

CASE NO.:
Appeal (crl.) 242 of 2005

PETITIONER:
Sivakumar

RESPONDENT:
State by Inspector of Police

DATE OF JUDGMENT: 08/12/2005

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

This appeal is directed against a judgment and order dated 24.6.2004 whereby and whereunder the appeal filed by the Appellant herein against a judgment of conviction and sentence dated 30.6.1997 passed by II Additional Sessions Judge, Coimbatore Division in Sessions Case No. 197 of 1996 was dismissed.

The Appellant, herein and the deceased Senthil were relatives as well as friends. Relationship of parties is not in dispute. Nataraj Gounder (PW-1) was the brother-in-law of the deceased whereas Radhakrishnan (PW-2) was his brother. The deceased, however, was living with his mother as well as his brother (PW-2). He indisputably was addicted to drinks.

At about 11.00 a.m. on 17.9.1995, PW-1 while standing in his Kalam had seen the Appellant, one Ravikumar (PW-7) and the deceased going together. At about 4.30 p.m. on the same day, he came to learn that the body of the deceased was lying near a Tea Stall belonging to one Rathinammal. PWs.-1 & 2 went there and found Senthil dead. PW-1 lodged a First Information Report whereupon a case under Section 174 of the Indian Penal Code was registered. One Dr. Jothi Arunachalam (PW-11) conducted autopsy on the dead body of the deceased and inter alia found a circular penetrating wound = cm medial to right nipple. He opined that the injury might have been caused by an air gun like M.O.I. He further found that the injury was due to profuse haemorrhage and shock due to penetrating injury. The Post mortem report was marked as Ex. P-11.

The Appellant together with two others, namely, Ravikumar and Murugaraj thereafter went to the house of Nataraj (PW-6) at Palghat in the State of Kerala and stayed there for a few days. The Appellant at about 7.00 p.m. on 29.9.1995 visited the office of the Village Administrative Officer at Servaikaranpalayam. He made an extra judicial confession of his guilt wherein he stated that the firing of the shot took place when the deceased had allegedly stated, "what son-in-law you are going to shoot me. If you want you can shoot. I can see you after you shoot." The said extra-judicial confession was marked as Ex. P-3. The Appellant thereafter was handed over to the Inspector of Police (PW 14) by the said Village Administrative Officer (PW-5) along with the said extra-judicial confession. He was interrogated by the Inspector of Police whereupon he allegedly made confession, leading to recovery of the air gun from Pappannan Thottam canal. The said air gun was sent to Forensic Sciences Department, Madras and was examined by one Rajan (PW-9). It was found to be in working condition. P.W. 9 opined "it is a 0.22/5.5 mm of caliber rifle on test firing. It was found to be in working condition. The muzzle velocity of the pellet from the above Air Rifle is about 400 feet per second. As per T.S.R. 991

Annexed to Schedule II under Arms Rules, 1962, the Air Rifle was found to satisfy the test specified therein i.e., the pellets did not penetrate 1" thick deal wood plank at the range of five feet. If a human body is shot by this kind of Air Rifle in a close range, there is every chance to occur death".

A chargesheet was filed against the Appellant for commission of an offence under Section 302 of the Indian Penal Code. The prosecution in support of its case examined 14 witnesses. The learned Sessions Judge upon consideration of the evidences brought on record and in particular the depositions of PWS-1,2,5,6,7 and 12 found the Appellant guilty of commission of offence under Section 304, Part II of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for five years.

The Appellant herein aggrieved by and dissatisfied with the said judgment of conviction and sentence preferred an appeal before the High Court which by reason of the impugned judgment has been dismissed.

Mr. A.T.M. Sampath, learned senior counsel appearing on behalf of the Appellant, urged that the prosecution cannot be said to have proved the guilt of the Appellant who was convicted only on the basis of purported circumstantial evidences. The learned counsel contended that the circumstances against the Appellant were not such which could be said to have completed all links in the chain inasmuch as the ownership of the air gun was not proved. The pellets which were noticed by the autopsy surgeon in the dead body of Senthil had not been removed nor the recovery of the air gun can be said to have been made in accordance with law. It was further submitted that the purported extra-judicial confession which was recorded by a person not authorized therefor in view of Rule 72 of Criminal Rules of Practice (CRP) in terms whereof a village magistrate is prohibited from recording the extra judicial confession or statement whatever made by an accused person after the police investigation has begun.

Mr. Subramonium Prasad, learned counsel appearing on behalf of the Respondent, however, supported the judgment contending that the circumstantial evidences against the Appellant had been fully proved in view of the fact that:

- (i) he was last seen with the deceased;
- (ii) his conduct in leaving the place of occurrence and going to the State of Kerala for a few days;
- (iii) extra-judicial confession; and
- (iv) recovery of air gun at his instance from Pappannan Thottam canal.

The High Court in its judgment relied upon the following circumstances:

(i) Evidence of P.W. 1 that he saw Senthil along with the Appellant/ Accused- Sivakumar, P.W. 7 Ravikumar on 17.9.1995 11.00 a.m. and that Senthil was last seen alive in the company of the Appellant/ Accused.

(ii) The Appellant/ Accused purchased M.O.I Air Gun from the shop of P.W. 8 \026 Prakash; M.O.I \026 Air Gun is in working condition and the death was due to Gun Shot wound and the opinion evidence of P.W. 11- Dr. Jothi Arunachalam.

(iii) Conduct of the Appellant/ Accused in leaving for Kerala after the occurrence and that he did not return to Servaikaranpalayam Village for few days.

(iv) Extra-Judicial Confession to P.W. 5 \026 Village Administrative Officer and Confession Statement to P.W.14 \026 Inspector of Police and recovery of M.O.I Air Gun at the instance of the Appellant / Accused.

PW-1 in his deposition categorically stated that he had seen the Appellant, the deceased and Ravikumar going together on the road at about 11.00 a.m. He, of course, stated that he was not aware as to where they had been going which shows his truthfulness, but the fact that the deceased was last seen with the Appellant is not in dispute.

He is a natural witness in the sense that when he was informed that the body of the deceased was lying near the tea shop of Rathinammal, he went there with PW-2. He had at that time no reason to suspect any person for commission of the crime. He, therefore, did not raise any finger of suspicion against the Appellant as a result whereof the case under Section 174 of the Indian Penal Code came to be registered. Contention of Mr. Sampath is that he in his first statement before the police did not allege about the presence of the pellets on the chest of the deceased, is not very material for the purpose of this case.

PW-2 also appears to be a truthful witness. He also stated that he did not know the reason of death of his elder brother. He as well as PW-1 admitted that the deceased used to consume liquor.

PW-3 deposed to the effect that the deceased and the Appellant were close friends and they used to go together very often. The evidence of PW-3 was also not material except for the fact that he stated that the deceased and the Appellant used to go out frequently.

The evidence of PW-4 is not very material. PW-5 is the Village Administrative Officer. He categorically stated that at about 7 a.m. on 29.9.1995, the Appellant made an extra-judicial confession before him. From a perusal of the statement of the said witness, it appears that the story was narrated in great details. The Appellant is said to have stated that a realization came to him that although he was well-educated, he could do such thing and, thus, intended to surrender before the police but could not do so as he was afraid that if he did so he would be beaten up. The statement made before PW-5 by the Appellant herein was reduced to writing which upon having been read over was signed by the Appellant. He also prepared a report in this behalf before going to the police station. In his presence, the Appellant made a statement also before the Inspector wherein he disclosed that if he is taken to the Pappan Thottam bridge he can produce the air gun. On 30th September, 1995 at about 12 O'clock, the said air gun was recovered. As regard applicability of Rule 72 of CRP he in the cross-examination stated:

"\005I am having power if any murder took place within my jurisdiction to receive the complaint and to send it to police station in that regard\005"

Nothing material was elicited from him in cross-examination which would discredit the said witness.

PW-6 was the person in whose house the Appellant, Ravikumar and Murugaraj stayed for about 2-3 days. PW-7 was declared hostile. Prakash (PW-8) was the partner in Sri Krishna Pollachi from whose shop the Appellant is said to have purchased the air gun. However, he did not say that the air gun was purchased by the Appellant from his shop whereupon he was declared hostile. The High Court, however, relied upon a part of his evidence which is as under:

- (i) Air Guns like M.O.I are sold in the shop of P.W. 8.
- (ii) That Appellant/ Accused used to purchase Articles from Krishna Associates \026 shop of P.W. 8.

P. Rajan (PW-9) is the forensic expert. In his evidence, he stated:

"\005The above gun was with .22 inches or 5.5 m.m. pipe dia and operated by air. I found the gun was in shooting condition while I shoot it for test. The speed of the pellet shoot from this gun is 400 feet per second. The pellets had not penetrate (sic) one inch thick deal wood plank at the range of 5 feet as per the tests done under the rules specified under Arms Act, 1962. So license is not necessary to possess such a gun. The office copy of letter received from Judicial Magistrate No. 2 Polachi by Forensic Science department Chennai is Exhibit P-7. The test report submitted by me is Exhibit P-8. There is chance to cause death if the human body is shot from very nearer\005"

Contention of Mr. Sampath is that the air gun was received in two parts, namely, wooden part and iron part separately and, thus, the evidence of PW-9 should not be relied upon. We do not see any reason to accept the said contention because for the purpose of carrying out tests in the forensic laboratory, the iron part of the gun was material.

PW-10 was the head constable. His evidence is not material. Dr. Jothi Arunachalam (PW-11) conducted the post mortem examination on the body of the deceased. As noticed hereinbefore, Mr. Sampath submitted that the pellets had not been recovered. PW-11 categorically stated that the foreign body seen through X-ray could not be recovered despite great effort made in this regard during post mortem. He noticed that the penetrating injury was in the vital organ of the chest part.

In view of the aforementioned statement of PW-11, we are of the opinion that non-recovery of the pellets from the body of the deceased during post mortem examination was not very material so as to discredit the entire prosecution case.

PW-12 is a formal witness who proved some documents. PW-13 is a retired head constable who registered the case. PW-14 is the Inspector of Police Station before whom the Appellant was produced by the Village Administrative Officer. He recovered the air gun produced by the Appellant which had been kept under the Pappannan Thottam canal at about 6.30 a.m. on 30th September, 1995.

The ownership of the air gun was not necessary to be proved. Recovery of the said air gun was made at the instance of the accused in terms of Section 27 of the Indian Penal Code. When the possession of the air gun and recovery thereof had been proved, in our opinion, ownership takes a back seat.

Submission of Mr. Sampath that in view of Rule 72 of the Criminal Rules of Practice, P.W. 5 had no jurisdiction to record the extra-judicial confession of the Appellant deserves some consideration.

The Madras Village Police Regulation, 1816 was made for establishment of a general system of police throughout the territories subject to the Government of Fort St. George, clause 10 whereof was as follows:

"10. First \026 In cases of a trivial nature, such as abusive language and inconsiderable assaults or affrays, heads of villages shall have authority, on a verbal examination, either to dismiss the parties, or, if the offence charged shall be proved to have been committed by the persons accused of it and shall appear deserving of punishment, to confine the offending parties in the village choultry for a time not exceeding twelve hours\005
Second \026 Heads of villages shall report to the Police-

officer of the district all cases in which they shall have exercised the power of punishment granted to them by the first clause of this section, but it shall not be necessary for them to report the cases in which they may dismiss parties."

By Regulation 6 of Madras Regulation IV of 1821, it was provided:

"6. First \026 The powers granted to heads of villages, under clause first, section 10, Regulation XI of 1816, to punish trivial offences, are hereby extended, under the rules and limitations therein specified, to the punishment of petty thefts not attended with aggravating circumstances nor committed by persons of notoriously bad character, and where the value of the property stolen does not exceed one rupee.

Second \026 Heads of villages shall report to the head Police-officer of the district all cases in which they shall have exercised the power of punishment granted to them by clause first of this section."

The Madras High Court in some decisions held that a village Munsiff was a Magistrate within the meaning of the Code of Criminal Procedure whereupon Section 26 of the Evidence Act was amended by adding an explanation that Magistrate does not include the head of the village discharging magisterial functions in the Presidency of Fort St. George or elsewhere unless such headman is a magistrate under the provisions of the Criminal Procedure Code, 1882. The only provision where such a power may be traced to was Section 528(6) of the Criminal Procedure Code, 1898 which reads as under:

"The head of a village under the Madras Village Police Regulation 1816 or the Madras Village Police Regulation 1821, is a Magistrate for the purposes of this section."

Before the High Court, strong reliance has been placed, for excluding the extra-judicial confession, upon a decision of the Division Bench of the Madras High Court in *Raja v. State*, by Sub-Inspector of Police, Kalaiyar Koli Police Station [1995-2-L.W.(CrI.) 513] wherein a reference has been made in *re Lakshmanan* [(1971) 1 MLJ 178].

In *re Lakshmanan* (supra) it was observed:

"The above mentioned Regulations 1816 and 1821 are practically defunct regulations. It is true under these regulations the village headman had limited civil and criminal jurisdiction. But even under the Madras Village Courts Act, 1889, giving civil and criminal jurisdictions to those Courts, it is specifically provided by section 7 of that Act that only in Villages where there are no Panchayat Courts, the Village Munsifs will be appointed by the Collector subject to qualifications as to the residence etc. But after the Madras Village Panchayats Act, 1950, came into force, section 132 (I) therein provides that every panchayat constituted or deemed to be constituted under the Act shall be deemed to be Panchayat Court for that area notwithstanding anything contained in the Madras Village Courts Act. It is true that only Presidency Magistrates or the Magistrates of the First Class and such of those Magistrates, specifically

empowered can record confessional statement and the Village Munsif, even if he is deemed to be a magistrate, is not competent to record confession. Thus, having regard to these provisions and the actual practice, it could not be said that the Village Headman is a Magistrate contemplated under the Criminal Procedure Code who could, if empowered, record confessions under the provisions of the said Code. Therefore, there is no real legal bar to the extra judicial confessional statement made by the appellant to the village Munsif during the investigation being admitted in evidence\005"

But despite holding so, the Bench having regard to the practice embodied in Rule 72 of the Criminal Rules of Practice, the extra-judicial confession was not relied upon particularly in view of the fact that conviction under Section 302 was found to be justified on other evidence of the case.

In *re Lakshmanan* (supra), therefore, a law has been laid down to the effect that a village headman is not a magistrate under the Code of Criminal Procedure. We, however, for the reasons stated hereinafter, do not agree that although Rule 72 of the Criminal Rules of Practice has, for all intent and purport, become otiose, still the principle laid down therein that a confession before a village headman should not be relied upon as a matter of practice.

A Village Administrative Officer, may have a power to report an offence committed within the jurisdiction of the police station where he is posted but the same would not make him a person in authority. Even under certain circumstances, Section 40 of the Code of Criminal Procedure (for short "the 1973 Code") enjoins a duty upon every officer employed in connection with the affairs of a village and every person residing in a village to communicate to the nearest Magistrate or to the officer in charge of the nearest police station whichever is nearer any information which he may possess respecting the matters enumerated therein. Sub-section 2(iii) of Section 40 defines "officer employed in connection with the affairs of the village" to mean a member of the panchayat of the village and includes the headman and every officer or other person appointed to perform any function connected with the administration of the village.

Section 528 of the Code of Criminal Procedure, 1898 empowered the Sessions Judge, District or Sub-Divisional Magistrate to withdraw cases from the courts specified therein. Sub-section (6) of Section 528 of the Code of Criminal Procedure, 1898 is similar to that of Sub-section (6) of Section 528 of the Code of Criminal Procedure, 1882.

In *Madavarayachar v. Subba Rau* [(1891) 15 M 94], it was opined:

"Village Magistrates are not Magistrates under the Code of Criminal Procedure, and, therefore, we do not think that the Joint Magistrate had power under section 528 to withdraw the case and transfer it for disposal to the Second-class Magistrate."

However, in *Sevakolandai v. Ammayan*, (1902) 26 M 395], it was held that it is permissible for a District Magistrate or a Sub-Division Magistrate to transfer a criminal case from the file of a Village Magistrate in respect of cases involving petty thefts which a Village Magistrate is empowered to try by Regulation IV of 1821.

The 1973 Code was brought about to give effect to the constitutional mandate to separate judiciary from the executive. The entire control and supervision of the Magistrates in terms of the 1973 Code now vests in the Sessions Judge and the High Court. Transfer of criminal cases is now dealt in Chapter XXXI of the 1973 Code. Section 406 confers power upon the Supreme Court to transfer cases and appeals from one State to another.

Section 407 empowers the High Court to transfer cases and appeals from one court to another situate within the State. Section 408 confers power upon the Sessions Judge to transfer cases from one criminal court to another criminal court within his sessions division. Section 409 confers power upon the Session Judge to withdraw cases and appeals from other sessions court. Section 410 empowers the Chief Judicial Magistrate to recall any case from any Magistrate subordinate to him either to himself or to transfer it to any other Magistrate. Section 411 empowers the District Magistrate or Sub-divisional Magistrate to make over for disposal or withdrawal any case from or recall any case or refer it for disposal to any other Magistrate. Sub-section (6) of Section 528 of the 1898 Code, therefore, has not been retained by the 1973 Code.

Criminal Rules of Practice and Orders, 1931 of the Madras High Court was issued by the High Court in exercise of its power conferred by Article 227 of the Constitution of India. Rule 72 of the Rules reads thus:

"Village Magistrates not to record confession. \026 Village Magistrates are absolutely prohibited from reducing or writing any confession or statement whatever made by an accused person after the Police investigation has begun."

The said rule has lost all its significance in view of the fact that now under the Code of Criminal Procedure or any other statute or statutory regulations, the village headman is not a village Magistrate. The post of a Village Magistrate since 1973 does not exist.

The Village Administrative Officer, it has not been shown, has been conferred with any power of a Magistrate by reason of the provisions of the Code of Criminal Procedure or otherwise. It has also not been shown that he exercises any judicial or quasi-judicial function. Indisputably he has no role to play in the matter of an investigation in a criminal case.

The Village Magistrates evidently, under the new Code of Criminal Procedure, are not empowered to record any confession or statement either in terms of Section 162 or Section 164 of the Code of Criminal Procedure.

For all intent and purport, therefore, Rule 72 of the Criminal Rules of Practice has become redundant and nugatory, logical corollary whereof would be that there does not exist any embargo for an accused person to make an extra-judicial confession before a Village Administrative Officer.

We do not, thus, see any reason as to why such an extra-judicial confession could not be made before a Village Administrative Officer. With a view to exclude the admissibility of the confession made before a person, he must be a police officer. A Village Administrative Officer does not answer the descriptions. While carrying out his duty to inform the Police or the magistrate in terms of Section 40 of the Code, the village headman does not act as a public servant removable only by or with the sanction of the local government nor he acts in his capacity as Magistrate. [See *Pregada Balanagu v. Krosuru Kotayya*, AIR 1937 Mad 578].

We, for the reasons stated hereinbefore, are of the opinion that the extra-judicial confession by the Appellant before the Village Administrative Officer was not inadmissible and, thus, could be relied upon.

In *Mohan Lal Pangasa v. the State of U.P.* [AIR 1974 SC 1144], whereupon Mr. Sampath placed strong reliance, this Court held:

"3\005It is true that there are no direct witnesses to the actual murder. Even so, an impressive array of telling circumstances has, according to the Courts below, convincingly shown the accused to be guilty. Men are convicted not merely on direct evidence alone but also on

circumstantial testimony. In the present case, the accused was the person last seen with the deceased; his conduct of running away when challenged and chased and crouching underneath a bogie when the Rakshaks were about to run him down, his wearing clothes which were bloodstained, the recovery of the knife, Ex. 1, from his trouser pocket and his conduct in telling the Rakshaks that he murdered his companion, are too overwhelming for any possible inference of innocence. Moreover, the accused led the police party to the discovery of the dead body which also has an incriminating impact."

The said decision, thus, instead of assisting the Appellant supports the Prosecution.

In Mujeeb and another v. State of Kerala [AIR 2000 SC 591], whereupon again Mr. Sampath relied, the prosecution failed to prove even the circumstances pointed out to the guilt of the Appellant.

Extra-judicial confession may or may not be a weak evidence. Each case is required to be examined on its own fact. In Sidharth etc. etc. v. State of Bihar [JT 2005 (12) SC 310] a Division Bench of this Court held:

" ... He had also made extra-judicial confession to PW-8 Arko Pratim Banerjee. The confession made by appellant Arnit Das was not under any inducement, threat or promise and is voluntary in nature. Therefore, it is perfectly admissible under the Evidence Act\005"

In Piara Singh and Others v. State of Punjab [(1977) 4 SCC 452], this Court observed:

"\005The learned Sessions Judge regarded the extra judicial confession to be a very weak type of evidence and therefore refused to rely on the same. Here the learned Sessions Judge committed a clear error of law. Law does not require that the evidence of an extra judicial confession should in all cases be corroborated. In the instant case, the extra judicial confession was proved by an independent witness who was a responsible officer and who bore no animus against the appellants. There was hardly any justification for the Sessions Judge to disbelieve the evidence of Balbir Singh particularly when the extra judicial confession was corroborated by the recovery of an empty from the place of occurrence."

Yet again in State of Rajasthan v. Raja Ram [(2003) 8 SCC 180] it was stated:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be

relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

[Emphasis supplied]

For the reasons aforementioned, the courts below must be held to have correctly come to the conclusion that the prosecution case has been proved as against the accused in view of the extra-judicial confession of the Appellant before the Village Administrative Officer, recovery of the air gun from Pappannan Thottam canal, the conduct of the Appellant and that he was last seen with the deceased.

Each one of the aforementioned circumstances although may not by itself be sufficient to prove the guilt of the Appellant, we are satisfied that the cumulative effect thereof satisfies the test of proof of the guilt of the Appellant on the basis of circumstantial evidence for the commission of the offence under Section 304, Part II of the Indian Penal Code. The appeal being devoid of any merit is, thus, dismissed.