S. Kaleeswaran v. State by the Inspector of Police Pollachi Town East Police Station, Coimbatore District, Tamil Nadu (SC)

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SUPREME COURT OF INDIA

Before: Uday Umesh Lalit, CJI. & Bela M. Trivedi, JJ.

Criminal Appeal No. 160 of 2017 Decided on: 03.11.2022

S. Kaleeswaran Appellant

Versus

State by the Inspector of Police Pollachi Town East Police Station, Coimbatore District, Tamil Nadu Respondent

Alongwith

Criminal Appeal No. 410 of 2017, John Anthonisamy @ John v. State, rep. by the Inspector of Police Pollachi Town East Police Station, Coimbatore District, Tamil Nadu

For Appellant(s):

Ms. N.S. Nappinai, Adv. Mr. Asaithambi MSM, Adv. Mr. V. Balaji, Adv. Mr. C. Kannan, Adv. Mr. Nizamuddin, Adv. Mr. Rakesh K. Sharma, AOR Mr. C.B. Gururaj, Adv. Dr. Nanda Kishore, AOR

For Respondent(s):

Mr. S.V. Raju, ASG Ms. Sairica Raju, Adv. Mr. Ashotoshu, Adv. Mr. Annam Venkatesh, Adv. Mr. Anshuman Singh, Adv. Mr. Ankit Bhati, Adv. Mr. Harsh Paul Singh, Adv. Mr. G.S. Makker, AOR Dr. Joseph Aristotle S., AOR Ms. Nupur Sharma, Adv. Mr. Shobhit Dwivedi, Adv. Ms. Vaidehi Rastogi, Adv Dr. Joseph Aristotle S., AOR

A. Indian Penal Code, 1860 (45 of 1860), Section 147, 364, 302, 120-B, 149, 201, 396 -- Indian Evidence Act, 1872 (1 of 1872), Section 24, 29, 45, 47 -- Circumstantial evidence -- Extra-judicial confession – Handwriting expert -- When the extra judicial confession is not duly proved, or does not inspire confidence or is not corroborated by any other reliable evidence, the conviction could not be based solely on such weak piece of evidence -- Prosecution having not examined the handwriting expert for proving the handwritings of the accused no.1 contained in the Inland letter allegedly addressed to the PW-19, nor any expert's opinion having been obtained, the High Court had rightly discarded the said piece of evidence.

(Para 8)

B. Indian Penal Code, 1860 (45 of 1860), Section 147, 364, 302, 120-B, 149, 201, 396 -- Indian Evidence Act, 1872 (1 of 1872), Section 9 -- Circumstantial evidence -- Last seen together – Identification of accused after 6 months –When there was huge time gap of about more than six months between the date of the incident and the date of recording of statements of witnesses by the Investigating Officer, the Test Identification Parade would have assisted the police in identifying the accused seen by the PW-7, however no such TI Parade was held by the Investigating Officer -- Therefore, identification of the accused nos. 2 to 5 at the instance of these witnesses becomes very doubtful.

(Para 10)

C. Indian Penal Code, 1860 (45 of 1860), Section 147, 364, 302, 120-B, 149, 201, 396 -- Indian Evidence Act, 1872 (1 of 1872), Section 7 -- Circumstantial evidence -- Last seen together – It is well settled that if there is considerable time gap between

the persons seeing together and the proximate time of the crime, the circumstances of last seen together, even if proved cannot clinchingly fasten the guilt of the accused.

(Para 11)

D. Indian Penal Code, 1860 (45 of 1860), Section 147, 364, 302, 120-B, 149, 201, 396 -- Indian Evidence Act, 1872 (1 of 1872), Section 106 -- Code of Criminal Procedure, 1973 (2 of 1974), Section 313 -- Circumstantial evidence -- Last seen together – Failure of the accused, in a case based on circumstantial evidence which included "last seen together theory", to explain u/s 313 Cr.PC as to under what circumstances the victim suffered death, would also not be a ground to arrive at an irresistible conclusion that the accused were involved in the commission of the alleged crime.

(Para 12)

E. Indian Penal Code, 1860 (45 of 1860), Section 147, 364, 302, 120-B, 149, 201, 396 -- Indian Evidence Act, 1872 (1 of 1872),Section 45 -- Circumstantial evidence -- Identification of dead body -- Super-imposition report -- Since the super-imposition report was not supported by any other reliable medical evidence like a DNA report or post-mortem report, it would be very risky to convict the accused believing the identification of the dead body of the victim through the super-imposition test -- Dead body of the victim was discovered from the place shown by the accused, it is imperative on the part of the prosecution to prove that the dead body or the skeleton found at the instance of the accused was that of the victim and of none else.

(Para 13)

F. Indian Penal Code, 1860 (45 of 1860), Section 147, 364, 302, 120-B, 149, 201, 396 -- Indian Evidence Act, 1872 (1 of 1872), Section 8 – Circumstantial evidence -- Motive -- In a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances.

(Para 14)

G. Indian Penal Code, 1860 (45 of 1860), Section 147, 364, 302, 120-B, 149, 201, 396 -- Indian Evidence Act, 1872 (1 of 1872), Section 7, 8, 24, 29, 45, 47, 106 – Murder -- Acquittal of accused -- Circumstantial evidence – Extra-judicial confession not corroborated by handwriting expert opinion – Last-seen theory after six months of incident without Test Identification parade by I.O. becomes doubtful – Super-imposition report was not supported by any other reliable medical evidence like a DNA report or post-mortem report of dead body – Witness to whom car of deceased sold become hostile – Evidence did not complete the chain to dispel the hypothesis of innocence of the appellants-accused -- Prosecution failed to establish through clinching, clear, cogent and consistent evidence, the chain of events, on the basis of which the guilt of the appellants-accused could be established – Judgements and orders of conviction and sentence passed by the Trial Court and confirmed by the High Court set aside -- Appeals allowed.

(Para 8-16)

Cases referred:

1. Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116.

2. State of Goa vs. Sanjay Thakran, (2007) 3 SCC 755.

3. Pattu Rajan v. State of Tamil Nadu, (2019) 2 SCC (Cri) 354.

4. Nandu Singh v. State of M.P., Cri. App. No. 285 of 2022 (Feb 25, 2022).

JUDGMENT

BELA M. TRIVEDI, J. –

1. Both the Criminal Appeal Nos. 160 of 2017 and 410 of 2017 are arising out of the common judgment and order dated. 22nd July 2016 passed by the High Court of Judicature at Madras in Criminal Appeal Nos. 436/2014, 482/2014, 490/2014, 175/2015 and 176/2015, whereby the High Court while dismissing the said appeals has confirmed the judgment and order dated 22nd July, 2014 passed by the Sessions Judge, Coimbatore (hereinafter referred to as the "Trial Court") in Sessions Case No. 187/2008. The Trial Court had convicted the present appellants i.e., S. Kaleeswaran (Original Accused No. 5), John Anthonisamy @ John (Original Accused No.1) along with the other three Accused i.e., Rajesh Kumar @ Rajesh (Original Accused No. 4), R. Ganeshkumar @ Ganesh (Original Accused No.3) and Muthumanickam @ Muthu (Original Accused No. 2) for the offence under Section 120(B), 147, 364 and 302 read with 120(B)/149, 201 and 396 I.P.C., and sentenced them as detailed below:

S. No.	Accused	Section of Law	Sentence
1.	A.1 to A.5	120(B) I.P.C.	Rigorous imprisonment for six months each.
2.	A.1 to A.5	147 I.P.C.	Rigorous imprisonment for two years each.
3.	A.1 to A.5	364 I.P.C.	Rigorous imprisonment for ten years and to pay fine of Rs. 2,000/- each in default to undergo simple imprisonment for six months.
4.	A.1 to A.5	302 I.P.C.	Imprisonment for life and to pay a fine of Rs. 2,000/- each in default to undergo simple imprisonment for six months.
5.	A.1 to A.5	302 r/w 120(B)/149 I.P.C.	Imprisonment for life and to pay fine of Rs. 2,000/- each in default to undergo simple imprisonment for six months.
6.	A.1 to A.5	201 I.P.C.	Rigorous imprisonment for seven years each.
7.	A.1 to A.5	396 I.P.C.	Imprisonment for life and to pay fine of Rs. 2,000/- each in default to undergo simple imprisonment for six months.

The aggrieved appellant (Accused No.1) John Anthonisamy @ John has preferred Criminal Appeal No. 410 of 2017 and appellant (Accused No. 5) S. Kaleeswaran has preferred Criminal Appeal No. 160 of 2017 challenging the impugned judgement passed by High Court. The other three accused have chosen not to file any appeal.

2. As per the case of the prosecution, accused no.1 John Anthonisamy was a taxi driver, accused no. 2 Muthumanickam was a friend of accused no.1, and accused no. 3, 4 and 5 were the friends of the accused no.2. On 18.07.2007 at about 7 A.M., the accused no.1 conspired with the accused no.2 and planned to commit dacoity of an

Ambassador Car bearing registration No. TN-41-P-4980 and to cause the murder of John Thomas, the driver of the said car. In furtherance of the said plan, the accused made the said John Thomas to come to the Fire service car stand at Pollachi. When John Thomas arrived in the Ambassador Car at the said place, accused no.1 made the accused no.4 Rajesh to hire the said Ambassador Car for two hours and requested John Thomas to come by 12:30 P.M. John Thomas accordingly arrived at the place as requested by the accused no.1 i.e., at Sakthi Hotel, Pollachi, with his Ambassador Car. The accused no.1 thereafter got into the car and proceeded towards Udumalpet. On 18.07.2007 at about 01:30 P.M., the accused no. 1 and the driver John Thomas arrived at the Udumalpet bus stand, where the accused no. 2 was waiting along with accused no. 3 to 5. All the accused thereafter got into the said Ambassador Car and proceeded towards Ammapatty and at about 02:45 P.M., all the five accused made the driver John Thomas stop the car near an isolated place on the road between Vadaboothanam and Ammapatti Road. All the accused in furtherance of the conspiracy hatched by them murdered the taxi driver John Thomas. The accused thereafter, with the intention of causing the disappearance of the evidence, buried the dead body of John Thomas in a pit. The Ambassador Car thereafter was sold out by them to one Rajendran of Thiruvarur and they shared the sale proceeds of the car. After John Thomas was missing for a week, a complaint was reported by the PW-1 wife of John Thomas on 25.07.2007, which was registered at Pollachi (East) Police Station for missing person.

3. The investigating officer after completing the investigation had laid the charge-sheet against all the five accused. All five accused were charged by the trial court for the offences under sections 120(B), 147, 364, 201, 396 I.P.C. Accused no. 3, 4 and 5 were additionally charged for the offence under Section 302 I.P.C. and Accused no. 1 and 2 were charged for the offence under Section 302 r/w 120(B)/149 I.P.C.

4. All the accused having abjured their guilt and claimed to be tried, the prosecution examined as many as 28 witnesses and adduced 43 documents to prove their guilt. In their further statements recorded under Section 313 Cr.PC, they denied the allegations levelled against them and stated that they were falsely implicated in the case.

5. The learned counsel appearing for the appellants submitted that the entire case of prosecution rested on circumstantial evidence and the prosecution had miserably failed to prove the chain of circumstances beyond reasonable doubt leading to an irresistible conclusion of the guilt of the accused. According to them, the High Court had rightly not relied upon the extra judicial confession allegedly made by the accused no. 1, the same having not been duly proved by the prosecution, and if the said piece of evidence is discarded, the credibility of other evidence more particularly of the witnesses PW-6 and PW-7 examined by the prosecution becomes doubtful. The identity of the dead-body of the deceased was also not duly proved. The alleged recoveries from an accused nos. 2 to 5 were made from the public place which had no link to connect them with the crime. The learned counsel for the appellants further submitted that the last seen theory propounded by the prosecution also could not have been relied upon in view of the fact that the statements of PW-6 and PW-7, who had allegedly seen the deceased with the accused no.1, were recorded about six months after the alleged incident of the deceased having gone missing. However, the Learned Advocate Dr. Joseph Aristotle S. appearing for the respondent-State vehemently submitted that the concurrent findings of facts as recorded by the High Court and Sessions Court, after fully appreciating the evidence adduced by the prosecution, this Court may not upset the same. According to him, though the High Court had not relied upon the extra judicial confession made by the accused no.1, there was sufficient evidence to connect all the accused with the alleged crime. The identification of the dead-body of the deceased, the incriminating recoveries and discoveries of the articles made at the instance of the accused having been duly proved, the entire chain of circumstances duly proved, had led to the irresistible conclusion about the guilt of all the accused.

6. At the outset, it may be stated that the entire case of prosecution rested on the circumstantial evidence. The law with regard to the appreciation of evidence when the case of the prosecution hinges on circumstantial evidence is very well-settled. The five golden principles laid down by this Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra[1] [[1](1984) 4 SCC 116]*** and followed in a catena of decisions, are worth reproducing:

> *"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:***
>
> ***a. 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 & Anr. v. State of Maharashtra[2] [[2](1973) 2 SCC 793] where the following 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."***
>
> ***b. 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,***
>
> ***c. the circumstances should be of a conclusive nature and tendency,***
>
> ***d. they should exclude every possible hypothesis except the one to be proved, and,***
>
> ***e. 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."***

7. Keeping in mind the above set of principles, let us examine whether the prosecution had proved beyond reasonable doubt, the entire chain of circumstances, not leaving any link missing for the accused to escape from the clutches of law.

8. Heavy reliance was placed by the prosecution on the extra judicial confession made by the accused no.1 through an Inland letter addressed to P.W.-19 Karthikeyan, former employer of the accused no. 1 who had received the same on 29.12.2007. It appears that the said alleged extra judicial confession of the accused no. 1 was the trigger point which directed the Investigating Officer to proceed further with the investigation after about five months of the alleged incident, which had taken place on 18.07.2007. Apart from the fact that the extra judicial confession is a very weak piece of evidence, the High Court in the impugned judgment had refused to rely upon the same on the ground that neither the handwriting expert was examined nor any opinion of handwriting expert was proved by the prosecution. It cannot be gainsaid that when the extra judicial confession is not duly proved, or does not inspire confidence or is not corroborated by any other reliable evidence, the conviction could not be based solely on such weak piece of evidence. In the instant case, the prosecution having not examined the handwriting expert for proving the handwritings of the accused no.1 contained in the Inland letter allegedly addressed to the PW-19, nor any expert's opinion having been obtained, in our opinion, the High Court had rightly discarded the said piece of evidence with regard to the alleged extra judicial confession made by the accused no.1.

9. The next circumstance on which the prosecution had placed heavy reliance was with regard to the theory of "last seen together", relying upon the evidence of PW-6 and PW-7. It is noteworthy that both the witnesses were the taxi drivers and were operating the taxis from the same taxi stand from where the deceased was operating his taxi, however their statements were recorded by the investigation officer almost six months after the alleged incident. The PW-6 had deposed before the Trial Court *inter-alia* that on 18.07.2007, he was standing near Durai Cinema Theatre at Pollachi to meet his friend and at about 12:45 pm the accused no.1 was seen standing near the Sakthi Hotel, which was situated near the place where he (PW-6) was standing. He further stated that within a short time, John Thomas (the deceased) came to the said place driving his taxi bearing registration no. TN-41-P-4980. He (PW-6) noticed that the accused no.1 was talking to the deceased for a while, and thereafter the accused no.1 got into the front seat of the car and then both went away in the car. According to this witness he did not see the deceased John Thomas thereafter. The PW-7 was also a taxi driver. He stated in his deposition before the Court that on 18.07.2007 when he was returning from Palani via Udumalpet bus stand, he saw the taxi driven by John Thomas. He therefore slowed down his taxi and saw that he (John Thomas) was at the driver's seat, and the accused no.1 whom he knew was in the front seat. According to him, he also saw four other persons siting in the car but he did not know them at that time.

10. Having regard to the evidence of PW-6 and PW-7, it appears that apart from the fact that their statements were recorded by the Investigating Officer after six months of the alleged incident, their evidence before the Court does not inspire confidence. The PW-6 in the cross-examination had admitted that he had come to know about the deceased having gone missing within one week of his having seen the deceased with the accused no. 1. It is difficult to appreciate his behaviour not to disclose this crucial information for six months either to his fellow taxi drivers or to the police about he having seen the deceased lastly in the company of the accused no.1. So far as PW 7 is concerned, he had deposed that he got to know about the deceased having gone missing only when Police came for enquiry on 01.01.2008. In our opinion, when the Investigating Officer was time and again coming to the taxi stand where all the taxi drivers including the PW-6 and PW-7 used to stand, for inquiring about the deceased's whereabouts, and when wide publicity was made in the local newspapers, television and radio about the deceased having gone missing, it is not believable that the PW-7 came to know about the deceased having gone missing only when the police came to him to make inquiry six months after the incident in question. PW-7 had also admitted that he did not know the other four accused who were accompanied the accused no.1 and the deceased on the alleged date of incident. When there was huge time gap of about more than six months between the date of the incident and the date of recording of statements of witnesses by the Investigating Officer, the Test Identification Parade would have assisted the police in identifying the accused seen by the PW-7, however no such TI Parade was held by the Investigating Officer. Therefore, identification of the accused nos. 2 to 5 at the instance of these witnesses also becomes very doubtful.

11. It is well settled that if there is considerable time gap between the persons seeing together and the proximate time of the crime, the circumstances of last seen together, even if proved cannot clinchingly fasten the guilt of the accused. (***State of Goa vs. Sanjay Thakran[3] [3](2007) 3 SCC 755]***).

12. The failure of the accused, in a case based on circumstantial evidence which included "last seen together theory", to explain under Section 313 Cr.PC as to under what circumstances the victim suffered death, would also not be a ground to arrive at an irresistible conclusion that the accused were involved in the commission of the alleged crime. In the instant case, even if the theory of "last seen together" propounded by the prosecution is accepted, then also it is difficult to draw an irresistible conclusion that the accused are guilty of the alleged offences, merely because they failed to explain as to

under what circumstances the victim suffered death.

13. The next circumstance relied upon by the prosecution is identification of the body. It may be noted that the corpus when found, was in a highly decomposed condition. Skeletal remains were found after almost 5 months from the date of the incident of the deceased having gone missing. The identification, therefore, was done by getting the skull super-imposition test done through the PW-16, forensic expert. In ***Pattu Rajan v. State of Tamil Nadu*** [4] ***[(2019) 2 SCC (Cri) 354]***, this Court has explained that though identification of the deceased through superimposition is an acceptable piece of opinion evidence, however the courts generally do not rely upon opinion evidence as the sole incriminating circumstances, given its fallibility, and the superimposition technique cannot be regarded as infallible. In the present case, since the super-imposition report was not supported by any other reliable medical evidence like a DNA report or post-mortem report, it would be very risky to convict the accused believing the identification of the dead body of the victim through the super-imposition test. It is true that in the case based on circumstantial evidence, if the entire chain is duly proved by cogent evidence, the conviction could be recorded even if the corpus is not found, but when as per the case of prosecution, the dead body of the victim was discovered from the place shown by the accused, it is imperative on the part of the prosecution to prove that the dead body or the skeleton found at the instance of the accused was that of the victim and of none else.

14. The Court also finds substance in the submission made by the learned counsel for the appellants that the prosecution had also failed to prove the motive of the accused for committing the alleged crime. As held in ***Nandu Singh v. State of M.P.***[5] ***[5Cri. App. No. 285 of 2022 (Feb 25, 2022)]***, though in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. In the instant case, the PW-8 Mr .Rajendran to whom the Ambassador car of the deceased was allegedly sold by the accused, had turned hostile and not supported the case of the prosecution that the money was received by the accused by selling the car to the PW-8.

15. Thus, having regard to the totality of evidence adduced by the prosecution, in our opinion, the circumstances relied upon by the prosecution did not complete the chain to dispel the hypothesis of innocence of the appellants-accused. The prosecution having failed to establish through clinching, clear, cogent and consistent evidence, the chain of events, on the basis of which the guilt of the appellants-accused could be established, in our opinion, the Courts below had committed an error in accepting the case of prosecution and convicting them for the alleged crime.

16. In that view of the matter, the judgements and orders of conviction and sentence passed by the Trial Court and confirmed by the High Court are set aside. Both the appellants-accused, and the other three accused who have not filed any appeal, are directed to be set free forthwith, if not required in any other case.

17. The appeals stand allowed accordingly.

Appeals allowed.

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