murdered his school mate Sathishkumaran on his refusal to accede to the lust of the appellant/accused to have homo-sex with him, fearing that he would reveal it to others and in order to screen his offence, he had buried the dead body near the compound wall of his residence.

3. The sequence of events as elicited from the prosecution witnesses and other materials is as under:-

i) On 4.4.2016, a complaint (Ex.P1) came to be filed by one Sathiyamurthy son of Pakkiri (PW1) father of Sathishkumaran (deceased) at Nellikuppam Police Station contending that his son Sathishkumaran, who went on his avocation on 1.4.2016 saying that he would come back late on that day as he was to meet his friend viz., the appellant/accused, did not come back upto 8.30 pm and when PW1 had contacted him over his mobile phone, he had replied that he was watching a movie and he would come late, but, since he did not come back even upto 10.00 pm, PW1 had tried several times to contact his son over mobile phone, however, he could not contact him as the phone was switched off.

ii) PW1 had approached the office of the Superintendent of Police where he was directed to approach the Nellikuppam Police Station and accordingly, he had rushed to Nellikuppam Police Station, where he was asked to come back on 3.4.2016.

iii) After searching for his son at various places and having waited for his return and on receipt of a reply from the appellant/accused over phone that Sathishkumaran had left from his place on 1.4.2016 itself, PW1 had approached the Nellikuppam Police Station and lodged the complaint, Ex.P1 for tracing his son.

iv) PW12, Sub Inspector of Police, who had received the complaint, Ex.P1 had registered a man missing case in Crime No.181 of 2016 in FIR, Ex.P18 and sent the original FIR alongwith the complaint to Judicial Magistrate I, Cuddalore and copies to his higher officials and one copy to the Inspector of Police, Nellikuppam.

v) PW14, who was the Inspector of Police, Nellikuppam Police Station at the relevant time, took up the investigation, visited the scene of occurrence, enquired the witnesses Damodharan and Murugaraj, PW3 and prepared observation mahazar, Ex.P2 and rough sketch, Ex.P20. Subsequently, he enquired the witnesses Sathiyamoorthy (PW1), Maanvizhi (PW2), Sivakalai and the witnesses to observation mahazar viz., Damodharan and Murugaraj individually

and recorded their statements. Thereafter, PW14 had issued requisition letter to the Nodal Officer for tracing the call details and tower location of the mobile numbers viz., 9524872889, 9944601805, 9698025119 and 8220288514 mentioned in the complaint, Ex.P1.

vi) Since Sathishkumaran could not be traced out till 6.4.2016, wide publicity was given with his photo through various police stations. On 8.4.2016, appellant/accused was enquired at the police station and his statement was recorded by PW14. Thereafter, PW14 had issued requisition letter to trace out the incoming and outgoing calls and IMEI information in respect of suspicious mobile numbers viz., 9944601805, 8220288514, 9787065561 and 9487504090.

vii) Whileso, on 12.4.2016, at about 11.00 am, the Village Administrative Officer, Devanampattinam, PW6 had produced the appellant/accused in the Nellikuppam Police Station contending that the appellant/accused had surrendered before him and given an extra judicial confession, Ex.P5 to the effect that he had murdered the said Sathishkumaran. PW6 had requested the police to take further action upon the confession of the appellant/accused and submitted his Special Report, Ex.P6 to the police.

viii) In view of the subsequent development in the case, PW14 had altered the case from one of man missing into a case of murder

against the appellant/accused for the offences punishable under Sections 302, 201 read with Section 3(2)(v) of SC/T Act, 1989 and sent the Alteration Report, Ex.P21 to the court and submitted the case records to the Deputy Superintendent of Police, Panruti for further investigation. The appellant/accused had given confession, Ex.P7 to the Deputy Superintendent of Police, Panruti, PW16.

ix) PW16 had arrested the appellant/accused, who was produced at Nellikuppam Police Station and recorded his confession statement in the presence of witnesses Rajasekaran (PW6) and Kirubakaran. Based on the confession statement made by the appellant/accused, PW16 had proceeded to the scene of occurrence, took photographs of the place where the dead body was buried. Later, PW16 had issued requisition letter to the Tahsildar, Cuddalore for exhumation of the body. Then, PW16 had prepared the observation mahazar and rough sketch, Ex.P23 in the scene of occurrence in the presence of witnesses Karnan (PW4) and Sabarinath. Thereafter, PW16 had recovered the knife M.O.4 which was produced by the appellant/accused by taking out from the buried place viz., along the compound wall and the same was recovered under seizure mahazar, Ex.P8. Thereafter, on identification by the appellant/accused, PW16 had recovered M.O.s1 to 3 and M.O.5 the

dresses of the deceased and that of the accused and the ash residues of the burnt dresses. The admitted portion of the confession statement given by th e appellant/accused is marked as Ex.P24. Thereafter, PW16 had remanded the appellant/accused to judicial custody and sent the M.Os. recovered under Form 95, marked as Ex.P25.

x) PW10, Manickam the Scientific Assistant of Forensic Sciences Department, Villupuram, on receipt of M.Os.1 to 3, analysed the same having found blood stains on the same, sent them for serological test and has issued his report, Ex.P16.

xi) PW11, Dr.K.Nalina, Scientific Assistant in Serology Department, Chennai, on analysis of the blood stains found on the material objects, had opined that it belongs to human blood, however, she could not opine about the blood group and other details and had issued her report, Ex.P17.

xii) PW16, had enquired the witnesses Rajasekar (PW6), Kirubakaran, Karnan Babuji (PW4) and Sabarinath and recorded their statements. PW16 had issued requisition letter, Ex.P27 to the Tahsildar, Cuddalore for exhumation of the dead body for conducting post mortem. in this regard is marked as Ex.P27. On the basis of the requisition letter issued by PW16, the Tahsildar, Cuddalore, PW7 had

issued requisition letter, Ex.P10 to the Medical Officer, Medical College and Hospital, Mundiyampakkam, Villupuram District.

xiii) On 13.4.2016, a team of Doctors were formed as evidenced by Ex.P3 and the body of the deceased was exhumed in the presence of the Tahsildar by the team of Doctors headed by PW8 Dr.Geethanjali and Dr.Shanmugam, PW5 and and the Doctors had conducted spot post mortem over the body of the deceased. The rough sketch of the place where the dead body was buried is Ex.P26. After conducting the post mortem at the spot, the Doctors have issued the Post Mortem Report, Ex.P4 with the final opinion that the deceased would appear to have died due to effects of stab injuries to the Thorax and abdomen.

xiv) Since the scene of occurrence falls within the jurisdiction of Cuddalore N.T.Police Station, the complaint was transferred from Nellikuppam Police Station to Cuddalore N.T Police Station on the orders of Superintendent of Police, Cuddalore. PW16 had submitted the case records to the Cuddalore N.T. Police Station for further investigation.

xv) On receipt of the case details, the Inspector of Police, Cuddalore N.T.Police Station, PW15 and on the instructions of the Superintendent of Police, Cuddalore, registered a case in Crime

No.236 of 2016 under Section 302 and 201 of IPC read with Section 3(2)(v) of SC/T (POA) Act, 1989 and sent the original FIR, Ex.P22 to Judicial Magistrate I, Cuddalore and the case records to the Deputy Superintendent of Police, Cuddalore for further investigation.

xvi) On receipt of the case records, PW17, the Deputy Superintendent of Police, Cuddalore took up further investigation. He claimed community certificate from the Tahsildar, Cuddalore for the appellant/accused and the deceased and issued requisition letters, Exs.P28 and P29 to Judicial Magistrate II, Cuddalore for conducting superimposition test and DNA test in respect of the deceased and the Chemical Analysis Report for Skull is marked as Ex.P19 and the DNA Report is marked as Ex.P30. Thereafter, PW17 had arranged for sending the dresses of the deceased to Forensic Sciences Laboratory through Judicial Magistrate II, Cuddalore with a requisition, Ex.P31. Subsequently, PW17 had enquired the Doctors, who had conducted post mortem on the dead body and recorded their statements. Ultimately, on 17.8.2016, after completion of investigation, PW17 had filed the final report.

4. Learned Judicial Magistrate II, Cuddalore has taken the case on file in PRC No.15 o 2016 under Sections 302, 201 IPC read with section 3(1)(2)(v) of SC/ST (POA) Act, 1989 against the

appellant/accused and after complying with the requirements under Section 207 Cr.P.C. committed the case to the Court of Sessions.

5. When the appellant/accused was confronted with the charges, he denied the charges, pleaded not guilty and sought to be tried.

6. During trial, the prosecution had examined 17 witnesses as P.Ws.1 to 17, marked 31 documents as Exs.P1 to P31 and marked M.Os.1 to 5. Though the appellant pleaded not guilty, no oral and documentary evidence was let in on the side of the defence.

7. On completion of trial, the Trial Court found the appellant/accused guilty for the offences punishable under Section 302 and 201/302 IPC and sentenced him to undergo imprisonment for life with a fine of Rs.1000/- in default to undergo further simple imprisonment for one year for the offence under Section 302 IPC and rigorous imprisonment for 3 years with a fine of Rs.100/- in default to undergo further simple imprisonment for one month and ordered for running of the sentences concurrently.

8. Aggrieved against the judgment of conviction and sentence, the present Appeal has been filed by the appellant/accused.

9. The sum and substances of the submissions made by the Mr.C.Prasanna Venkatesh, learned counsel appearing for the

appellant is as under:-

The entire prosecution case is based on very vague circumstantial evidence which does not point out the guilt of the appellant. The conviction is based only on suspicion which cannot be sustained as suspicion cannot replace proof. The motive part has not been properly established by the prosecution and a flimsy allegation alone has been made. Though the prosecution alleges that the appellant was last found in the company of the deceased, it has not proved the same by producing even a single piece of evidence. When the prosecution witnesses viz., the parents of the deceased speak about a love affair of the deceased with a girl from another community and suspect that it could be the reason for his murder, the prosecution has failed to investigate the case in that line. The recovery of weapon of the offence is a stage managed one as found from the contradictions in the prosecution witnesses. The Trial Court, disbelieving the arrest, confession and recovery of weapon, M.O.4 and also finding that the prosecution has failed to recover the Cell phones of the accused and the deceased and also the call details and finding laches in the investigation, erred in finding that they by itself will not dislodge the chain to prove the circumstances pointing the guilt of the accused. When the prosecution was unable to prove the

basic facts as alleged against the accused. The Trial Court erred in shifting the burden on the accused. The Trial Court ought to have exercised great care when evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The Trial Court erred in convicting the appellant/accused ignoring the above aspects and the fact that the prosecution was not able to make out a case with a chain of circumstances pointing out the guilt of the appellant and there are other several other hypotheses possible for the occurrence and thereby the conviction and sentence rendered by the Trial Court is liable to be set aside.

10. In support of his contentions, the learned counsel for the appellant would rely upon the decision in ***Periyasamy vs. State by the Inspector of Police (2019 SCC OnLine Mad 24024).***

11. Per contra, Mr.M.Babu Muthumeeran, learned Additional Public Prosecutor would submit that the prosecution has proved its case with cogent evidence and only on the confession of the appellant, the dead body was found from the backyard of his house where it was buried by him and when such a strong piece of evidence is against the appellant/accused, he cannot keep quiet when he was

confronted with the the evidence against him without proving that he was not in the company of the deceased at the relevant time. He would further submit that as per Section 106 of the Evidence Act, the burden shifts on the appellant to prove his innocence. He would rely upon the following decisions in support of his case:-

(i) State of A.P. vs. Gangula Satya Murthy (1997) 1 SCC 272

(ii) State of A.P. vs. Kanda Gopaludu (2005) 13 SCC 116

12. In reply, the learned counsel for the appellant would submit that the prosecution has miserably failed to prove that the premises from where the body was recovered belongs to the appellant and when the alleged occurrence is said to have occurred in a residential area surrounded by many houses and the recovery of the body was alleged to have been done in the same place, none of the neighbours has been examined to prove that the house belongs to the appellant and the official witnesses have also stated that the house belongs to one Murali, however, no materials have been elicited to connect the appellant and the said Murali. He would further submit that the parents of the deceased viz., P.Ws.1 and 2 have entertained a suspicion and they have informed it to the investigating officer,

PW14, Ramanathan, Inspector of Police, Nellikuppam Police Station and PW17 and the Deputy Superintendent of Police Narasimhan that their son could have been murdered by the relatives of one Mohanasundari belonging to a different community with whom, their son had love affair for which, the said Mohanasundari was enquired by the police, however, investigation has not been done in that aspect. He would also submit that failure on the part of the accused to explain the circumstances cannot take place of proof of facts which the prosecution has to establish in order to succeed and the failure to explain can at the best be considered as an additional circumstance if only the prosecution is able to prove the guilt of the accused unfailingly. In this case, the prosecution has failed to conclusively prove beyond reasonable doubt that the place from where the body was recovered is the house of the appellant or to let in any evidence to show that such premises was not accessible to anyone other than the appellant.

13. Heard the learned counsel appearing for the parties and perused the materials available on record.

14. The appellant is alleged to have murdered his close friend on his refusal to accept the invitation of the appellant/accused to have homosex due to the fear that he may reveal the truth to

anybody else and later fearing that he could be caught by the police, he himself had surrendered before the Village Administrative Officer of Devenampattinam, PW6 and gave extra judicial confession that he had committed murder and buried the dead body in the backyard of a house denoted in the confession statement.

15. A careful study of the testimony of the prosecution witnesses, the supporting documents and the judgment of conviction and sentence rendered by the Trial Court reveals that the prosecution has heavily relied upon the extra judicial confession to implicate the appellant in the case. The motive attributed is just a refusal to accept the invitation of the appellant to have homosex. The weapon of offence is shown as a single-edged vegetable knife.

16. The entire case of the prosecution against the appellant/accused is based on circumstantial evidence alone and not on any material evidence or eyewitness to the occurrence. The prosecution also much relies upon the theory of "last seen together" recovery of M.O.4 weapon and the dead body of the deceased to contend that the appellant alone was the person in company with the deceased prior to his death. The further case of the prosecution is that the place from where the body was exhumed is the backyard of the house of the appellant. The Trial Court, disbelieving the extra

judicial confession and the recovery of M.O.4, has relied upon or had taken into consideration the fact that the body was recovered from the backyard of the house of the appellant to find the appellant guilty for the offence. It is pertinent to note that the Trial Court has also rendered a finding that the recovery of crime weapon is a stage managed one and that the extra judicial confession is only of frail nature and does not have capacity to inspire confidence, however, conviction is based on the recovery of body from the backyard. The reasoning given by the Trial Court is that the accused failed to explain his innocence. Further, the Trial Court shifted the burden on the accused stating that he failed to prove his innocence with regard to recovery of dead body, crime weapon in commission of crime at his home and at his instance.

17. A thorough reading of the judgment rendered by the Trial Court makes it clear that though the verdict is overwhelmed with a lot factual aspects and had observed the discrepancies found by itself or pointed out by the defence, it has misled itself in shifting the burden on the appellant/accused to disprove the case against him when the prosecution itself has not proved its case beyond reasonable doubts. When the prosecution has not taken any initiative to trace the call details of the mobile phone of the deceased and the

motorcycle used by the deceased, the Trial Court had expected the appellant/accused to give alibi.

18. It is the case of the prosecution that the appellant/accused and the deceased consumed liquor and thereafter, the appellant/accused had invited the deceased to have homosex with him, however, the prosecution has not all proved that the appellant/accused and the deceased had consumed liquor on the fateful day and the appellant/accused was a homosexual. No medical evidence has been produced by the prosecution to prove such a case. Rather, the post mortem report, Ex.P4 discloses that the internal organs of the deceased contained no alcohol or poisonous material which falsifies the case of the prosecution that the appellant/accused and the deceased had consumed liquor. It also probabilises the theory that only to strengthen the motive part, such a version has been introduced in the extra judicial confession. Though the medical evidence has been recorded by the Trial Court, the discrepancy has been omitted to be considered by the Trial Court.

19. Sofar as the weapon of offence is considered, the case of the prosecution is that it is a vegetable knife, a single-edged one, which was taken out by the appellant/accused from its buried place near the compound wall, whereas the post mortem report says that

on opening of the Thorax, a stab injury of 2x2x1 cm seen over the anterior wall of the left ventricle, seen entering into the cavity. The Doctor, PW5, who had conducted the post mortem opines that the deceased would appear to have died due to the effects of stab injuries to the Thorax and abdomen. During the cross examination, PW5, the Doctor, who had conducted post mortem, had categorically admitted that the injury found on the dead body could be caused only with a doubled-edged knife and with the weapon M.O.4, only an incised wound could be inflicted. Moreover, it is seen that in the extra judicial confession alleged to have been given voluntarily by the appellant/accused, Ex.P5, nothing has been stated about the weapon of offence viz., M.O.4 knife, whereas in Ex.P7, the confession statement alleged to have been given by the appellant/accused, it has been newly introduced. Such an introduction coupled with the discrepancy elicited from the medical evidence shows that it is a stage managed one. Considering these aspects, the Trial Court disbelieved the recovery of crime weapon M.O.4 and rendered a finding that the recovery of weapon M.O.4 cannot be said to be valid.

20. It is also relevant to note that the entire case of the prosecution against the appellant/accused commences from the point of extra judicial confession, Ex.P5 alleged to have been given

voluntarily by the appellant/accused. Coming to that aspect and the consequent handing over of the appellant/accused to the police is concerned, PW6, the Village Administrative Officer of Devanampattinam admits that he had first seen the appellant/accused only on 12.4.2016 on which date the extra judicial confession is alleged to have been given and he had not enquired about the ownership of the house from where the dead body was exhumed. It is the case of the prosecution that the appellant/accused had surrendered to PW6 at Devanampattinam and he was taken by PW6 to Nellikuppam Police Station for handing over to the police whereas, it is relevant to note that from the place of PW6, the Police Station at Devanampattinam is 2 kilometers away, Cuddalore Police Station is just one kilometer away and the Nellikuppam Police Station is 10 kilometers away, however, the appellant/accused was taken to Nellikuppam Police Station for handing him over to the police, and still worse, is later, the jurisdiction for the case was found to have fallen within the limits of Cuddalore N.T. Police Station and the case was transferred to that Station.

21. This court in ***Periyasamy vs. State by the Inspector of Police (2019 SCC OnLine Mad 24024),*** relying upon various

decisions, has held that extra judicial confession stated to have been given while in custody is highly unbelievable.

22. In the decision relied on by the prosecution in ***Trimukh Maroti Kirkan vs State of Maharashtra (2006 10 SCC 681,*** the Apex Court has held that in the case based on circumstantial evidence, when no eyewitness account is available, the principle of law which must be kept in mind is that when incriminating circumstances is put to the accused and the accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes additional link to chain of circumstances to make it complete.

23. In ***Dnyaneshwar vs. State of Maharashtra (2007) 10 SCC 445,*** the Apex Court has held that one of the circumstances which is relevant is that when the accused was last seen with the deceased in a premises to which an outsider may not have any access, it is for the accused to explain the ground for unnatural death of the deceased.

24. Coming to the case on hand, it is seen that the appellant/accused and the deceased were friends from school days and during the initial days of their avocation at Chennai, they both

had stayed under one shelter in Triplicane, even as per the confession statement alleged to have been given by the appellant/accused. Whileso, it is the case of the prosecution that on return from outstation to Cuddalore, the appellant/accused, when he met his friend, the deceased, had invited for homosex and on refusal by the deceased, the appellant/accused had murdered him fearing that the deceased may reveal it to anybody else. Such a motive attributed by the prosecution appears to be highly unbelievable, especially, when they the appellant/accused and the deceased had stayed for some time at Chennai under one shelter and their relationship was cordial. It is not the case of the prosecution that the appellant/accused had suddenly developed such a habit overnight or in a spur of moment. If the appellant/accused is of such a character, he would have teased the deceased even earlier and their friendship could not have continued. The motive attributed appears to be a feeble one. The prosecution has also not taken any initiative to test the sanity of the appellant/accused with any psychological method. Therefore, the motive part and the weapon of offence projected by the prosecution appear to be not only artificial but, also a cock and bull story.

25. A conjoint reading of the evidence adduced by the prosecution witnesses reveals that there are many discrepancies

among their version. PW1, father of the deceased and PW2 mother of the deceased had admitted that during the police enquiry, they had stated that their son had a love affair with one Mohanasundari, who belongs to different community and her relatives, who were antagonized, might have done something to his son and they had informed the same to the police officials of Nellikuppam Police Station and the Deputy Superintendent of Police. PW1 had specifically admitted that the police had also enquired the said Mohanasundari, whereas, PW14, Inspector of Police, Nellikuppam, during his cross examination, has specifically admitted that his enquiry revealed about the love affair of the deceased with one Mohanasundari, however, neither the said Mohanasundari nor her parents were enquired and no statement was recorded from them and he has not taken any steps to remove such a discrepancy. PW14, Inspector of Police, further admitted that no steps were taken to check the CCTV footage though CCTVs are installed in Cuddalore Town at the relevant time and no steps were taken to trace the bike used by the deceased.

26. The further discrepancy found on the part of the investigating officer, PW16 is that he had commenced his investigation immediately on receipt of case details without even

waiting for the instructions from the Superintendent of Police and he had shown the weapon of offence, M.O.4 as if it was lying in open space as evidenced by the rough sketch and observation mahazar prepared at 2.00 pm on 12.4.2016, whereas, it was recovered only at 2.45 pm on that day as identified by the appellant/accused.

27. In ***Nagendra Sah vs. State of Bihar (2021)10 SCC 725,*** the Apex Court has held that when the case of the prosecution is governed by circumstantial evidence and if chain of circumstances which is required to be established by prosecution is not established, the failure of the accused to offer reasonable explanation in discharge of burden placed on him by virtue of Section 106, is not relevant at all and when the chain is not complete, falsity of the defence is not a ground to convict the accused. It is useful to refer to the following paragraphs:-

> "***20.*** *Now we come to the argument of the prosecution based on Section 106 of the Evidence Act. Section 106 reads thus:*
>
> > *"**106. Burden of proving fact especially within knowledge**.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

21. Under Section 101 of the Evidence Act, whoever desires any Court to give a judgment as to a liability dependent on the existence of facts, he must prove that those facts exist. Therefore, the burden is always on the prosecution to bring home the guilt of the accused beyond a reasonable doubt. Thus, Section 106 constitutes an exception to Section 101. On the issue of applicability of Section 106 of the Evidence Act, there is a classic decision of this Court in the case of Shambu Nath Mehra v. The State of Ajmer3 which has stood the test of time. The relevant part of the said decision reads thus (AIR .406, paras 10-13):-

"10. Section 106 is an exception to section 101.

Section 101 lays down the general rule about the burden of proof.

*'**101.Burden of proof -** Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".*

Illustration (a) to Section 106 of the Evidence Act says-

'(a) "A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime".

11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It

*means facts that are **pre-eminently** or **exceptionally** within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor and Seneviratne v. R.*

12. Illustration (b) to section 106 has obvious reference to a very special type of case, namely to offences under sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be

impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

13. We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain

facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts." (emphasis added)

22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of

circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

28. In ***Satye Singh and another vs. State of Uttarkhand (2022) LiveLaw (SC) 169,*** the Hon'ble Supreme Court has held that Section 106 is not intended to relieve the prosecution from discharging its duty to prove the guilty of the accused and burden could not be shifted on the accused by pressing into service the provisions contained in Section 106 of the Evidence Act when the prosecution could not prove the basic facts as alleged against the accused. The relevant portion of the decision is extracted hereunder for ready reference:-

"11. .... It is settled position of law that circumstances howsoever strong cannot take place of proof and that the guilt of the accused have to be proved by the prosecution beyond reasonable doubt. At this juncture, let us regurgitate, the

golden principles laid down by this Court in ***Sharad Birdhichand Sarda vs. State of Mahashtra*** *reported in 1984 (4) SCC 116. This court while drawing the distinction between "must be" and "may be" observed as under in para 153:*

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made.

Certainly, it is a primary principle that the accused

must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

12. It was further observed in Para-158 to 160 as under:

"158. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor General relying on a decision of this Court in Deonandan Mishra v. State of Bihar [AIR 1955 SC 801 : (1955) 2 SCR 570, 582 : 1955 Cri LJ 1647] to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

"But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation,. . . such absence of explanation or false explanation would itself be an additional link which completes the chain."

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal case [(1981) 2

SCC 35, 39 : 1981 SCC (Cri) 315, 318-19 : (1981) 2 SCR 384, 390 : 1981 Cri LJ 325] where this Court observed thus :[SCC para 30, p. 43 : SCC (Cri) p. 322]''

"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstances, if other circumstances point unfailingly to the guilt of the accused."

13. The said principles have been restated in catena of decisions. In State of U.P. vs. Ashok Kumar Srivastava (1992) 2 SCC 86, it has been observed in para 9 that:

''9. This Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negatived on evidence. Great

care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise."

14. Again in Majendran Langeswaran vs. State (NCT of Delhi) & Anr. (2013) 7 SCC 192, this court having found the material relied upon by the prosecution inconsistent and the infirmities in the case of the prosecution, considered number of earlier decisions, and held that the conviction can

be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to the circumstantial evidence that all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else.

15. Applying the said principles to the facts of the present case, the Court is of the opinion that the prosecution had miserably failed to prove the entire chain of circumstances which would unerringly conclude that alleged act was committed by the accused only and none else. Reliance placed by learned advocate Mr. Mishra for the State on Section 106 of the Evidence Act is also misplaced, inasmuch as Section 106 is not intended to relieve the prosecution from discharging its duty to prove the guilt of the accused. In Shambu Nath Mehra vs. State of Ajmer, AIR (1956) SC 404, this court had aptly explained the scope of Section 106 of the Evidence Act in criminal trial. It was held in para 9:

"9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to

mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor [AIR 1936 PC 169] and Seneviratne v. R. [(1936) 3 All ER 36, 49]""

29. In the case on hand, several discrepancies and material contradictions were found out as indicated above, which vitiate the case of the prosecution case. Further, the Trial Court has observed that the extra judicial confession and recovery of weapon, M.O.4 are shrouded with suspicion, but, strangely, shifted the burden on the appellant finding that the place from where the body was recovered is the backyard of the house of the appellant especially, when no legal evidence has been let in by the prosecution to prove that the place belongs to the appellant. Further, non-examination of the neighbours also creates grave suspicion in the prosecution case. Therefore, we are of the view that such a hasty inference upon motive part without going into its genuineness cannot be allowed to be the basis for convicting the accused.

30. To be precise, we are of the view that the prosecution has come up with a tailor-made case against the appellant without taking any steps to wipe out the reasonable doubts and other hypotheses

that arise in the case leaving hobson's choice to the Trial Court by projecting the extra judicial confession alone without any chain of cogent circumstances and in turn, the Trial Court has erred in accepting the choice offered by the prosecution by patching up the holes in the prosecution case by rendering a finding that it is the appellant/accused, who has to disprove the allegation levelled against him on the basis of "last seen theory" and recovery of the dead body which, in the opinion of this court, has not been conclusively proved by the prosecution.

31. The law has been consistently held by the Apex Court and various High Courts that extra-judicial confession allegedly made by an accused loses its significance in the absence of any substantive evidence against the accused and there cannot be any conviction based on such confession. An accused "must be" and not merely "may be" guilty before a court can convict him and the conclusions of guilt arrived at must be sure conclusions and must not be based on vague conjectures. Of course, an extra-judicial confession attains greater credibility and evidentiary value only if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence. The entire chain of circumstances, on which the conclusion of guilt is to be drawn, should be fully established and

should not leave any reasonable ground for the conclusion consistent with the innocence of the accused. It is also the settled law that an extra-judicial confession is a weak kind of evidence and unless it inspires confidence or is fully corroborated by some other evidence of clinching nature, ordinarily conviction for the offence of murder should not be made only on the evidence of extra-judicial confession.

32. In the case on hand, such a chain of cogent circumstances is missing, rather, the case of the prosecution is surrounded by suspicion from the inception viz.,

i) Omission to initiate investigation on the suspicion raised by the parents about the relatives of a girl of different community with whom, the deceased had love affair.

ii) Voluntariness and necessity on the part of the appellant/accused to give extra judicial confession to an unknown person viz., the Village Administrative Officer (PW6) of a different jurisdiction.

iii) Necessity for the said Village Administrative Officer to hand over the appellant/accused to a Police Station without jurisdiction, which is also located 10 kms away from his place when compared to other two police stations which are very nearer to him viz., one or two kilometers away, when, in fact, one of those two police stations

has got the jurisdiction and the case also came to be transferred to that police station in a later point of time, especially, after completion of major part of investigation.

iv) Contradiction with regard to nature of weapon that could have inflicted the injury, viz., when the medical evidence suggests that the injury could have been inflicted with a double edged weapon, a single edged vegetable knife is alleged to have been recovered as weapon of crime.

v) Contradiction in the manner the weapon of crime was recovered.

vi) Introduction about the weapon in the confession statement, alleged to have been given by the appellant/accused to the Deputy Superintendent of Police, Panruti, when it does not find in the version alleged to have been given to PW6, the VAO.

vii) Failure to prove by legal evidence that the premises from where the body was recovered belongs to the appellant.

33. In view of the above laches found in the case of the prosecution, we have no hesitation in holding that the prosecution has not proved its case beyond reasonable doubts and therefore, it would not be safe to convict the appellant/accused for the offences alleged against him. Accordingly, we allow the Criminal Appeal

setting aside the judgment of conviction and sentence rendered by the Principal Sessions Judge in S.C.No.200 of 2016 dated 30.10.2018. The appellant is acquitted of all the charges and is set at liberty. He is ordered to be released, if his presence is not required in any other case. Fine amount paid, if any, is ordered to be refunded. The connected Miscellaneous Petition is closed.

(P.U.,J.) (A.D.J.C.,J.)
28.6.2022.

Index: Yes/No.
Internet: Yes/No.

To

1. Principal Sessions Judge,
   Cuddalore.

2. The Deputy Superintendent
   of Police,
   Cuddalore Sub Division,
   Cuddalore District.

3. The Superintendent,
   Central Prison,
   Cuddalore.

3. The Public Prosecutor,
   High Court, Madras.

PARESH UPADHYAY, J.
and
A.D.JAGADISH CHANDIRA, J.

ssk.

P.D. JUDGMENT IN
Criminal Appeal No.737 of 2018
and
Crl.M.P.No.15638 of 2018

Delivered on
28.6.2022.