BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 11.04.2023

Pronounced on : 23.08.2023

CORAM

THE HON'BLE MR.JUSTICE R.SURESH KUMAR
AND
THE HON'BLE MR.JUSTICE K.K.RAMAKRISHNAN

Crl.A.(MD)Nos.423 of 2019 and 181 of 2021

Crl.A.(MD)Nos.423 of 2019:

Saibunisha(died) ..Appellant / P.W-1

Syed Jameel

Vs.

1.The State rep., by
The Inspector of Police,
CBCID,
Madurai Town,
Kenikarai Police Station,
(Crime No.500/2010) .. Respondent/ Complainant

2.Sahul @ Raseel Khan

3.Mohammed Harsath @ lala

4.Manivannan

5.Sheik Thakasath @ Soodani

6.Thameemul Ansari

7.Shahnavas

8.Nahoor Husaain

9.Muniyasamy

10.Pakkerammal

11.Jailani

12.Avul Hameed Yasin .. Respondents/A1 to A7, A9, A10, A12, A13

PRAYER: Appeal filed under Section 372 of the Code of Criminal Procedure, 1973, against the judgment dated 16.07.2019 passed in S.C.No.137 of 2015 on the file of the learned Sessions Judge, Fast Track Mahila Court, Ramanathapuram.

For Appellant : Mr.R.Manickaraj
for M/s.Veera Associates

For Respondents : Mr.A.Thiruvadikumar
Additional Public Prosecutor
for R1

: Mr.N.Ananthapadmanabhan
Senior Counsel
for M/s. APN Law Associates
for R2 to R12.

Crl.A.(MD)No.181 of 2021:

The State represented by
The Inspector of Police,
Crime Branch CID,
Ramanathapuram District,
[Kenikarai Police Station
Crime No.500/2010] .. Appellant / Complainant

Vs.

1.Sahul @ Raseel Khan
2.Mohammed Harsath @ lala
3.Manivannan
4.Sheik Thagashath @ Soodani
5.Thameemul Ansari
6.Shahnavas
7.Nahoor Husaain
8.Muniasamy
9.Pakeerammal
10.Jailaani
11.Avul Hameed Yasin .. Respondents/A1 to A7, A9, A10, A12 & A13

PRAYER: Appeal filed under Section 372 of the Code of Criminal Procedure, 1973, against the judgment dated 16.07.2019 passed in S.C.No.137 of 2015 on the file of the learned Sessions Judge, Fast Track Mahila Court, Ramanathapuram, be set aside and convict the respondents/accused for the charges framed against them.

For Appellant : Mr.A.Thiruvadikumar
Additional Public Prosecutor

For Respondents : Mr.N.Ananthapadmanabhan
Senior Counsel
for M/s. APN Law Associates
for R2 to R12.

COMMON JUDGMENT

[Judgment of the Court was made by **K.K.RAMAKRISHNAN, J]**

Since these two appeals are arising out of the same crime number and against the order of acquittal made in S.C.No.137 of 2015 on the file of the learned Sessions Judge, Fast Track Mahila Court, Ramanathapuram, these two appeals are taken up together for hearing and disposed of by way of this common judgment.

2. The accused persons A1 to A13 in S.C.No.137 of 2015 were charged for the offences under Sections 120(b), 364, 364 r/w 34, 302, 201, 404, 201 r/w 109, 201 r/w 34 and 302 r/w 34 IPC. After examination of all witnesses and evidence, the accused were acquitted by the trial Court. Hence, challenging the same, these two appeals were filed by the defacto complainant and the State respectively.

3(i). Brief facts of the prosecution case :

The defacto complainant preferred a complaint alleging that her daughter deceased Aathila Banu, a muslim lady entered into love marriage with one Muthusamy, Hindu belonging to the Scheduled Caste Community as per the Muslim customs and in the wedlock, the deceased

children viz., Ajira Banu(5 years) and Mohammed Aslam(7 years)were born to them. The said Muthusamy was a star witness in the murder of one Roseline, who was a relative of A-11's son-in-law. But the said Muthusamy did not support the case and was declared as hostile. In the result, the said case ended in acquittal.

3(ii). After acquittal, the said Muthusamy left India and went to Singapore to carry out his job, where the first accused was also working. In Singapore, due to the above hostility in the murder case, the first accused is said to have assaulted Muthusamy in Singapore and broke his little finger. Enraged by the same, the deceased Aathila Banu uttered harsh words of taking revenge upon the said A1, in front of A8-Jeyakumar, who had acquittance with both the deceased family as well as the accused family. In turn, A8 transmitted the said message to A1 and hence A1 and the family members along with remaining accused conspired together to murder the deceased Aathila Banu. In furtherance of conspiracy, on the date of the occurrence, ie., on 08.11.2010 at 4.00 p.m, A8-Jeyakumar called the deceased through the mobile phone to come and collect the Gas cylinder. The deceased left the residence along with her two children after informing the defacto complainant. She parted with A8 and A8 clandestinely taken the deceased to the custody of

A1 and the remaining accused. All the accused jointly abducted the deceased along with her children into an isolated place at Vedhalam, Ramanathapuram District and murdered them in the TATA Sumo car and buried their dead bodies in the grove of A10 and subsequently, exhumed the dead bodies and packed the two children's dead bodies in one parcel wrapping with white cloth and the deceased Aathila Banu's dead body was packed in another parcel wrapping with white cloth and transported the same to two separate isolated places near Vadipatti in the Maduai-Dindigul National Highways within the limit of the Vadipatti Police Station jurisdiction, a far away place from the occurrence place.

3(iii). That being so, the defacto complainant, without getting any response from the mobile phone of the deceased, got panicky and informed to her relative and all had taken steps to trace her, but they could not find out their whereabouts, and hence, she preferred the complaint to the Kenikarai jurisdictional police and the same was registered in Crime No.500 of 2010 under the caption of 'woman missing'.

3(iv). Pending the same,on 11-11-2010 P.W.24, a Village Administrative Officer got information about the unidentified two dead bodies in his jurisdiction village namely, Thathampatti and he informed to P.W-28, Special Sub Inspector of Police, Vadipatti Police Station and he registered the case in Crime No.793 of 2010 for the alleged offence under Section 302 IPC (2 counts-2 children)upon receipt of compliant from him. Similarly P.W25 A Village Administrative Officer got information about one unidentified dead body in her jurisdiction and she also informed to P.W.28. P.W.28 registered a case in Crime No.794 of 2010 for the alleged offence under Section 302 IPC (murder of the mother of the children) on 12.11.2010 based upon receipt of compliant from her. P.W-36 upon showing the dead bodies to the defacto complainant and her relatives and confirmed the identity and conducted investigation by preparing mahazar and examining the number of witnesses and arrested the A8 on 15.11.2010 and thereafter, he altered the offence 302 IPC into 120 B, 201, 115, 364, 366A, 302 r/w 34 IPC. Further, on 19.11.2010, he arrested A4(Sheik Dawood @ Soodani), A7 (Nahoor Hussain) and A9 (Muniasamy). A4 gave a voluntary confession and based on the same the Tata Sumo car bearing Registration No.TN-3999 in which the deceased are murdered, was recovered from

the place situated behind Hotel Boss, Ramanathapuram, in the presence of the witnesses P.W.16 and one Mr. Anand.

3(v). On 20.11.2010, at 07.30 a.m, in front of the Ramanathapuram Murugan Temple, P.W-36 arrested A5 (Thameemul Ansari) and he gave confession and disclosed that the jewels belonging to the deceased Aathila Banu was pledged in P.W-10's Jewellery Shop and on his disclosure, the said jewels were recovered as ingot weighing about 55.850 gms. On 20.11.2010, at around 11.00 a.m, he received a secret information that A2 was hiding in one of the houses of one Pattinamkatthan at Madurai Reserve Line and hence he went there and arrested the said A2. Thereafter, he collected the passport particulars of A1(Sahul), A2(Mohammed Asrath), A3(Manivannan) and took steps to issue the Red Corner notice. In the meantime, on 01.12.2010, A10 (Pakkirammal) was arrested at Sathankulam. Thereafter, on 20.12.2010, as per the direction of the higher officials, he submitted the requisition to transmit the entire case records relating to Crime Nos.793 of 2010 and 794 of 2010 to the Kenikarai Police Station, Ramanathapuram, on account of jurisdiction issues. In the meantime, he obtained the postmortem certificate and produced the Maruthi car bearing Registration No.TN65K-3288.

3(vi). That being so, the defacto complainant has filed Crl.O.P(MD)No.15143 of 2010 seeking transfer of the investigation to the CBCID, Ramanathapuram and the same was allowed by this Court. So, on 22.01.2011, P.W-36 handed over the entire CD file relating to two crime numbers to the CBCID, Ramanathapuram Officers.

4. P.W-39, Inspector of Police, CBCID, Ramanathapuram received the file from P.W-36 and conducted the investigation and examined all the witnesses and collected number of the documents, and filed the final report on the file of Judicial Magistrate No.II, Ramanathapuram, and the same was taken on file in P.R.C. Nos. 09 of 2011, 14 of 2013 and the same was committed to the learned Additional Sessions Court(Fast Track Mahila Court), Ramanathapuram. The learned trial Judge had taken on file the above cases in common S.C.No.137 of 2015 and thereafter, he framed the following charges against the accused:

S.No.	Offence	Charges Against Appellant/Accused
1	120B IPC	A1 to A5, A8 to A13
2	364 IPC	A1, A2, A3, A5, A9, A13
3	364 r/w 34 IPC	A8 (died)
4	302 IPC	A1 to A5

5	201 IPC	A1 to A5
6	404 IPC	A1, A3, A4
7	201 r/w 109 IPC	A10, A12
8	201 r/w 34 IPC	A1, A2, A4, A5, A6, A7
9	302 r/w 34 IPC	A1 to A13
10	201 r/w 34 IPC	A1 to A13

5. After framing the above charges, the learned trial Judge questioned the accused under Section 235 Cr.P.C, and the accused specifically denied the charges and pleaded not guilty and stood for trial.

6. To prove the case, the prosecution examined P.W-1 to P.W-39 and marked Ex.P1 to Ex.P65 and M.O1 to M.O13. After that, when the accused were examined under Section 313 Cr.P.C, by putting the incriminating materials available against them, they denied the same. Thereafter, on behalf of the accused, D.W-1 was examined and Ex. D-1 to Ex. D-7 marked as defense documents. After considering the evidence on record and upon hearing either side, the learned trial Judge vide impugned judgment dated 16.07.2019 in S.C. No.137 of 2015, acquitted all the accused.

7. Aggrieved over the same, P.W-1 defacto complainant filed the appeal in Crl.A.(MD)No.423 of 2019 challenging the impugned acquittal judgment and pending the same, prosecution agency has also filed the appeal against acquittal in Crl.A(MD)No.181 of 2021. In both cases, all the accused were duly served with notices and all the accused were represented through their counsel. Since in both appeal, the impugned judgment is one and the accused are all same, this Court jointly heard the two appeals and deliver the common judgment.

8. Mr. A.Thiruvadikumar, learned Additional Public Prosecutor made the following submissions:

This is the case of triple murder and all the material witnesses have been subjected to the threat perception and hence, they turned hostile and the same was substantiated from the registration of Crime No. 240 of 2016 wherein it is specifically alleged that the witness P.W-16 was criminally intimidated by the accused not to depose before the Court and assaulted. After that all the witnesses turned hostile and hence, this is the case for retrial and the same came under the parameter of Best Bakery case namely, famous Gujarat riot case reported in **Zahira Habibulla H. Sheikh and another Vs. State of Gujarat and others in (2004)4 Supreme Court Cases 158.** He further submitted that in this

case, the specialised investigation agency conducted fair investigation by examining the number of witnesses to prove the case of circumstantial evidence upto the mark of law requirement, but the witnesses show their turncoat face and hence, the trial Court without any option, acquitted the accused. Even, the brother of the deceased has not supported the case, which shows that all the witnesses are under threat. So, he seeks for retrial with specific direction to conduct the trial outside the Ramanathapuram District and also he affirmed the availability of the witnesses till date.

9. Reiterating the said contention of the learned Additional Public Prosecutor, the learned counsel Mr. R.Manickaraj appearing for the defacto complainant submitted that the witnesses are eyes and ears of criminal justice and their eyes and ears are closed under force and threat and the same was revealed from the manner of the retraction of their stand from deviating the statement recorded during the 161 Cr.P.C as well as 164 Cr.P.C. So, in all aspect, he also prayed for retrial. Both counsels relied the following judgments to buttress their submissions:

i) **Zahira Habibulla H. Sheikh and another Vs. State of Gujarat and others** reported in **(2004)4 Supreme Court Cases 158**

ii) **Nasib Singh Vs. State of Punjab and another** reported in **(2022) 2 Supreme Court Cases 89**

iii) C**handrappa v. State of Karnataka [Chandrappa v. State of Karnataka** reported in **(2007) 4 SCC 415**

iv) **Ajay Kumar Ghoshal and others Vs. State of Bihar and another** reported in **(2017) 12 Supreme Court Cases 699**

10(i). Per contra, the learned Senior Counsel Mr. N.Ananthapadmanabhan, appearing for the accused, submitted that the plea of the threat perception is not proved beyond peradventure of basic facts and the same was without any material. And also no circumstances have been established to presume the said threat perception. The learned appellant counsels only invented the said submission of threat perception for the purpose of making the plea of retrial for the reason that the prosecution agency as well as the specialised investigation agency was unable to unearth the truth behind the murder.

10(ii). He further contended that this case is based on the circumstantial evidence and the prosecution never proved the motive, abduction of the deceased Aathila Banu and kidnapping of her children,

murdering of the said persons, looting of jewels belonging to the deceased, burial of their dead bodies in the A10's grove and exhumation from the said place and throwing away the bodies in Vadipatti village situated in Madurai-Dindigul Highways, far away place from the alleged occurrence place of murder by the accused and there is a reasonable doubt over the truthfulness of the contents of the statement of the material witnesses recorded by the investigation officers which resulted into the imitation of hostility and also hostility in this present case, viewed from the angle that the investigation agency recorded the statement which was not originally spoken by the witnesses to suit their investigation and hence, the witnesses' statement cannot be treated as false and hostile. On the other hand, it is treated as their true version.

10(iii). He further submitted that *Dehors* the above situation, this is the case of appeal against acquittal, even assuming that the witnesses were not treated as hostile, the credibility of the witnesses lacks sanctity and after arrest of the accused, the witnesses are suitably examined and the statements were recorded to fit the confession circumstances and hence, the witnesses are not sufficient to prove the case beyond the reasonable doubt. The Hon'ble Supreme Court repeatedly laid down the guidelines that interference in the case of the appeal against acquittal is

very much limited one. The learned counsel appearing for the defacto complainant as well as the learned Additional Public Prosecutor did not raise any finger about the finding of the learned trial Judge either as perverse or the trial Court made a mockery of the trial. In the said circumstances, this is not the case for interference with the finding of the learned trial Judge. So far as the submission of the counsel that the witnesses deposed before the Court under threat and the same was clearly proved through the registration of FIR in Crime No. 240 of 2016 and the same culminated into final report, the said plea is neither in the appeal grounds nor taken during the course of the trial. The said witness was examined as P.W-16 on 19.08.2016. If it is so, number of avenues are available to the defacto complainant to seek the protection for the witnesses and transfer of the case. In the said circumstances, the plea of retrial has no legs to stand.

10(iv). The strong reliance placed on the basis of the Best Bakery case reported in 2004(4)SCC 158 is misconceived one. So, the case of retrial after the number of years is not to be ordered and he placed his strong reliance of the judgment of the Hon'ble Supreme Court relied by the learned Additional Public Prosecutor reported in **2022 (2) SCC 89** and more particularly, he relied the paragraph Nos.20, 21, 23 to 33. He

further emphasised that the paragraph No.61 of the above said judgment in the following lines; *"With a lapse of over 7 years since the date of the incident, a retrial would not advance the cause of justice but would result in a serious miscarriage of justice. The judgment of the High Court is a travesty of justice."*

11. This Court considered the erudite submission of both side counsel.

11.1. Murder of two children and their mother in an unusual manner followed by burial of three bodies and subsequent exhumation and separating the bodies ie., two children were separately wrapped in the white cloth and the mother also was wrapped in white cloth separately and both parcels were thrown into two separate places, far away from the native of the victim are all horrible acts. At this stage, it is relevant to remember the words of Hon'ble Justice Vivian Bose reiterated by the Hon'ble the then Chief Justice Y.V. Chandrachud, in the case of murder of 5 small kids and 4 women in Manwar, Maharashtra in **AIR 1977 SC 1579** [***Dagdu v. State of Maharashtra]***

" .... it is just as well to begin with Justice Vivian Bose's reminder that the shocking nature of the crime

ought not to induce an instinctive reaction against a dispassionate scrutiny of facts and law."

11.2. So, this Court starts its duty of marshalling of facts and arriving of finding in dispassionate manner by framing the following points:-

i) Whether the acquittal judgment of the Court below requires any interference?

ii) Whether the case of the complainant for retrial is validly established or not?

12.1. This is the case of the circumstantial evidence. So, it is the duty of the prosecution to draw the material circumstances available against the respondents into complete chain and the same to be fully established and all the facts established should be consistent towards the hypothesis of the guilt of the accused.

12.2. At this juncture, it is profitable to bear in mind the guidelines of the Hon'ble Supreme Court in the following judgments:

12.2(a). Hon'ble Constitution Bench of the Hon'ble Supreme Court in the case of ***Govinda Reddy v. State of Mysore,*** *reported in* **AIR 1960 SC 29** held as follows:

> *"5.The mode of evaluating circumstantial evidence has been stated by this Court in* ***Hanumant Govind Nargundkar v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343]*** *and it is as follows:*
>
> ***"****It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."*

12.2(b). Hon'ble Supreme Court in **1984 4 SCC 116 (Sharad Birdhichand Sarda Vs. State of Maharashtra)** has held as follows:

> *"**153.** A close analysis of this decision would show that the following condition 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 Vs. State of Maharashtra*** *where the following observations were made:* ***[SCC para 19, p.807 : SCC (Cri) p.1047]***

> *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.*

154*.These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."*

12.2(c). ***Sachin Kumar Singhraha v. State of M.P., (2019) 8 SCC 371:***

> "***6.****There cannot be any dispute as to the well-settled proposition that the circumstances from which the conclusion of*

guilt is to be drawn must or "should be" and not merely "may be" fully established. The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused."

12.2(d). ***Digamber Vaishnav v. State of Chhattisgarh*****, (2019) 4 SCC 522:**

15. *This Court in Jaharlal Das v. State of Orissa [Jaharlal Das v. State of Orissa, [(1991) 3 SCC 27] , has held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof. The court must satisfy itself that various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused.*

16. *In order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:*

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused."

13.The prosecution in order to prove the case relied the following circumstances:-

1.Motive

2.Conspiracy

3.Meeting of A8 (Jeyakumar) with the deceased

4.Last seen evidence

5.Murder of deceased

6.Burial of dead bodies and exhumation of dead bodies at A10's grove

7.Package of dead bodies into two parcels and thrown at two isolated place at Vadipatti in the Dindigul – Maduai National High ways

8.Recovery of jewels of deceased

14. Motive:

14.1. In the case of circumstantial evidence, motive is the important additional circumstances that has to be proved, which is emphasized by the Hon'ble Supreme Court in various judgments stated below.

14.2. In **2020 (10) SCC 166**, in paragraph 24, it is held as follows:

> *"It is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true that if motive is proved that would supply a link in the chain of circumstantial evidence, but the absence thereof cannot be a ground to reject the prosecution case. However, at the same time, absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused".*

14.3. 2020(11)SCC174 Basheera Begam v. Mohammed Ibrahim and Others:

> *"189. It is well settled, suspicion however strong cannot substitute proof beyond reasonable doubt. Enmity as a result of property related disputes may give rise to suspicion. However, conviction can never be based on suspicion unless the prosecution clearly proves circumstances conclusively and all circumstances proved should only point to the guilt of the accused. Possibility of any conclusion other than the conclusion of guilt of the accused would vitiate a conviction."*

14.4. In this case, the prosecution came forward with a motive that the deceased Aathila Banu's husband Muthusamy was a star witness in the murder of the relative of A1 and he turned hostile. So, A1 attacked Muthusamy in Singapore and broke his little finger. To prove this motive, the investigating officer never marked any documents relating to the criminal case where the said Muthusamy was arrayed as a witness and because he turned hostile, the said case ended in acquittal. Further, during the course of the trial, the investigation officer did not collect any material regarding the stay of Muthusamy as well as A1 in Singapore and the alleged attack on Muthusamy by A1 in Singapore which resulted in causing injuries to Muthusamy. The Investigation Agency should have produced the copy of the acquittal judgment of A1's relative's murder case in order to prove the said acquittal judgment was passed only on the basis that the deceased's husband Muthusamy had turned hostile. Further, the Investigation Agency never produced the documents to show that the said Muthusamy and A1 were staying at Singapore and A1 assaulted Muthusamy in Singapore and caused the injuries to Muthusamy. The said circumstances, required to be proved only on the basis of the documentary evidence. "So, in all angle, motive is not proved."

15. <u>Conspiracy</u>:

15(i) <u>The prosecution projected two conspiracies</u>:

15(i)(a). First one took place at the house of A10 some days prior to the occurrence and the same was overheard by P.W-4. According to the prosecution, P.W-4, a milk vendor during the investigation stated that when he passed through the house of A10, A1 and other accused assembled in front of the house of A10 and openly planned to murder the deceased. But he did not depose before the Court reiterating the statement made before the respondent police and hence, *"he was treated as hostile witness"*. Hence, the open conspiracy made in front of the house even though unbelievable, the same was not proved through the deposition of P.W-4.

15.(i)(b). The investigation agency projected another conspiracy in Hotel Boss,where immediately before the occurrence, A8 allegedly made a phone call to the deceased around 3.30 to 04.00 O' clock on 08.11.2010 , the date on which the occurrence had allegedly happened. A1, to A5, A8, A9,A13 conspired to murder the deceased and the same was overheard by the P.W-5. P.W-5 was the Hotel manager and he overheard about the conspiracy as a chance witness. But he has not deposed as pleaded by the investigation agency and *"he was treated as*

hostile". Even the prosecutor has only suggested to the witness that in his earlier statement he only disclosed about the events that had taken place on 28.03.2021 ie., arrest of A12, search in her house and the availability of the Tata Sumo vehicle. It is claimed that in his further statement he disclosed about the conspiracy. So, even as per suggestion, the witness speaks about conspiracy only in his further statement. Hence the further statement about conspiracy even assuming it is truly given, the same does not inspire confidence for the reason that he was examined earlier but he did not disclose the above fact. So, the conspiracy was not proved by the prosecution.

16. <u>Company with A8:</u>

The first step in the execution of the conspiracy to commit murder is that A8 clandestinely brought the deceased Aathila Banu to the custody of the remaining accused to murder her and for that A8 telephoned to the deceased on 08.11.2010 at 3.30 p.m, and called her to obtain the gas cylinder and hence, she informed to P.W-1 defacto complainant and she left the house with two children. To prove the same, call details of the accused A8 as well as the deceased are obtained and the same were marked as series Ex.P.50 to Ex.P.62. The said Ex.P.50 to

Ex.P.62 are not admissible one for want of certificate under Section 65 B of the Indian Evidence Act. Even assuming that the validity of Ex.P50 to 62, there was no linking evidence that the deceased after receiving the call from A8 at the particular time, went into the company of A8 along with her children. So, without any evidence regarding the claim that A8 had company with the three deceased in pursuance to the said call, this Court is unable to find any incriminating circumstances against A8 in this aspect. Similarly, contiguous action of the deceased being accompanied by A8 to obtain cylinder, boarded into the Omni Car bearing Registration No.TN65K-3288 was also not proved. Subsequent claim that the deceased were shifted to A1's Scorpio car was also not proved. It is the specific case of P.W.1 that A8 had been helping in the day-to-day domestic life of the deceased. So, mere making call without any further incriminating circumstances like parting of deceased with A8 and consequent act of A8 taking the deceased in the Omni Van and A8 entrusting the custody of the deceased with the remaining accused, the company of A8 with deceased cannot be said to be proved and hence, the prosecution miserably failed to prove the first step of execution of conspiracy to murder the deceased.

17. <u>Last seen evidence:</u>

17.1. While the said A1's Scorpio car passed through Sathankulam Junction, the witnesses P.W-6 and one Mathiyalagan were accidentally saw that the deceased and her children were illegally confined in the said car.

17.2. According to the prosecution, P.W-6 during the course of the investigation stated that on 08.11.2010 between 07.30 and 08.00 p.m, he and one Mathiyalagan by chance were standing in the Sathankulam Junction bus stop, and at that time, A1's Scorpio car crossed the place and parked nearby and they heard crying noise from the car and hence, they visited the car and found that the deceased were in the illegal confinement of some of the accused. He turned hostile and he has not supported the prosecution case. Even if the said witness had deposed in favour of the prosecution case, his evidence would become artificial one for the reason that when they saw the illegal confinement of the deceased with two children, it is the duty of the said witness to safeguard their interest by informing the same to the jurisdictional police officers or the father and relative of the victims. In addition to the fact that the said witness turned hostile, the witness was not believable one for the reason that he did not disclose the same to the jurisdictional

police upto the date of examination even though he along with the defacto complainant searched for the victim at various places before making complaint to the Kenikarai jurisdictional Police Station on 08.11.2010. So, the last seen theory on the basis of the P.W-6 evidence is in no way helpful to the prosecution.

17.3. Thereafter, from the said car, the accused transferred the three victims into one Tata Sumo car and had taken them to the Vedhalam, a place situated near Mandapam and murdered them. To prove the same, no witness was examined. This is the crucial fact that has to be proved by the prosecution beyond reasonable doubt and the same has not been proved.

18. <u>Burial and exhumation of dead bodies in A10's grove</u>:

After that, their bodies were taken to A10's grove situated at Thennampillaivalasu village and buried there. P.W-7 and P.W-9 are wife and husband working in the said A10's grove as servants and they witnessed the arrival of A1's Scorpio car and A1 and A3 get down from the car and asked them to give spade around 8 o' clock and another car with the presence of A2, A4, A5 was parked in front of A10's grove and

it is further claimed that all looked tense and scolded P.W-7's husband P.W-9 and asked him to go away from that place and the same was informed to P.W-11 and thereafter A10 informed the above murder and the same was disclosed to P.W-7 and directed not to disclose the same to anybody. But both witnesses turned hostile and hence, the said factum of burial and exhumation was not proved in accordance with law.

19. <u>Packing of exhumed dead bodies and throwing away in the far away place of Vadipatti</u>:

Thereafter the dead bodies were exhumed from the said place and packed into two parcels and thrown in two isolated places near Vadipatti on the Madurai-Dindigul National Highways. The case of the prosecution is that after exhumation, the accused purchased two cotton clothes from the P.W-38's shop. Upon their purchase, they packed the two children in one cloth and their mother in another cloth. The P.W-38 never deposed that the accused came to their shop and purchased the two clothes and his case is not that they identified the clothes recovered from the spot ie., he did not identify the M.O.1 (Cotton Cloth) recovered under the Ex.A6. Similarly, he did not identify the M.O.2 (Cotton Cloth) which was recovered under Ex.B8. Apart from that the investigation agency did not recover the video footage of the shop even though the same was

available in the said shop. So, the evidence is not sufficient to hold the charge of murder. Apart from that there is no evidence that the deceased's dead bodies were disposed in Vadipatti area by the accused. *"So, the prosecution has not proved the various circumstances from the abduction till they thrown out of the bodies in the isolated places near Vadipatti"*.

20.<u>Recovery of the jewels of the deceased</u>:

On the basis of confession of A1 and A2, the jewels of the deceased were recovered from P.W-10. It is the case of the prosecution that after murder of the deceased, A1 took the jewels of the deceased and pledged with P.W-10 and received the money. But, P.W-10 turned hostile. Further, P.W-1's categorical evidence is that after receipt of the phone call from A8, the deceased informed her and hence, P.W-1 specifically instructed to go without wearing jewels. In the said circumstances, without any evidence, the deceased has started with the company of the 8th accused with jewels, the alleged recovery even assuming it is true, cannot be said to have linked the chain connecting the accused.

21(i). In all aspect, the prosecution did not prove the circumstances beyond reasonable doubt. Even assuming that the statements given to the investigation officer and the Judicial Magistrate under Section 164 Cr.P.C are true, their evidence is not sufficient to convict the accused for the grave charge of triple murder and the same may create a suspicion in the mind of the Court but is not sufficient to give the conviction of murder charge. It is well settled principle that suspicion however strong cannot form basis for the conviction as held by the Hon'ble Supreme Court in 2020(11)SCC174 more particularly, when the strong motive is projected by the P.W-1 and her family members against the accused which might have been the probable reason to falsely implicate the accused in the above crime. In all aspect, the prosecution failed to prove the case.

21(ii). While dealing with the appeal against acquittal, this Court is required to bear in mind the guidelines issued by the Hon'ble Supreme Court in the following decisions:

21(iii)(a). In **Sheo Swarup v. King Emperor [Sheo Swarup v.King Emperor, 1934 SCC OnLine PC 42** the Privy Council observed as under: (SCC Online PC: IA p. 404)

'... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.'

21(iii)(b). In **Chandrappa v. State of Karnataka [Chandrappa v. State of Karnataka, (2007) 4 SCC 415** the Hon'ble Supreme Court framed the following guidelines as under: (SCC p. 432, para 42)

'(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances","distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption

in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'

21(iii)(c). ***Doshi case*** **[*Ramesh Babulal Doshi* v. *State of Gujarat*, (1996) 9 SCC 225** the Hon'ble Supreme Court held as follows :

"first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other

hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand."

21(iii)(d). In ***Babu*** **[*Babu* v.*State of Kerala*, (2010) 9 SCC 189)**, the Hon'ble Supreme Court had reiterated the principles to be followed in an appeal against acquittal under Section 378 CrPC. In paras 12 to 19, it is observed and held as under: (SCC pp. 196-99)

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence

brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court."

21(iii)(e). In **State of Rajasthan v. Naresh [State of Rajasthan v. Naresh, (2009) 9 SCC 368 : (2009) 3 SCC (Cri) 1069]**, the Hon'ble Supreme Court again examined the earlier judgments of the Hon'ble Supreme Court and laid down that: (SCC p. 374, para 20)

> *'20. ... An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.'*

22. This Court does not find any perversity in the finding of the learned trial Judge except one inadvertent finding that the husband of the deceased was not examined and hence, the learned trial Judge has taken adverse inference against the prosecution without noticing the memo of instruction filed by the prosecution agency that the husband of the deceased died during the pendency of the trial. The said inadvertent mistake was happened due to the recording of the evidence by one learned Judge and the continuation of the trial by the other learned Judge and judgement was delivered by another learned Judge upon hearing the both side arguments. Even during the argument, the learned Government Advocate (Criminal side) did not make any statement regarding the death

of the husband of the deceased. After considering the entire evidence, the learned trial Judge gave the categorical finding that the prosecution has not established the following facts:

i) To prove the motive, the prosecution has not produced any evidence that the husband of the deceased was cited as a material witness in the murder of the relative of the first accused and also there was no evidence adduced to prove the actual assault made by the first accused upon the deceased husband in Singapore.

ii) The prosecution has not adduced any evidence that the accused Jeyakumar (A8) accompanied the deceased on the date of the occurrence.

iii) The prosecution has also not adduced any evidence to prove that the deceased was murdered by the accused in the TATA Sumo at Vedhalayam, Mandapam.

iv) The prosecution has also not produced any evidence to prove that the bodies of the deceased were taken to A10's garden and buried there.

v) The prosecution has also not produced any evidence, to show that the said buried bodies were exhumed from the A10's garden and dumped at Vadipatti, a far away place from the occurrence i.e 150 km away from the place of occurrence.

vi) The prosecution has also not produced any evidence to show that the deceased wore jewels and the same was recovered from the accused.

23. It is relevant to note the meaning of 'perversity' as stated by the Hon'ble Supreme Court in the following judgments:

23.1. ***Babu v. State of Kerala, (2010) 9 SCC 189***

> *" 20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality."*

23.2. Kuldeep Singhv.Commr. of Police[(1999) 2 SCC 10]:

> *"if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with."*

24. The learned trial Judge without any perversity rendered the finding to the above aspect upon considering all the evidence and hence, this Court concurred with the finding of the learned trial Judge in acquitting all the accused in the above case.

25. **Retrial:**

25.1. Considering all the earlier judgments reported in AIR 1963 SC 1531, 2001(7)SCC679, 2000(2)SCC504, 2004(4)SCC158, 2005(1)SCC115, 2012(9)SCC408, 2012(2)SCC584, 2015(1)SCC496, 2017(12)SCC699, 2018(2)SCC278 and 2014(14)SCC477 the Hon'ble Supreme Court in **Nasib Singh Vs. State of Punjab and another in (2022) 2 Supreme Court Cases 89** framed the following guidelines to order retrial:

> *"**33.** The principles that emerge from the decisions of this Court on retrial can be formulated as under:*
>
> ***33.1.** The appellate court may direct a retrial only in "exceptional" circumstances to avert a miscarriage of justice.*
>
> ***33.2.** Mere lapses in the investigation are not sufficient to warrant a direction for retrial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed.*

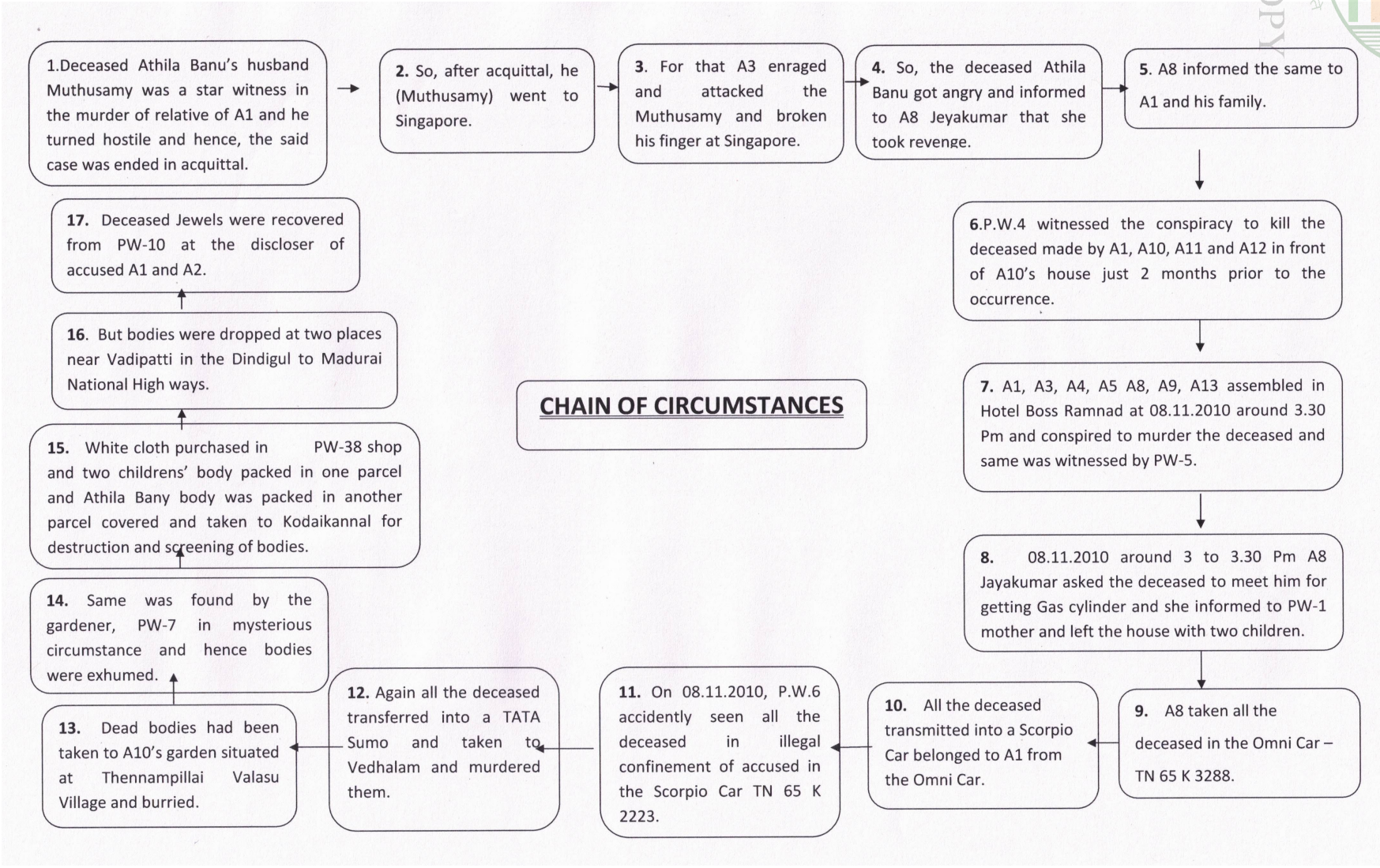
33.3. *A determination of whether a "shoddy" investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence.*

33.4. *It is not sufficient if the accused/prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the appellate court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process.*

33.5*. If a matter is directed for retrial, the evidence and record of the previous trial is completely wiped out.*

33.6. *The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice:*
(a) The trial court has proceeded with the trial in the absence of jurisdiction;
(b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and
1.The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade."

25.2 According to the prosecution, the following 17 material circumstances shown in the diagram described below formed to complete chain which tends to only conclusion of guilt of the accused without any other hypothesis.



26. As discussed earlier, the above 17 circumstances have not been proved by the prosecution beyond reasonable doubt. Further, the investigation agency not even examined any witnesses to prove 8, 9, 12 and 16th circumstances and the remaining stand alone circumstances have not been established on the account of the witnesses turning hostile.

27. Their specific submission is that P.W-16 was threatened by the accused and also they caused injuries in order to thwart the process of giving evidence before the Court. The said incident took place prior to the examination of the witnesses P.W-3 onwards and hence, the investigation agency filed the FIR in Crime No.240 of 2016 and the same was investigated and final report was filed on 09.07.2016. So, all the witnesses turned hostile and hence, the case was remitted for de-novo trial. The learned Additional Public Prosecutor as well as the defacto complainant are unable to answer the question of this Court that even though the said alleged threatening made on 27.04.2016, the complainant as well as the P.W-16 did not make any attempt to disclose the above threatening before the learned trial Judge during the entire course of the trial. Apart from that in the memorandum of grounds of appeal, he did not state any fact about the threatening of the witnesses. Even no document was produced to prove the above factum of threatening and

they made the submission without any documents by filing application under Section 391 Cr.P.C. So, this Court is not in a position to accept the case of threat perception.

28.1. In said circumstances, their reliance placed on the basis of the Best Bakery case is also misconceived one. In the said case, the star witnesses filed affidavit before the learned Trial Judge and also before the High Court and the same was considered and hence, the Hon'ble Supreme Court concluded that the witness was under the life threat. Apart from that, in the said case, the investigation was not properly done and the prosecutor did not conduct the case properly. Further, no witness stated either expressly or impliedly from the recording of evidence by the trial Court about the demeanor of the witness did not disclose any iota of the circumstances to presume the witness are under threat. Moreover, the Hon'ble Supreme Court distinguished the said judgment in the subsequent judgements 2017(12)SCC699 and 2022(2)SCC89 and holding that Best Bakery case ratio is not universally applied in all cases.

28.2. The submission of the learned Additional Public Prosecutor that special investigating agency namely, CBCID in this case conducted fair investigation by examining number of witnesses to prove this case of circumstantial evidence up to the mark as required by law, but the witnesses showed the turncoat face and hence, trial Court, without any option, acquitted the accused. So, he seeks for retrial with specific direction to conduct the trial outside the Ramanathapuram District. The said submission of the learned Additional Public Prosecutor has no substance as much as the materials so collected by the investigating agency during the investigation should have to be translated into legal evidence in a Court of law, because, the result of investigation of the police officer is not legal evidence as held by the Hon'ble Supreme Court in the case of **Vijender v. State of Delhi** reported in **(1997) 6 SCC 171**

> *"25..... The reliance of the trial Judge on the result of investigation to base his findings is again patently wrong.* ***If the observation of the trial Judge in this regard is taken to its logical conclusion it would mean that a finding of guilt can be recorded against an accused without a trial, relying solely upon the police report submitted under Section 173 CrPC, which is the outcome of an investigation. The result of investigation under Chapter XII of the Criminal Procedure Code is a conclusion that an Investigating Officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent court to take cognizance thereupon under Section 190(1)(b) CrPC and to proceed with the case for***

trial, where the materials collected during investigation are to be translated into legal evidence*. The trial court is then required to base its conclusion solely on the evidence adduced during the trial; and it cannot rely on the investigation or the result thereof. Since this is an elementary principle of criminal law, we need not dilate on this point any further. ”*

29. On one side, learned Additional Public Prosecutor as well as the learned counsel for the defacto complainant made submission that number of material witnesses turned hostile which shows that the witnesses are under threat and hence, hostility as a result of being won over and hence there has been a mockery of trial and hence this case is to be retried. On the other hand, learned Senior Counsel appearing on behalf of the accused cautioned that hostility as projected by the learned Additional Public Prosecutor is one side of the coin, other side of coin is that the special investigation officer from CBCID whether actually recorded the statement of the witnesses as they truly stated is the question to be decided before the argument of the learned Additional Public Prosecutor. Hostility is not meant as put forth by the learned Additional Public Prosecutor that once witnesses retracted their earlier statement that have been made to the Investigation Officer without

ascertaining the actual contents of the recorded statement are true version of witnesses is meaningless.

30. So, hostility is viewed on a case to the case basis without following the straight jacket formula in all cases, the witness turned hostile only under threat, without ascertaining the fact that the witness deposed before the Court is true one or the statement recorded by the investigation officer is true one, otherwise it would cause grave injustice to the justice delivery system.

31. In this case, the witnesses P.Ws.4,5,6,7, 10 &11 turned hostile and no fruitful answer was elicited during the cross-examination in order to rely their evidence as per Section 154 of the Indian Evidence Act. Further, the investigation officer, even during the chief-examination, has not deposed that the witnesses stated the incident as found in the 161 statement recorded by him, which is mandatory in compliance with Section 145 and 154(2) of the Indian Evidence Act, which was clearly emphasized by the Hon'ble Supreme Court in **2016(3)SCC108 [Krishnan Chander v. State of Delhi).**

32. By applying the above principle, this Court finds no legal reasoning to accept the plea of the learned Additional Public Prosecutor as well as the learned counsel for the defacto complainant to order for retrial and the said plea is highly misconceived one. Hence, in view of the above discussion made, there are no extraordinary special circumstances established by the prosecution to demand the retrial. Hence, the said plea of retrial is rejected.

33. The duty of this Court does not end with dismissal of these appeals. The travesty of the criminal trial is witnesses turning hostile. The Hon'ble Supreme Court has expressed its anguish a number of times and has also issued a number of directions. So, the 154th Law Commission Report gave number of suggestions and Malimath Committee rendered the following recommendations to eradicate the hostile witness:-

> *"7.24 VIDEO/AUDIO RECORDING OF STATEMENTS OF WITNESSES, DYING DECLARATION AND CONFESSIONS*
>
> *7.24.1 Frequent changes in statements by the witnesses during the course of investigation and, more particularly, at the trial are really disturbing. This results in miscarriage of justice. Hence, modern science and technology should be harnessed in criminal investigation. Tape recording or video recording of statements of witnesses, dying*

declarations and confessions would be a meaningful and purposive step in this direction. Unfortunately, the existing law does not provide for it. It is understandable as these facilities did not exist at the time when the basic laws of the land were enacted. Now that these facilities are available to the investigating agency, they should be optimally utilised.

7.24.3 The Committee is of the view that the law should be amended to provide for audio or video recording of statements of witnesses, dying declarations and confessions etc. and about their admissibility in evidence. A beginning may be made to use these modern techniques at least in serious cases."

34. The proposed changes to the Section 161 Cr.P.C and 164 Cr.P.C to the extent of recording of the statement of by audio-video electronic means vide the code of Cr.P.C amendment Bill 2006 referred to the Parliamentary Standing Committee and the Parliamentary Standing Committee was not in favour of implementing the Malimath Committee. But, Parliament passed the amendment to Section 161 Cr.P.C, 164 Cr.P.C, and 275 Cr.P.C. The amended section was notified on 31.12.2009 with effect from 30.12.2009. The amended Section 161 Cr.P.C and 164 Cr.P.C are as follows:-

161 Cr.P.C	164 Cr.P.C
Provided that statement made under this sub–section may also be recorded by audio-video electronic means	Provided that any confession or statement made under this sub-section may also be recorded by audio-vide electronic means in the presence of the advocate of the person accused of an offence

35. A fair and objective investigation can unearth the crime committed and as well collect the material which can prove the guilt or innocence of the accused. So, utmost fairness is required in the process of recording the 161 statement of witnesses. Experience goes to show that the Investigation Officers never record the statement of witness as the witnesses had spoken. They are recorded in a stereo type manner and further witnesses have no facility to check the statements because witnesses are not given due respect by the police. More often than not, witnesses are also treated like accused. In many instances, the Investigation Officers treat the witnesses like slaves and show indifferent attitudes towards the witnesses. In result, there is no humanitarian treatment given to the witnesses who are already facing psychological threat at the hands of the accused. The Investigation Officers do not record the statement as given by the witnesses and the same leads to a number of contradictions and improvement in the eye of the accused. In order to over come the above and to facilitate the recording of true version of the witness statement and prevent the growing tendency of the witnesses being threatened or induced or influenced to turn hostile, the amendment was brought to record the 161 Cr.P.C statement under audio-video electronic means.

36. Even after that, the spirit of the amendment has not beenimplemented. So, The Hon'ble Supreme Court elaborated the above requirement in order to strengthen the criminal justice delivery system and directed to record the statement of the eye witnesses under the 164 Cr.P.C statement under the audio-video electronic means by issuing the following directions in **2018 (13)SCC 741** :

> *"10.3.Statements of eyewitnesses should invariably be recorded under Section 164 CrPC as per procedure prescribed thereunder.*
>
> *11.The High Courts may issue appropriate directions to the trial courts for compliance of the above.*
> *12.A copy of this order be sent by the Secretary General to the Registrars of all the High Courts for being forwarded to all the presiding officers in their respective jurisdiction."*

37. It is a known procedure that before recording the 164 Cr.P.C statement, 161 Cr.P.C statement to be recorded in the manner described under the Criminal Procedure Code. Till date, no procedure has been formulated to record the 161 Cr.P.C statement through audio-video electronic means. Even after 14 years, the recording of the 161 Cr.P.C statement through the audio-video electronic means has never been implemented by the Investigation Officer and the same has been never

supervised and Crosschecked by the either Home Department of the State or the Director General of Police, Tamilnadu.

38. In order to comply with the above direction of the Hon'ble Supreme Court in 2018 13 SCC 741 and in the interest of the criminal justice system this Court issues a direction to the Principal Secretary, Home Department, Tamilnadu, as well as the Director General of Police, Tamilnadu, to record 161 Cr.P.C statement atleast in serious crime cases through the audio-video electronic means and for said purpose of recording the statements of material witnesses under 161 Cr.P.C statement both in eyewitnesses cases as well as the circumstantial evidence cases through the audio-video electronic means, framed the following procedure;

39. Step No.1:-

The Investigation Officer may orally examine the witness by asking questions to elicit answers wherever required. After this oral examination, witness statement may be recorded by audio-video recorder as mentioned below after which the same can be reduced into writing.

Step No.2: The investigation officer shall depute a police personnel with knowledge in handing the video camera/body worn camera/mobile phone as well as process of taking copies through a compute/lap-tap, for audio-video recording the statement of witness.

Step No.3: The videography shall cover both the investigation officer and the witness.

Step No.4: Care must be taken to ensure that video and audio is recorded clearly.

Step No.5: The audio video recording shall be continuous and without any stoppage. In the case of inevitable stoppage of recording, the reason for the said stoppage shall be duly mentioned in the statement of recording officer.

Step No.6: After a statement is recorded by videography, necessary number of copies (in CD or pen drive) of the same shall be made. One copy shall be forwarded to the Court along with the written statements, one for the Investigation Officer to be kept in Case diary. Further copies shall be made as per the number of accused for serving upon them.

Step No.7: Points to be kept in mind during copying ie., making secondary evidence and issuance of Section 65B Indian Evidence Act certificate:

a. Electronic devices which are used for recording namely, video camera, body worn camera, mobile phone and those which are used for making copies namely, computer / laptop shall be mentioned.

b. Certifying that electronic devices such as video camera, body worn camera, mobile phone and computer/lap-top are operating properly and the accuracy of its contents are assured.

c. Identity of the audio-video recording i.e., the file name of video shall be mentioned in the certificate. Hash value of the files should be indicated. The court should also verify the hash value of the original files with the hash value of the copies prepared by the police.

d. Wherever the date and time stamp are visible, it shall be ensured that it is accurate and matches with the date of recording of the written statement.

e. The software application used to play the audio-video recording may be mentioned so that the trial Court may also use the same application.

f. The person having lawful custody over the electronic devices shall be mentioned.

g. For facilitating easy identification, the file name may be changed as per convenience and the same shall be duly mentioned in the certificate.

h. Editing of audio-video recording shall be avoided to preserve the authenticity of the video. Any editing, truncating made intentionally will result in prosecution for fabrication of record as well as false evidence.

i. Details of the Storage medium like CD or pen drive) i.e., make, type etc.,) which is used to store copies shall also be mentioned.

j. The 65B certificate mentioning the above details shall be signed by the police official who is involved in recording / transferring / copying the video file. (The person who records the video shall also transfer and copy the video file).

Step No.8: A 161(3) statement shall be recorded for the above person by the Investigation Officer.

Step No.9: After that without any delay, the recorded statement as well as the CD recorded under Section 161 Cr.P.C, should be produced to the learned Judicial Magistrate along with the witnesses for recording the

Section 164 Cr.P.C, statement. The learned Judicial Magistrate shall follow the procedure for recording the 164 Cr.P.C statements without any further delay on their part.

Step No.10: The above procedure shall be followed in the case of the recording of further statements under Section 161 of Cr.P.C.

40. The duty of the Investigation Officer does not end with recording of material witnesses through the audio-video electronic means. It is the duty of the Investigation Officer to give protection to the said witnesses under the witness protection scheme. The Investigation Officer is further obligated to treat the witnesses with human dignity and respect and if any failure, it would amount to the infraction of the right to life of the witnesses with human dignity and the same shall be treated severely.

41. In result, this Court issues the following directions:-

i) the Home Secretary as well as the Director General of Police shall suitably issue a direction to comply the above direction

ii) Further, it is directed to supervise the above compliance of the direction through a high level team.

42. Accordingly, these Criminal Appeals are dismissed with above directions. The judgment dated 16.07.2019 made in S.C.No.137 of 2015 on the file of the learned Sessions Judge, Fast Track Mahila Court, Ramanathapuram, is confirmed.

43. Post this matter for reporting compliance on **06.11.2023.**

[R.S.K.,J.] & [K.K.R.K., J.]

23.08.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No

dss/pjl

To

1.The Sessions Judge,
Fast Track Mahila Court,
Ramanathapuram.

2.The Inspector of Police,
CBCID,
Madurai Town,
Kenikarai Police Station,

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

R.SURESHKUMAR, J.
and
K.K.RAMAKRISHNAN, J.

dss/pjl

Pre delivery Judgment made in Crl.A.(MD)Nos.423 of 2019 and 181 of 2021

23.08.2023