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BASKARAN & ANR.

v.

STATE OF TAMIL NADU

(Criminal Appeal No. 121 of 2008)

APRIL 25, 2014

B

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss.302 and 376 – Rape followed by murder – Conviction of appellants (A-1 and A-2) u/ss.376, 302 by trial court – High Court affirmed conviction of A-1 for both rape and murder but held A-2 guilty of rape only and not murder – On appeal, held: A-1 and A-2 committed rape on the victim one after the other whereafter A-1 throttled the neck of the deceased with his hands resulting in her death which act was questioned by A-2 – In the circumstances, even though A-2 committed rape on the victim and was convicted for the same, he was rightly acquitted by the High Court of the offence of murder – Insofar as A-1 was concerned, he was insulted by the deceased when he attempted to develop intimacy with her whereupon A-1 got angry and conspired with his friend and committed not only rape on her, but also murdered her – Although, there was no eye-witness to the incident, confessional statement of the accused fully corroborated circumstantial evidence as the post-mortem report revealed that deceased had died of strangulation which matched with the confessional statement of A-1 – Sexual assault of rape was also established from the post-mortem report – Evidence of PW-10 and PW-13, the then Village Administrative Officers before whom A-1 and 2 gave their extra-judicial confessions, clearly unveiled the case of the prosecution and this evidence was further corroborated – PW-11 and PW-14 even though treated as hostile, not able to establish that the extra-judicial confessions had not been recorded in their presence – Merely because one of the

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witnesses to the confessional statement did not support the confession in its entirety, the entire confession cannot be brushed aside as unreliable even though independent witness like the Village Administrative Officer had supported the recording of conviction – In addition, recovery memos from A-1 and A-2 clearly established the charges leveled against them – Conviction of appellants not based merely on confessional statement but also on other substantial evidence relied upon by the prosecution – No infirmity in the judgment of High Court holding the appellants guilty.

Evidence – Confession – Extra judicial confession – Reliability of – Held: An extra-judicial confession can be relied upon only if the same is voluntary and true and made in a fit state of mind – But it is not open to any court to start with the presumption that extra-judicial confession is insufficient to convict the accused even though it is supported by the other circumstantial evidence and corroborated by independent witness which was the position in the instant case – If evidence relating to extra-judicial confession is found credible after being tested on the touchstone of credibility and acceptability, it can solely form the basis of conviction.

The prosecution case was that the appellants -A1 & A2 along with two others forcibly took a girl to a secluded place, where she was raped and then in course of the same transaction, A1 strangled her to death; and that further, with a view to screen the offence, all of them threw the dead body to a secluded place in an agricultural field. Subsequently, A-1 made extra-judicial confession before PW10 which was witnessed by PW11 while A-2 made extra-judicial confession before PW13 which was witnessed by PW14. Both PW10 and PW13 were Village Administrative Officers.

Placing reliance upon the said extra-judicial confessions made by A-1 and 2, the trial court convicted them under Sections 302 and 376 IPC. On appeal, the

A High Court affirmed the conviction of A-1 under Section 376(2)(g) and 302 I.P.C. As regards A-2, the High Court acquitted him of the offence of murder under Section 302 IPC but upheld his conviction under Section 376 IPC.

B The question which arose for consideration in the present appeal was whether the appellants could be convicted solely on the basis of two extra-judicial confessions, allegedly witnessed by PW-11 and PW-14 respectively though they had turned hostile with regard to some portions of the prosecution evidence.

C Dismissing the appeal, the Court

HELD: 1. There is substance in the plea of the prosecution that the accused A-1 and A-2 committed rape on the victim one after the other and A-1 thought that if the victim is allowed to go alive, she may expose all of them and, therefore, A-1 throttled the neck of the deceased with his hands resulting in her death and on noticing this, A-2 questioned him as to why he did like that. Thus, even though A-2 had committed rape on the victim, his acquittal under Section 302 IPC but conviction under Section 376 IPC was rightly sustained. In so far as A-1 was concerned, the background of the prosecution story cannot be given a go by as the case of the prosecution was that appellant no.1 was insulted by the deceased when he attempted to develop intimacy with her and on being insulted by her, A-1 got angry and conspired with his friend and committed not only rape on her, but also murdered her. Although, there was no eye-witness to this incident, the confessional statement of the accused appellants fully corroborated circumstantial evidence as the post-mortem report revealed that the deceased had died of strangulation which matched with the confessional statement of the appellant accused. The sexual assault of rape was also established from the post-mortem report which established that the death of

victim was homicidal and she was forcibly subjected to rape at the instance of several persons. The evidence of PW-10 and PW-13, the then Village Administrative Officers before whom appellant no.1 and 2 gave their extra-judicial confession, clearly unveiled the case of the prosecution and this evidence was further corroborated. From the evidence of PW-11 and PW-14 even though they were treated as hostile, they have not been able to establish the fact that the extra-judicial confession had not been recorded in their presence. In addition the recovery memos from appellant no.1 and 2 clearly established the charges levelled against them. It further cannot be overlooked that PW-10 the then Village Administrative Officer of Kadhili village spoke about the extra-judicial confession of appellant no.1 and in this regard his evidence was corroborated by PW-11 who is an independent person and had no prior enmity with the 1st accused. Thus, even though this witness had turned hostile in the chief –examination itself, he spoke about the confession made by appellant no.1 before the Village Administrative Officer and his presence there and putting his signature on the document regarding extra-judicial confession cannot be discarded specially when this extra-judicial confession led to the surrender of the accused who were then arrested and tried. PW-14 although turned hostile, the same was confined only about the fact of recording confessional statement and he could not resile from the same. [Paras 12, 13] [832-E-H; 833-A-G]

2. An extra-judicial confession can be relied upon only if the same is voluntary and true and made in a fit state of mind. The value of the evidence as to the 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. But it is not open

A to any court to start with the presumption that extra-judicial confession is insufficient to convict the accused even though it is supported by the other circumstantial evidence and corroborated by independent witness which was the position in the instant case. The Courts cannot be
 B unmindful of the legal position that if the evidence relating to extra-judicial confession is found credible after being tested on the touchstone of credibility and acceptability, it can solely form the basis of conviction. [Para 14] [833-G-H; 834-A-C]

C 3. Merely because one of the witnesses to the confessional statement did not support the confession in its entirety, the entire confession should not be brushed
 D aside as unreliable even though independent witness like the Village Administrative Officer had supported the recording of conviction. However, the conviction of the
 E appellants was not based merely on the confessional statement but also on other substantial evidence relied upon by the prosecution viz. recovery of the body, post-mortem report matching with confessional statement,
 F evidence of other independent witness who corroborated the recording of confessional statement in their presence and thus did not create doubt about the credibility of the prosecution case so as to discard the same. There was no infirmity in the judgment and order of the High Court holding the appellants guilty and sentencing them appropriately. [Para 15 and 16] [834-D-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 121 of 2008.

G From the Judgment & Order dated 09.11.2006 of the High Court of Judicature at Madras in Criminal Appeal No. 9 of 2005.

Ratnakar Dash, B. Karuna Karan (for S. Gowthaman) for the Appellants.

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M. Yogesh Kanna, A. Santha Kumaran for the Respondent. A

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. This appeal by special leave is directed against the judgment and order dated 09.11.2006 passed by the High Court of Madras affirming the conviction and sentence of the first appellant under Section 376 (2) (g), 302 and 201 I.P.C. awarding sentence for life imprisonment along with Rs. 5,000/- fine, 10 years RI, along with Rs. 5,000/- fine and 3 years RI, with a fine of Rs. 2,000/- respectively. The Trial Court had awarded identical sentences to Appellant No. 2, who on appeal in the High Court, was acquitted of the offence of murder under Section 302 IPC but his conviction and sentence under Section 376 I.P.C. was maintained. B C

2. The case of prosecution which led to the conviction and sentence of the appellants summarily stated are as follows: D

The Appellants -A1 & A2 along with two others had forcibly taken the deceased girl to a secluded place on 21.10.1995 at about 7.00 p.m., when she was raped and then in course of the same transaction, A1 had strangled her to death. Further, with a view to screen the offence, all of them threw the dead body to a secluded place in an agricultural field. The body was then discovered by the elder brother of the deceased girl, the next day. Investigation of the case was thereafter conducted which included the post-mortem report of the body of the deceased, wherein the doctor had opined death due to strangulation, injuries on the body, bleeding vaginal rupture. However, the vaginal smear didn't reveal any traces of semen. The initial investigation didn't reveal the names of the appellants and even the witnesses examined didn't offer any clue in this regard. Thus, there were no eye-witness to the incident in support of the prosecution case. E F G

3. After about 35 days, on 25.11.1995, the appellant No.1 approached PW10, the village Administrative Officer of Kadhili H

A village whereby he confessed that he along with appellant No.2 and two others murdered the deceased after raping her and offered to surrender. This confession was reduced into writing in presence of PW-11 who was there and who signed the same. In pursuance to the confessional statement, the I.O. took him
B to the scene of crime where some earth sample was taken and then they went to A1's home, where a diary belonging to the deceased was recovered. The next day, on 26.11.1995, A-2 approached PW-13, the village Administrative Officer of Sunderam Palli village and confessed about the crime, in the
C presence of PW-14, who had attested the written confession given to PW-13. The accused/appellants were then, committed to trial and convicted on the basis of the extra-judicial confession. While A-1 had identified A-4, A-2 had identified A-3 and thus, they too were arrested. However, later the trial court
D had acquitted A-3 and A-4 and the State did not challenge the same.

4. The High Court had to deal with the following two issues:

- E (i) The nature of death of the deceased, whether rape was committed upon her;
- (ii) The guilt of the Appellants with regard to the crime on the basis of their extra-judicial confessions, which were given separately to PW-10 and PW-13 by A1 and A-2 respectively.
- F

5. The High Court found on the basis of the post-mortem report that the death was caused due to strangulation and that the girl's body exhibited all other symptoms of rape except the presence of semen in the vaginal swab.

G 6. The High Court was informed by the counsel of the appellants that both the extra-judicial confessions (Ext. 7 by A-1 and Ext. 11 by A-2) had striking similarity in their expression used thereunder although they were made by two different
H people/accused at two different places; but the court found it

an accidental coincidence as the sequence of events disclosed, was described in words that were commonly used. A

7. However, the defence that was taken was that the two witnesses PW-11 and PW-14 for A-1 and A-2's confessions had turned hostile as to the recovery of Diary from A-1's house and a certain letter from the house of A-2 due to which their evidence was challenged as not credible. However, the High Court rejected the same on the ground that in case these witnesses were 'Obliging Witnesses' to the prosecution, they could've supported the entire prosecution case blindly and not turned hostile with reference to a particular portion. The High Court therefore relied upon the witnesses' statements with regard to the confessions that they made. B
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8. The High Court, however, granted some relief to Appellant No.2 by acquitting him from the charge of murder, on the basis of his confessional statement, wherein he had asked Appellant No.1, at the time of strangulation as to why was he doing it and hence the High Court held that he had not participated in the murder and the deceased was strangled by A-1 alone, all of a sudden which led to her death. D
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9. We have taken note of the prosecution evidence and perused the judgments of the Courts below and also heard the learned counsels at length. The issue before us is whether the Appellants can be convicted solely on the basis of these two extra-judicial confessions, which was witnessed by PW-11 and PW-14 who have turned hostile with regard to some portions of the prosecution evidence. F

10. The High Court, however, granted some relief to the appellant No. 2 by acquitting him of the charge of murder on the basis of his confessional statement wherein he had asked appellant No.1 as to why he was committing the act of strangulation and thus the High Court inferred that he had not participated in the act of throttling the victim even though the deceased was killed and was held to have been strangled G
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A by A-1 alone, all of a sudden and hence was pleased to acquit
A-2 of the charge of murder.

B 11. We have carefully perused the evidence led by the
prosecution as also the reasonings assigned by the judgment
and order of the courts below and heard learned counsels for
the parties at length who in substance had submitted that the
impugned judgment is contrary to law, weight of evidence,
probabilities and circumstances of the case and the material
on record. According to his submission, the judgment is based
C on mere surmises and conjectures and is, therefore,
unsustainable in law and liable to be set aside. The counsel
for the appellant further submitted that the conviction could not
have been based on the confessional statement of the accused
as the witnesses who were stated to be present at the time of
recording of confessional statement had turned hostile.

D 12. However, on a scrutiny of the background and
circumstance of the matter, we have taken note of the fact and
find substance in the plea of the prosecution that the accused
A-1 and A-2 committed rape on the victim one after the other
E and A-1 thought that that if the victim is allowed to go alive, she
may expose all of them and, therefore, A-1 throttled the neck
of the deceased with his hands resulting in her death and on
noticing this, A-2 questioned him as to why he did like that. Thus,
even though A-2 had committed rape on the victim, his acquittal
F under Section 302 IPC but conviction under Section 376 IPC
was rightly sustained.

G 13. In so far as A-1 is concerned, the background of the
prosecution story cannot be given a go by as the case of the
prosecution is that the first petitioner/A-1 was insulted by the
deceased when he attempted to develop intimacy with her and
on being insulted by her, A-1 got angry and conspired with his
friend and committed not only rape on her, but also murdered
the deceased. Although, there is no eye-witness to this incident,
the confessional statement of the accused appellants fully
H corroborates circumstantial evidence as the post-mortem

report revealed that the deceased had died of strangulation which matched with the confessional statement of the appellant accused. The sexual assault of rape is also established from the post-mortem report which establishes that the death of victim Janaki is homicidal and she was forcibly subjected to rape at the instance of several persons. The evidence of PW-10 and PW-13, the then Village Administrative Officers before whom the first and second accused gave their extra-judicial confession, clearly unveils the case of the prosecution and this evidence was further corroborated. From the evidence of PW-11 (Radha Krishnan) and PW-14 (Selva Kumar) even though they were treated as hostile, they have not been able to establish the fact that the extra-judicial confession had not been recorded in their presence. In addition the recovery memos from the 1st accused and the 2nd accused/appellants herein clearly establishes the charges levelled against them. It further cannot be overlooked that PW-10 the then Village Administrative Officer of Kadhili village speaks about the extra-judicial confession of the 1st accused Baskaran and in this regard his evidence was corroborated by PW-11 (Radha Krishnan) who is an independent person and had no prior enmity with the 1st accused. Thus, even though this witness had turned hostile in the chief –examination itself, he spoke about the confession made by the 1st accused before the Village Administrative Officer and his presence there and putting his signature on the document regarding extra-judicial confession vide Ext. P-7 cannot be discarded specially when this extra-judicial confession led to the surrender of the accused who were then arrested and tried. PW-14 (Selvakumar) although turned hostile, the same was confined only about the fact of recording confessional statement and he could not resile from the same.

14. It is no doubt true that this Court time and again has held that an extra-judicial confession can be relied upon only if the same is voluntary and true and made in a fit state of mind. The value of the evidence as to the confession like any other evidence depends upon the veracity of the witness to whom it

- A has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. But it is not open to any court to start with the presumption that extra-judicial confession is insufficient to convict the accused even though it is supported by the other circumstantial evidence and corroborated by independent witness which is the position in the instant case. The Courts cannot be unmindful of the legal position that even if the evidence relating to extra-judicial confession is found credible after being tested on the touchstone of credibility and acceptability, it can solely form the basis of conviction.
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15. Having examined the instant case based on the aforesaid principle, we are not prepared to accept the plea that merely because one of the witnesses to the confessional statement did not support the confession in its entirety, the entire confession should be brushed aside as unreliable even though independent witness like the Village Administrative Officer had supported the recording of conviction. However, we have further taken note of the fact that the conviction of the appellants is not based merely on the confessional statement but also on other substantial evidence relied upon by the prosecution viz. recovery of the body, post-mortem report matching with confessional statement, evidence of other independent witness who corroborated the recording of confessional statement in their presence and thus do not create doubt about the credibility of the prosecution case so as to discard the same.
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16. We thus do not find any infirmity in the judgment and order of the High Court holding the appellants guilty and sentencing them appropriately. Consequently, the appeal fails and is dismissed. The appellants are on bail. Their bails bonds are cancelled and they be taken into custody forthwith for serving out remaining part of the sentence.
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Bibhuti Bhushan Bose

Appeal dismissed

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