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Crl.A.No. 212 OF 2001
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ITEM No.104 Court No.7 SECTION IIA
PH

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Crl.A. No. 212 OF 2001

PARAMASIVAM @ PARAMAN @ KOTTIYAN & ANR. Appellant

VERSUS

STATE OF TAMIL NADU Respondent (s)

(With Office Report)

Date : 17/09/2002 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE U.C. BANERJEE
HON'BLE MR. JUSTICE B.N. AGRAWAL

For Appellant (s)
Mr. G. Krishnan, Sr. Adv.
Mr. V.J. Francis, Adv.
Mr. P.I. Jose, Adv.

For Respondent (s)
Mr. S. Balakrishan, Sr. Adv.
Mr. Sreenasim Jha, Adv.
Mr. Ajay Kumar, Adv.
Mr. R. Gopalakrishnan, Adv.
Mrs. Revathy Raghavan, Adv.

UPON hearing counsel the Court made the following
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The Appeal is allowed in terms of the signed order. The accused persons be released forthwith if not wanted in any other case.

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Neelam (SHELLY SENGUPTA)
COURT MASTER

(Signed order is placed on the file)

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 212 OF 2001@@
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Paramasivam @ Paraman @ Kottiyan & Anr. ... Appellant (s)

Versus

State of Tamil Nadu ... Respondent (s)

O R D E R@@
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The appellants, being accused nos. 1 and 2, alongwith one Selvaraj, who happened to be a driver of the deceased, were charged under Section 302 I.P.C. read with Section 34 IPC on the allegation that they had stabbed Raja and killed him on the night of 26th October 1988. The learned Sessions Judge admittedly, on the basis of the circumstantial evidence convicted them under Section 302 I.P.C. and sentence to life imprisonment . Accused nos. 1 and 2 were also convicted under Section 364 I.P.C. read with Sections 120-B and 109 of the I.P.C. Selvaraj, the third accused was sentenced to imprisonment for life under Section 302 I.P.C. read with Sectioin 109 I.P.C. Aggrieved by the order of the learned Sessions Judge, the matter was placed before the High Court in appeal by the accused persons. The High Court,upon consideration of the matter, acquitted accused no. 3 of all charges but while
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passing an order of acquittal against accused nos. 1 and 2 of all the charges, but as regards charge no. 4, the conviction of accused nos. 1 and 2 stood confirmed .Charge no. 4 spoken of earlier happened to be the one under Section 302 I.P.C. read with Section 34 IPC. Incidentally, at the conclusion of the order impugned, the High Court was pleased to observe in paragraph 20 the following :

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" The Extra-judicial confession relied on by the prosecution through the evidence of PWs 4 and 5 in our view, is artificial and mutually contradictory and we do not place any reliance for arriving at a conclusion. Similarly, we have also not placed any reliance on the evidence of PW8 from whom accused 1 and 2 have allegedly purchased the

knife MO6 since in our view, it would be difficult for PW8 to identify accused 1 and 2 as the persons who was examined and whose statement was recorded on 3.11.1988. As we have stated earlier, even if we reject the evidence of PWs 4,5 and 8, we have the evidence of PWs 1,2,6 and 16 to clearly establish the complicity of accused 1 and 2 in the crime. Merely, because the prosecution was not able to establish the motive, the prosecution case against accused 1 and 2 cannot be thrown out."

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The principal reliance for such conviction thus was on the evidence of PWs 1,2,6 and 16. The learned senior advocate appearing in support of the appeal made a detailed submission as to why the evidence of the above noted four prosecution witnesses cannot be relied upon. For convenience sake, relevant extracts from the

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examination-in-chief being the gist of the PW 1’s evidence are set out hereinbelow.;

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"On 26.10.88 at about 9 or 9.30 P.M. I was in the auto stand at the Erode Bus Stand. Along with me Raja and one Selvaraj were there. Raja was lying down in his auto.

At that time A1 Paramasivam @ Parameswaran he woke up Raja behind the said auto stand, Raja and A1 were talking for sometime. Raja came and took his auto, in the auto A1 Paramasivam sat in the back seat, both Raja and Paramasivam after talking for 5 minutes went away in the auto, thereafter the deceased Raja and A1 Paramasivam never came back to the auto stand."

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PW2 in his examination -in-chief stated as below :

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"On 26.10.1988 at about 9.30 p.m., A1 Paramasivam came to the auto stand woke Raja who was in his auto and both of them were talking for a while. Then both Raja and Paramasivam went in the auto of Raja. Since A1 worked as auto driver for sometime I know him. On that thereafter both Raja and Paramasivam did not return."

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The evidence of Thiru Jagdeesan PW 6 needs to be dealt with in slightly greater detail since the principal reason for the impugned order has been the evidence of

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the said witness - PW6 as such we shall deal with the same immediately hereafter. but before so doing, the evidence of PW16, Thiru Felix Stephen however ought to be noticed at this juncture. PW 16 though a formal witness but happened to the Finger Print Expert.In his examination- in- chief, PW16 stated thus :

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"The finger prints in F4 is found identical with the left thump impression of Parameswaran S/o perumal gounder the said impression is S1 in Ex.P.15, the chance print relating to S1 is MO18, the enlargement of F4 is MO 19, the enlargement of S1 is MO20, (objected to by he counsel, since the negative of MO 20 was not produced) the impression F4 and S1 is left thumb impression of same person that is lef thumb impression of Parameswaran s/o Perumal gounder."

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Before proceeding further, however, the learned advocate placed a strong reliance on a decision of this Court in Mahmood versus State of U.P. [1976(1) SCC 542] as regards the finger prints and its admissibility wherein this Court in paragraph 16 of the report was pleased to observe as below :

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"16. Furthermore, the specimen fingerprints of the appellant were not taken before or under the order of a magistrate in accordance with Section 5 of the

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Identification of Prisoners Act. This is another suspicious feature of the conduct of investigation. It has not been explained why this magistrate was kept out of the picture."

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Admittedly there has been no Magistrate’s presence or order in that regard and in that view this Court has

expressed that in terms of the statutory provisions, the question of relying thereon would not arise. Reliance on PW 16 by the High Court thus possibly cannot be had by reason of the non-admissibility as noticed by this Court in Mahmood (Supra).

Coming back to the evidence of PW6 - Thiru Jagadeesan , be it noted that this particular witness is also an auto driver and stated in his examination-in-chief as below :

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" Deceased Raja is my friend. I picked a passenger at Erode bus stand went along the Central theatre road, bulk fighting corner on 26.10.1988 at about 10.15 a.m. reached Railway station. After dropping the passenger I parked my auto near bulk fighting corner and took tea in the near kby tea stall, at that time the auto TDX 1980 was coming towards bulk fighting corner, since it was driven by friend Raja, I stopped it, in that auto A1 Paramasivam and A2 Parameswaran as where they were going, for that he told that they on the way to meet one Udayakumar (p.w.4) tiller at Pasur. When asked him to have a cup of tea, A1 replied that they were going urgently to meet p.w.4 at Pasur and that

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they can take tea while returning, then it was 10.30 p.m. near the tea shop at that time a mercury lamp was burning, in that light I saw the slippers worn by A1 and that of A2, the slippers belonging to A1 Paramasivam are MO3 series the slippers belonging to Parameswaran are MO4 series, the slippers belonging to Raja are Mo2 series. Raja was wearing kakki half hand shirt, they went viaq karur road, then it was 10.35 p.m. next day I was not in the town. I went to meet my paternal uncle and aunt at Sholiappagoundanur, I came to Erode on 28.10.1988 Friday at 8 a.m."

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It is the evidence of PW6 which stood accepted by the High Court with the following observation:

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"We have no reason to reject the evidence of PW6, since a perusal of his evidence is convincing. Apart from the fact that his evidence is convincing, it is also supported by another evidence, viz., the evidence of PW16, Finger Print Expert who lifted the finger print from the auto."

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We have noticed hereinabove that the evidence of PW16 cannot in any way be admitted since the same contravenes the statutory provisions as held by this Court in Mahbood (Supra). On a perusal of the evidence, the High Court was pleased to record that the evidence of PW6 stands out to be convincing. We are, however, at a loss as to how the credibility of the witness can be accepted when in fact the witness goes on to reflect that he could identify a slipper, on the basis of the street mercury light inside the auto-rickshaw,said to be belonging to accused Nos. 1 and 2 as also that of the deceased,

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admittedly when, they had no occasion to be even there for more than one or two minutes. The auto was stopped the deponent asked Raja, the deceased ,for a cup of tea: Passengers sitting inside the auto stated that they were otherwise in a hurry and they would prefer to have tea on their return journey and thereafter the auto left. Is it conceivable unless special attention is drawn to the slippers,worn by the accused persons to be noticed, the date of occurrence. While it is true that the learned senior advocate appearing for the State in no uncertain terms stated that the recovery of the slippers and the identification thereof is not being relied upon in support of the prosecution version but does the evidence on record lend any credence to the theory of the creditworthiness. Is it creditworthy ? In our view, the answer cannot but be in the negative. On the wake of the aforesaid the High Court’s ascribing the deponent’s evidence as convincing cannot be appreciated by us. It is on this background the evidence shall have to be scrutinised.

Significantly identification of the accused were held on the basis of the recovery of the slippers. The evidences of the two other witnesses namely PWs. 1 and 2 thus needs to be scrutinised as to whether that would form the golden chain of events in the matter of proof by

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circumstantial evidence. Before we do so, two decisions of this Court need to be gone into, the first being the decision in the case of Kanhai Mishra alias Kanhaiya Misar versus State of Bihar[2001(3)SCC 451] wherein one of us was a party (Agrawal, J.) has been rather categorical in the matter of laying down well established rule of Criminal jurisprudence in the manner following :

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> "It is a well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person’s conviction if it is of such a character that the same is wholly inconsistent with innocence of the accused and is consistent only with his guilt.

> The incriminating circumstances for being used against the accused must be such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In a case of circumstantial evidence the whole endeavour and effort of the court should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the accused. If the circumstances proved against the accused in a case are consistent either with the innocence of the accused or with his guilt, he is entitled to the benefit of doubt. Reference in this connection may be made to a Constitution Bench judgment of this Court in the case of M.G. Agarwal v. State of Maharashtra and recent decisions of this Court in the cases of Ronny v. State of Maharashtra and Joseph v. State of Kerala."

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The other decision which also pertains to evidentiary value of circumstantial evidence is in Pawan Kumar versus State of Haryana (2001(3) SCC 628) wherein one of us also was a party (Banerjee, J.) has specifically recorded as below :-

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> "Incidentally, success of the prosectution on the basis of circumstantial evidence will however depend on the availability of a complete chain of events so as not to leave any doubt for the conclusion that the act must have been done by the accused person. While, however, it is true that there should be no missing links, in the chain of events so far as the prosecution is concerned, but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts. Circumstances of strong suspicion without, however, any conclusive evidence are not sufficient to justify the conviction and it is on this score that great care must be taken in evaluating the circumstantial evidence. In any event, on the availability of two inferences, the one in favour of the accused must be accepted and the law is well settled on this score, as such we need not dilate much in that regard excepting, however, noting the observations of this Court in the case of State of U.P. v. Ashok Kumar Srivastava wherein this Court in para 9 of the report observed : (SCC p.95, para 9)
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> "9. This Court has, time out of

number observed that while appreciating circumstantial evidence the court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negatived on evidence. Great care must be taken in evaluating

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

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3. The other aspect of the issue is that the evidence on record, ascribed to be circumstantial, ought to justify the inferences of the guilt from the incriminating facts and circumstances which are incompatible with the innocence of the accused or guilt of any other person. The observations of this Court in the case of Balwinder Singh v. State of Punjab lends concurrence to the above."

.....L.....I.....T.....T.....T.....T.....J.....T.....T.....T.....T.....T.....T.....T.....T.....R.

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Keeping in mind the state of the law as above there should thus be available one record evidence, so that no other conclusion is possible neither there is a snap in the chain.

We have already noticed hereinbefore as to the circumstances under which the prosecution was launched against the appellants herein and the state of evidence. Learned senior advocate for the State, however, contended that the chain seems to be complete by reason of the

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absence of any explanation from the accused’s end. It has been contended that there is a duty incumbent on the

accused to come out with the explanation as to what had happened after they left the railway station tea shop. We, however, cannot lend our credence thereto. The missing link in the chain is not supposed to be filled in or supplied by the accused. We are not involving ourselves in a great debate on this score but the fact remains is that by reason of abscondation till their arrest though may be a factor to be on record but the same cannot also form the missing link of the chain of events.

There is thus not available on record a complete chain of events which would warrant a conviction under Section 302 I.P.C. In that view of the matter, the opinion expressed by the High Court cannot but be termed to be erroneous since the chain of events is not otherwise complete and pointedly pointing to the accused persons as guilty persons.

The appeal therefore succeeds and is thus allowed. The order as passed by the High Court stand set aside and quashed.

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The accused persons be released forthwith,if not wanted in any other case.

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.....J.
(U.C. BANERJEE)

.....J.
(B.N. AGRAWAL)

New Delhi,
Sept. 17, 2002.