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S. ARUL RAJA

v.

STATE OF TAMIL NADU

(Criminal Appeal No. 1494-95 of 2009)

JULY 30, 2010

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[DR. MUKUNDAKAM SHARMA AND C.K. PRASAD, JJ.]

Penal Code, 1860:

C *ss.302 and s.120-B – Death caused allegedly in pursuance of criminal conspiracy – Various accused – Statement of one accused while in police custody – Circumstantial evidence – Acquittal by trial court – Conviction of accused-appellant by High Court– Challenge to – Held: On facts, the chain of events did not establish a clear motive* D *for the appellant to commit the offence of murder – Prosecution failed to substantiate the allegation of conspiracy against the appellant – The statement of co-accused did not constitute a valid dying declaration or a confession or an evidence in any manner to implicate the appellant , and also* E *did not fall within the ambit of s.10 of the Evidence Act – Appellant given benefit of doubt and acquitted – Code of Criminal Procedure, 1973 – s.164 – Evidence Act, 1872 – s.10.*

F *s.120-B – Criminal conspiracy – Ingredients of – Discussed.*

Evidence:

Confessional statement – Admissibility of – Guidelines G *discussed – Held: A statement that does not prescribe to the procedure laid down in s.164, CrPC is not admissible as a confessional statement – On facts, the statement in question was neither recorded by a Judicial Magistrate nor fulfilled procedural requirements, including that of a certificate to be*

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appended by the Magistrate – Besides, it is doubtful as to whether the statement was made voluntarily – Hence, the statement is not admissible as a confession under s.164 CrPC – Code of Criminal Procedure, 1973 – s.164.

Extra-judicial confession – Admissibility of – Rules of caution before accepting an extra-judicial confession – Discussed.

Evidence Act, 1872:

s.32 – Dying declaration – Admissibility of – Held: When a person who has made a statement perhaps in expectation of death, is not dead, it is not a dying declaration and is not admissible u/s.32.

s.10 – Post-arrest statement – Held: Does not fall within the ambit of s.10.

The accused-appellant and PW8's father were running their respective educational institutions in the same area, and their relations were allegedly strained in view of the cancellation of the affiliation of appellant's college to Anna University, purportedly at the instance of PW8's father; and subsequent exodus of students from appellant's college to the college of PW8's father. According to the prosecution, in view of the said animosity, the appellant hatched a criminal conspiracy with the other accused which led to the death of PW8's father.

The trial court acquitted the appellant. The High Court, however, relying upon the post-arrest statement (Ex. P22) made by A1, co-accused, in hospital that he had been engaged as a contract killer, which was recorded by the Executive Magistrate (PW-46) as a dying declaration; and the theory of motive as projected by the prosecution i.e. the alleged animosity between the

A deceased and the appellant, set aside the acquittal of the appellant and convicted him u/ s.302 IPC r/w s.120-B IPC and also u/s.307 IPC r/w s.120-B IPC.

In the instant appeals, the questions which thus fell B for consideration were; 1) whether there existed a motive for the appellant to murder PW8's father; 2) whether the appellant conspired with the other accused to commit the crime; and 3) whether A1's statement could constitute a valid dying declaration or a confession or could constitute C an evidence in any manner so as to be used to implicate the appellant for murder.

Allowing the appeals, the Court

HELD:1.1. The alleged motive is claimed to have been D evidenced by threats from the appellant. PW8 has testified to a conversation with the appellant wherein he spoke of "dire consequences" for having the affiliation of Anna University removed from his college. However, according to PW 38 (the Chief Superintendent of Anna University), E the cancellation of affiliation was done on the basis of irregularities in the appellant's college. Moreover, the appellant had obtained a stay from Court on Anna University's order. Seen in this light, there does not appear to be any role of the deceased in the act and F hence, the argument that the cancellation of affiliation compelled the appellant to eliminate PW8's father does not hold merit. [Paras 17, 18] [371-A-C]

1.2. As far as exodus of students from appellant's college to deceased's college is concerned, the issue can G be termed inconclusive at best. The cancellation of affiliation had been done in August 2004, and new registrations would have to be accepted only in the next academic year beginning from May/June 2005. This is well after the cancellation of affiliation, and hence the H connection between these events and the escalation of

hostilities between the appellant and the deceased is not established. While it may be true that appellant had grievances against the deceased, the chain of events that is said to have driven the appellant to commit murder do not provide a clear motive to substantiate the argument of the respondent, or the decision of the High Court. [Paras 19, 20] [371-D-H]

2.1. To punish a person for criminal conspiracy under Section 120-B of IPC, it is necessary to establish that there was an agreement between the parties for doing an unlawful Act. In the instant case, the prosecution made reference to meetings allegedly held between the appellant and two co-accused including A1. However, there is little evidence to prove the presence of the appellant in both these meetings. The High Court rightly noted that the prosecution could not make its case concerning the first meeting due to PW1 and PW2 turning hostile. While the evidence of a hostile witness would not be completely effaced, the same requires corroboration and strict scrutiny. In this case, however, the prosecution has not been able to adduce any material evidence that may corroborate the statements of PW1 and PW2. Hence, the same is not admissible in this case. [Para 22] [372-D-F]

2.2. As regards the second date of meeting that the prosecution had put forward for the formulation of a conspiracy, on this date, A1 and another accused were alleged to have met the appellant to plot the murder. In this regard, the statements of PWs 4 and 5 were recorded wherein they testified to hearing a conversation between the said persons in the appellant's chamber regarding the commission of the crime. However, since both witnesses subsequently turned hostile, their statements do not inspire confidence and hence this story is not substantiated. [Para 23] [372-G-H; 373-A]

A 2.3. As regards the statement of PW3, a bystander, that he had witnessed A1 and another accused entering the premises of the appellant's college on a motorcycle a week before the murder, the High Court while relying upon the said statement as a vital piece of evidence B affirming the existence of a conspiracy between the appellant and the co-accused, glossed over important facts. The prosecution has also relied on a number of other meetings to hold up the charge of conspiracy. However, the evidence as regards these meetings make C no reference to the appellant and hence no reference is to be made to the same at this stage. [Paras 25, 26] [373-F-H; A-B]

2.4. In the present case, the events, cited by the D prosecution, even when taken together, cannot prove a charge of conspiracy so far as the appellant is concerned. The mere circumstantial evidence to prove the involvement of the appellant is not sufficient to meet the requirements of criminal conspiracy under Section 120-A of the IPC. A meeting of minds to form a criminal E conspiracy has to be proved by placing substantive evidence and the respondent has not adduced any evidence which underlines the same. [Para 28] [375-C-D]

Vijayan v. State of Kerala, 1999 (3) SCC 54; *Bhagwan* F *Singh v. State of Haryana* (1976) 1 SCC 389 and *State through Superintendent of Police, CBI/SIT v. Nalini & Others*, (1999) 5 SCC 253 – relied on.

3.1. Section 32 (1) of the Evidence Act, 1872 states that a dying declaration is a relevant fact and, therefore, G admissible in evidence. For a statement to be admissible in evidence as a dying declaration, the person making the statement should no longer be alive. If the person eventually does not die after making the statement, then the same cannot be treated as a dying declaration. [Paras H 30, 31] [375-F-G; 376-B]

3.2. In the present case, Ex. P22 (the post-arrest statement made by A1) cannot be said to be a dying declaration on account of various reasons, the most important of which is that A1 did not die after making the alleged dying declaration. When a person who has made a statement perhaps in expectation of death, is not dead, it is not a dying declaration and is not admissible under Section 32 of the Evidence Act. Furthermore, there is no reason forthcoming as to why A1 was brought to the hospital. There is nothing on record to show that A1 had consumed poison or that he was in any manner ill or injured which necessitated his admission to the hospital for treatment. In this regard, it is noticed from the testimony of PW-46 that he has clearly deposed that when he went to the said hospital, he saw that A1 was sitting "hale and healthy". He further stated that he had recorded the alleged dying declaration of A1 because in the requisition letter it was mentioned that both A1 and deceased 'B' had consumed poison. PW-46 also stated that A1 was under treatment and in a frightened mood. He has categorically stated in his testimony that he did not ascertain from A1 as to whether he had consumed poison or as to the nature of the same. He further states in his testimony that he did not ascertain from A1 as to what made him consume poison and whether he had consumed it himself or if somebody had administered the same. This is a major lapse and casts a serious doubt on the credibility of the statement. [Paras 34, 35, 36] [377-F-H; 378-A-E]

3.3. Despite the fact that A1 was admitted to the ICU ward, he was discharged from the hospital and was produced before the Magistrate on the same day. From this, two inferences may be drawn. One is that A1 was not actually ill so as to warrant admission to the ICU and that was done only with a view to obtaining a statement which could subsequently be used against him. Alternatively,

A the second is that A1 was actually ill and his serious condition necessitated admission to the ICU ward. But if his condition was so serious, then one fails to understand why he was discharged from the hospital on the very same day. That does not seem to be a reasonable
B course and raises serious doubts. [Para 37] [378-F-H; 379-A]

3.4. One cannot appreciate the need for PW-46 having recorded the dying declaration of A1 when A1 was sitting "hale and healthy", as deposed by PW-46 himself.
C No doctor treating A1 was examined as to prove and establish that A1 was seriously ill and the line of treatment given to him in the hospital. [Para 38] [379-B]

3.5. On a perusal of Ex. P-22 (the statement made by
D A1) as a whole, it cannot be said to be a statement admissible in evidence as a dying declaration. There is nothing in the alleged dying declaration to show why A1 was brought to the hospital. Also, if it were recorded as a dying declaration, it should have contained the
E circumstances that necessitated A1's admission to the hospital. Ex. P-22 lacks that important aspect and hence it cannot be raised to the status of a dying declaration. [Paras 39] [379-C-D]

Rattan Singh v. State of Himachal Pradesh, (1997) 4
F SCC 161 and *Ramprasad v. State of Maharashtra*, (1999) 5 SCC 30 – relied on.

4. As regards the issue as to whether the statement made by A1 though inadmissible as a dying declaration,
G could be admissible as a confession, it is clear that Section 164 CrPC provides guidelines to be followed for taking the statement of accused as a confession. The one essential condition is that it must be made voluntarily and not under threat or coercion. A statement that does not

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prescribe to the procedure laid down in Section 164, CrPC is not admissible as a confessional statement. In the instant case, the statement has neither been recorded by a Judicial Magistrate nor has it fulfilled procedural requirements, including that of a certificate to be appended by the Magistrate. Hence, the statement is not admissible against the appellant as a confession under Section 164 CrPC. Besides, in the present case, as pleaded by the appellant, A1 gave a representation with a request to the Judicial Magistrate Court and also Magistrate Court stating that his confessional statement which implicated the appellant was not voluntary and that he was forced to give the same by the police. Therefore, there is a doubt as to whether implication of the appellant by A1, if any, was made voluntarily. Viewed from this angle and under any circumstance, the said statement cannot be regarded as a confession as envisaged under Section 164 Cr. P.C. to implicate the appellant. [Paras 43, 45, 46] [380-C; 381-G-H; 382-A-C]

Aloke Nath Dutta & Ors. v. State of West Bengal (2007) 12 SCC 230; *Babubhai Udesinh Parmar v. State of Gujarat* (2006) 12 SCC 268; and *State of UP v. Singhara Singh*, (1964) 4 SCR 485 – relied on.

Sharawan Bhadaji Bhirad & Others v. State of Maharashtra (2002) 10 SCC 56 – referred to.

5.1. As regards the issue that whether the statement made by A1 may be considered as an extra-judicial confession, the concept of an extra-judicial confession is primarily a judicial creation, and must be used with restraint. Such a confession must be used only in limited circumstances, and should also be corroborated by way of abundant caution. An extra-judicial confession while in police custody cannot be allowed. Moreover, when there is a case hanging on an extra-judicial confession,

A corroborated only by circumstantial evidence, then the Courts must treat the same with utmost caution. [Para 47] [382-D-F]

5.2. Rules of caution must be applied before accepting an extra-judicial confession. Before the Court proceeds to act on the basis of an extra-judicial confession, the circumstances under which it is made, the manner in which it is made and the persons to whom it is made must be considered along with the two rules of caution. First, whether the evidence of confession is reliable and second, whether it finds corroboration. [Para 54] [384-G-H; 385-A-B]

5.3. In the present case, the purported dying declaration was recorded in the hospital. A1 was discharged from the hospital on the same day that his statement was recorded. That A1 later made a representation stating that the confession was not given voluntarily, raises doubts as to its truthfulness. Under these circumstances, authenticity of A1's confession is not free from doubts. A1 being the co-accused, it is not proper to convict the appellant solely on the basis of the confession of A1 – more so, when the confession is not corroborated by any evidence. Such corroborating evidence that may confirm the appellant's involvement in the murder is totally missing in this case. [Para 55] [385-C-E]

Ram Singh v. Sonia & Others, (2007) 3 SCC 1; *Ediga Anamma v. State of AP*, (1974) 4 SCC 443; *State of Maharashtra v. Kondiba Tukaram Shirke*, (1976) 3 SCC 775; *Maghar Singh v. State of Punjab* (1975) 4 SCC 234; *State of A.P. v. S. Swarnalatha & Others*, (2009) 8 SCC 383; *Pakkirisamy v. State of T.N.* (1997) 8 SCC 158; *State of A.P. v. Kanda Gopaludu* (2005) 13 SCC 116; *Kavita v. State of T.N* (1998) 6 SCC 108 – relied on.

6. Furthermore, the statement made by A1 is insufficient to implicate the appellant in the said conspiracy as the same is hit by Section 10 of the Evidence Act, which refers to the statement of a fellow conspirator that pertains to the common intention behind the act, and such a statement can be used against the other conspirators. In the present case, the prosecution has failed to substantiate the allegation of conspiracy against the appellant and therefore, he could not be under any circumstance be called a co-conspirator so as to attract the provisions of Section 10 of the Evidence Act. Further, a post-arrest statement would not fall within the ambit of Section 10 of the Evidence Act. Therefore, the statement made by A1 in police custody cannot be used to implicate the appellant in the conspiracy to murder. [Para 56] [385-F-H; 386-A]

Mohd. Khalid v. State of West Bengal, **(2002) 7 SCC 334** and *State of Gujarat v. Mohd. Atik & Others* **(1998) 4 SCC 351 – relied on.**

7. Viewed from any angle, the evidence adduced by the prosecution against the appellant is not sufficient to justify his conviction either under Section 302 or Section 307 or under Section 120-B IPC. The decision of the High Court is reversed and the appellant stands acquitted of the charges against him purely and simply on benefit of doubt. [Paras 57, 58] [386-B-C]

Case Law Reference:

1999 (3) SCC 54	relied on	Para 21
(1976) 1 SCC 389	relied on	Para 22
(1999) 5 SCC 253	relied on	Para 28
(1997) 4 SCC 161	relied on	Para 32

A	(1999) 5 SCC 30	relied on	Para 33
	(2002) 10 SCC 56	referred to	Para 40
	(2007) 12 SCC 230	relied on	Para 43
B	(2006) 12 SCC 268	relied on	Para 44
	(1964) 4 SCR 485	relied on	Para 45
	(2007) 3 SCC 1	relied on	Para47
	(1974) 4 SCC 443	relied on	Para 47
C	(1976) 3 SCC 775	relied on	Para 47
	(1975) 4 SCC 234	relied on	Para 48
	(2009) 8 SCC 383	relied on	Para 50
D	(1997) 8 SCC 158	relied on	Para 51
	(2005) 13 SCC 116	relied on	Para 52
	(1998) 6 SCC 108	relied on	Para 53
E	(2002) 7 SCC 334	relied on	Para 56
	(1998) 4 SCC 351	relied on	Para 56

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1494-95 of 2009.

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From the Judgment & Order dated 05.08.2009 of the High Court of Madras at Madurai Bench in Crl. A. No. 270 of 2008 & Crl. R.C. No. 648 of 2008.

Uday U. Lalit, R.S. Sodhi, P.S. Narasimha, M. Gireesh G Kumar, K. Parameshwar, Manisha Bhandari, Vijay Kumar for the Appellant.

N. Natarajan, Anand Sasidharan, Promila, S. Thananjayan for the Respondent.

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The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. These appeals are directed against the judgment of the Madurai Bench of the Madras High Court dated 05.08.2009. By the said judgment, the High Court reversed the judgment of acquittal of the appellant passed by the Principal Sessions Judge, Tirunelveli, and convicted the appellant, Arul Raja under Section 302 read with Section 120-B of the Indian Penal Code, 1860 ("IPC"), and sentenced him to undergo life imprisonment and to pay a fine of 5000/- in default to suffer three months' rigorous imprisonment. He was also convicted under Section 307, read with Section 120-B of the IPC and sentenced to Rigorous Imprisonment for a period of three years.

2. The appellant was convicted for murder, attempted murder, and criminal conspiracy to commit the aforesaid crimes in connection with the death of Sri Aladi Aruna, a former law minister of Tamil Nadu, which occurred on 31.12.2004. The facts in this regard go back to the alleged animosity between the appellant and Aladi Aruna over the years. The Appellant was running several educational institutions in the District of Tirunelveli and Kanyakumari, and had also started an Engineering College at Athiyuthu in 2000. Subsequently, Aladi Aruna himself started an Engineering College, proximate to the one started by the appellant. The relations between both the appellant and Aladi Aruna, who were on good terms until then, were said to have deteriorated after the latter's direct involvement in the business sphere of the appellant.

3. Furthermore, in the same month in which Anna University granted affiliation to the Engineering College run by Aladi Aruna, it also cancelled the affiliation already accorded to the appellant's College. Consequently, many students allegedly left the appellant's College to join the institution run by Aladi Aruna. This situation was also alleged to be

A responsible for increasing the existing tension between both the appellant and Aladi Aruna.

4. Appellant has been accused of hatching a conspiracy wherein he engaged Accused No. 1, Veldurai (hereinafter B referred to as "A1"), and deceased accused, Benny, to murder Aladi Aruna.

5. In pursuance of this alleged conspiracy, Aladi Aruna was murdered on 31.12.2004, by accused persons Nos. 1 to 4, along with deceased accused Benny and Auto Bhaskar, who C formed into two groups to commit the act. All of them were subsequently arrested, with the exception of A1 and deceased accused Benny. In the course of the investigation, it became known that A1 and Benny had fled to Ahmedabad in Gujarat.

D 6. On the night of 25.1.2005, a team comprising the Gujarat and Tamil Nadu Police entered the flat that housed Veldurai and Benny, and attempted to apprehend them. In the melee that ensued, A1 was arrested, while Benny consumed cyanide. Both were taken immediately to the L.G hospital E nearby, where despite being administered treatment, Benny died.

7. In the morning of 26.12.2005, the Executive Magistrate of Ahmedabad City, Mr. Solanki, went to L.G hospital upon receiving a written requisition to record the dying declaration F of A1. In his statement made to the Executive Magistrate, A1 implicated the appellant in the crime, and declared that he was given a contract killing by one S.P. Raja for an agreed remuneration of Rs. 5,00,000/- out of which he was paid an advance of Rs. 20,000/-. The Executive Magistrate Mr. Solanki G was examined as PW-30 and testified before the Principal Sessions Court at Tirunelveli as to the same.

8. The Executive Magistrate, who took the dying declaration from A1 has also noted that he was "hale and

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healthy" while his statements were being recorded. A1, it is significant to note, was discharged from L.G. Hospital on the same day, and produced before the Ahmedabad Magistrate for issue of transit warrant to Tamil Nadu.

9. The Madras High Court has convicted the appellant primarily on the basis of this declaration that implicated him in a conspiracy to murder Arul Raja. The High Court also took into account circumstantial evidence, such as the motive behind the act, as well as the statement of a bystander (PW3) who witnessed A1 and deceased accused Benny entering the premises of the Appellant's college on a motorcycle a week before the murder.

10. Being aggrieved by the aforesaid decision, the appellant has filed the present Special Leave Petition before this Court. We have heard the learned counsel appearing for the parties at length.

11. Counsel for the appellant argued that the statement of A1 is not a dying declaration within the meaning of Section 32(1) of the Evidence Act, 1861, since the very fact of his surviving negates the requirements to be complied in the said provision. Further, Counsel also argued that this statement is hit by Section 26 of the Evidence Act, 1872, as it was not recorded in the manner prescribed by Section 164 of the Code of Criminal Procedure, 1973.

12. Counsel for the appellant also contended that the requirements of Section 10 of the Evidence Act mandate that such a statement be made prior to the cessation of the common intention of the conspiracy. Hence, it was argued that the statement of A1 made after the murder of Aladi Aruna may not be used to implicate the Appellant in a conspiracy. In addition, Counsel has also debunked the testimony of PW3 as inadequate and insufficient to prove charges of conspiracy against the Appellant.

A 13. In its reply, the Counsel for the State of Tamil Nadu urged this Court to weigh the collective evidence presented, which, it was argued, implicates the appellant. In addition to the motive to eliminate a rival, Counsel also pointed to the telephone conversation between the appellant and Aladi
B Aruna's son (PW8), which highlighted the animosity between the former and the deceased.

14. Counsel for the State also submitted that the statement of A1 is not tainted in any manner and hence, is admissible as evidence. In this regard, Counsel pointed out that there exists
C nothing to suggest any mala fide involvement between the Gujarat and Tamil Nadu Police to extract the confession from Veldurai. Counsel also contended that the statement was made in connection with the ongoing investigation surrounding the suicide of deceased accused Benny, rather than as a
D purported dying declaration.

15. In light of the aforesaid arguments, it falls upon us to consider the matter in terms of three issues. Firstly, whether there existed a motive for the appellant to murder Aladi Aruna;
E Secondly, whether the appellant conspired with the other accused to commit the crime; And thirdly, whether A1's statement could constitute a valid dying declaration or a confession or could constitute an evidence in any manner so as to be used to implicate the appellant for murder.

F 16. It was contended by the Respondent that the murder of Aladi Aruna was motivated by the animosity between the latter and the appellant. The Respondent had seized on the possible existence of a rivalry between Arul Raja and Aladi Aruna with regard to the running of their respective educational
G institutions in the same area. The cancellation of affiliation of appellant's college to Anna University has been alleged to be the catalyst that led the appellant to murder Aladi Aruna. The High Court also held that the appellant believed this cancellation of affiliation to be done at the instance of Aladi Aruna.

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17. The aforesaid motive is claimed to have been evidenced by threats from the appellant. PW8 (Son of Aladi Aruna) has testified to a conversation with the appellant wherein he spoke of "dire consequences" for having the affiliation of Anna University removed from his college. A

18. However, according to PW 38 (the Chief Superintendent of Anna University), the cancellation of affiliation was done on the basis of irregularities in the appellant's college. Pursuant to an application submitted by the appellant, the Madras High Court had also issued a stay on Anna University's order. Seen in this light, there does not appear to be any role of the deceased in the act and hence, the argument that the cancellation of affiliation compelled the appellant to eliminate Aladi Aruna does not hold merit. B C

19. As far as exodus of students from Arul Raja's college to Aladi Aruna's is concerned, the issue can be termed inconclusive at best. The cancellation of affiliation had been done in August 2004, and new registrations would have to be accepted only in the next academic year beginning from May/ June 2005. PW 21 (a student who used to study in the appellant's Engineering College), who has testified that nearly 30 students left from the appellant's college to Aladi Aruna's, completed his 12th Grade in the academic year 2004-2005 and joined thereafter. This is well after the cancellation of affiliation, and hence the testimony fails to establish the connection between these events and the escalation of hostilities between the appellant and Aladi Aruna. D E F

20. To the Respondent, these events added together provide a vital link that illuminates the actions of Arul Raja and his alleged co-conspirators. However, we find such an argument to be unconvincing. While it may be true that appellant had grievances against Aladi Aruna, the chain of events that is said to have driven the appellant to commit murder do not provide a clear motive to substantiate the argument of the Respondent, or the decision of the High Court. G H

A 21. In pursuance of this motive, it has been sought to be established by the Respondent that the appellant conspired with the other accused to murder Aladi Aruna. This Court in *Vijayan v. State of Kerala* reported in 1999 (3) SCC 54 has held that to punish a person for criminal conspiracy under Section 120-
B B of IPC, it is necessary to establish that there was an agreement between the parties for doing an unlawful Act. Therefore, it is imperative to see whether there had been any such agreement between the Appellant and co-accused to murder Aladi Aruna, which could be established by producing
C reliable evidence.

22. To this effect, reference was made to meetings allegedly held between the appellant and two of the co-accused, namely, A1 and deceased accused Benny. While the first meeting between the said persons was purported to be
D held on 14.9.2004, the second one is claimed to have been held on 24.12.2004. However, we find that there is little evidence to prove the presence of the appellant in both these meetings. The High Court has rightly noted that the prosecution could not make its case concerning the meeting on 14.9.2004
E due to PW1 and PW2 turning hostile. As has been held by this Court in *Bhagwan Singh v. State of Haryana* (1976) 1 SCC 389 and other subsequent cases, while the evidence of a hostile witness would not be completely effaced, the same requires corroboration and strict scrutiny. In this case, however, the
F prosecution has not been able to adduce any material evidence that may corroborate the statements of PW1 and PW2. Hence, the same is not admissible in this case.

23. The second date of meeting that the prosecution had
G put forward for the formulation of a conspiracy was 24.12.2004. On this date, A1 and deceased accused Benny said to have met the appellant to plot the murder of Aladi Aruna. In this regard, the statements of PWs 4 and 5 were recorded wherein they testified to hearing a conversation between the said persons in the appellant's chamber regarding the commission
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of the crime. However, since both witnesses have subsequently turned hostile, their statements do not inspire confidence and hence this story is not substantiated. A

24. On the other hand, the High Court has relied on the evidence provided by PW 3, Thenraj, who has testified to have seen both A1 and Benny drive into the college premises of the appellant. As the High Court recounted in the following words:- B

> "82....PW3 has stated that on 24.12.2004, he and his friend Karuppasamy were proceeding to the Poolangulam village and at about 11.00 A.M. when they were nearing S.A. Raja's college, they felt thirsty and they stopped the vehicle in front of weighing bridge...and were taking tender coconut. At that time, PW3 saw Accused No. 1- Veldurai and another person [deceased accused-Benny] came in a motorcycle from east to west and both entered into the Engineering college of S.A. Raja and returned from the college some 15 minutes thereafter." C D

At the time, PW3 could not identify the pillion rider but later identified him as the deceased accused Benny after being shown his photograph. E

25. Whereas the High Court noted this statement as a vital piece of evidence affirming the existence of a conspiracy between the appellant and the co-accused, we are compelled to disagree. In relying upon the statement of PW3, the High Court has glossed over important facts. From the examination of witnesses it is not clear whether Arul Raja was at all present at this meeting and the same could not be substantiated by any cogent and reliable evidence. Since the purpose of the meeting and the presence of the alleged participants cannot be confirmed, this testimony is too weak to support any conclusion in favour of the Respondent. F G

26. The prosecution has also relied on meetings that may have taken place on 28.12.2004 to 30.12.2004 to hold up the H

charge of conspiracy. Accused Nos. 1 to 5 and deceased accused Auto Bhaskar were said to be in Sundara Nilayam, Courtallam to work out a plan to murder Aladi Aruna. However, the evidence as regards these meetings make no reference to the appellant and hence no reference is to be made to the same at this stage.

27. The High Court has strung the following pieces of substantiated events together to include the appellant within the ambit of the conspiracy:-

"• On 24.12.2004, Accused No. 1 and deceased accused-Benny had gone into the college of Accused No. 7 and returned after 15 minutes.

• Presence of Accused No. 1, Accused No. 4 and deceased accused-Benny on the southern side of place of occurrence on 31.12.2004.

• Accused No. 1 and deceased accused-Benny flew to Gujarat and were apprehended together.

• Accused Benny consumed cyanide poison immediately after the arrest and accused-Auto Baskar consumed cyanide poison after arrest while in transit."

28. We find that these events, even when taken together, cannot prove a charge of conspiracy so far the appellant is concerned. In *State through Superintendent of Police, CBI/SIT v. Nalini & Others,* reported in (1999) 5 SCC 253, it was held that: -

"583. .....

(1).....Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of

the intention, which is an offence. The question for consideration in a case is did all the accused have the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed....."

In this instance, mere circumstantial evidence to prove the involvement of the appellant is not sufficient to meet the requirements of criminal conspiracy under Section 120-A of the IPC. A meeting of minds to form a criminal conspiracy has to be proved by placing substantive evidence and the Respondent has not adduced any evidence which underlines the same. The issue of whether A1's statement, recorded after his arrest, may be used to implicate the appellant in the said conspiracy shall be dealt with subsequently.

29. We must now consider whether the statement made by A1 and recorded by the Executive Magistrate of Ahmedabad City in the morning of 26.12.2005, which is proved as Ex. P22, may be used to implicate the Appellant in this crime. The Respondent, and the High Court in its decision, both rely on A1's statement made while he was in L.G Hospital, subsequent to his arrest. This statement was recorded as A1's dying declaration. Therefore, the legal basis to admit the statement as a dying declaration needs to be examined.

30. Section 32 (1) of the Evidence Act, 1872 states that a dying declaration is a relevant fact and therefore admissible in evidence. Section 32 (1) categorically states that a statement made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death is a relevant fact and admissible in evidence in cases in which the cause of that person's death comes into question. It further mentions that such a statement will be admissible in evidence when the person making it is dead or cannot be found or has become incapable of giving evidence or whose attendance

A cannot be procured without an amount of delay or expense.

31. It is trite law that for a statement to be admissible in evidence as a dying declaration, the person making the statement should no longer be alive. If the person eventually does not die after making the statement, then the same cannot
B be treated as a dying declaration.

32. The cited authority of the High Court in regards to the admissibility of a dying declaration, *Rattan Singh v. State of Himachal Pradesh* reported in (1997) 4 SCC 161, in fact
C confirms the necessary condition of death failing which this statement will be inadmissible under the dying declaration rule.

33. Other case law also confirms this necessary condition. In *Ramprasad v. State of Maharashtra*, reported at (1999) 5
D SCC 30, this Court held:-

"13. Ext. 52 is the dying declaration made by PW 1 Ramu Somani, which was recorded by a Judicial Magistrate (PW 16). Both the trial court and the High Court counted Ext. 52 as a piece of evidence. Shri R.S. Lambat, learned
E counsel contended that both the courts have gone wrong in treating Ext. 52 as evidence because the person who gave that statement is not dead and hence it could not fall under Section 32 of the Evidence Act, 1872. Counsel further contended that even otherwise Ext. 52 could only
F have been used to contradict PW 1 as provided in Section 162 of the Code of Criminal Procedure (for short "the Code") as it was a statement recorded during investigation.

G *14. We are in full agreement with the contention of the learned counsel that Ext. 52 cannot be used as evidence under Section 32 of the Evidence Act though it was recorded as a dying declaration. At the time when PW 1 gave the statement he would have been under expectation of death but that is not sufficient to wiggle it*
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into the cassette of Section 32. As long as the maker of the statement is alive it would remain only in the realm of a statement recorded during investigation.

15. Be that as it may, the question is whether the Court could treat it as an item of evidence for any purpose. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before "any authority legally competent to investigate the fact" but its use is limited to corroboration of the testimony of such a witness. Though a police officer is legally competent to investigate, any statement made to him during such an investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code. But a statement made to a Magistrate is not affected by the prohibition contained in the said section. A Magistrate can record the statement of a person as provided in Section 164 of the Code and such a statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. A statement recorded by a Magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof."

34. In the present case, on 26.01.2005 at about 7:15 a.m., PW-46 (Executive Magistrate/Deputy Tehsildar), on receiving a written requisition from L.G. Hospital for recording the dying declaration of A1 who was admitted to the ICU Ward of the said hospital, went there and recorded the alleged dying declaration which is Ex. P22. Ex. P22 cannot be said to be a dying declaration and that is so on account of various reasons, which may be elaborated herein.

35. The most important of them all is that A1 did not die after making the alleged dying declaration. From the decision

A of this Court in the aforementioned case, it is clear that when a person who has made a statement perhaps in expectation of death, is not dead, it is not a dying declaration and is not admissible under Section 32 of the Evidence Act.

36. Furthermore, there is no reason forthcoming as to why
B A1 was brought to the hospital along with deceased accused Benny. There is nothing on record to show that A1 also had consumed poison or that he was in any manner ill or injured which necessitated his admission to the hospital for treatment. In this regard, we may notice the testimony of PW-46. PW-46
C has clearly deposed that when he went to the said hospital, he saw that A1 was sitting "hale and healthy". He further stated that he had recorded the alleged dying declaration of A1 because in the requisition letter it was mentioned that both A1 and deceased Benny had consumed poison. PW-46 also stated that
D A1 was under treatment and in a frightened mood. He has categorically stated in his testimony that he did not ascertain from A1 as to whether he had consumed poison or as to the nature of the same. He further states in his testimony that he did not ascertain from A1 as to what made him consume
E poison and whether he had consumed it himself or if somebody had administered the same. This is a major lapse and casts a serious doubt on the credibility of the statement.

37. It must also be noted that despite the fact that A1 was
F admitted to the ICU ward, he was discharged from the hospital and was produced before the Magistrate, Ahmedabad at 7:30 p.m on the same day, i.e., 26.01.2005. From this, two inferences may be drawn. One is that A1 was not actually ill so as to warrant admission to the ICU and that was done only with a view to obtaining a statement which could subsequently be
G used against him. Alternatively. the second is that A1 was actually ill and his serious condition necessitated admission to the ICU ward. But if his condition was so serious, then we fail to understand why he was discharged from the hospital on the

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very same day. That does not seem to us to be a reasonable course and raises serious doubts in our mind. A

38. We cannot appreciate the need for PW-46 having recorded the dying declaration of A1 when A1 was sitting "hale and healthy", as deposed by PW-46 himself. No doctor treating A1 was examined as to prove and establish that A1 was seriously ill and the line of treatment given to him in the hospital. B

39. On a perusal of Ex. P-22 as a whole and Question No. 11 therein in particular it cannot be said to be a statement admissible in evidence as a dying declaration. In response to Q.11, A1 replied that "in Ahmedabad Vatva Dr. Maya Tawer's Home Nr. Cadila Bridge dated 26.01.2005 at 1:30 in night police caught and brought". There is nothing in the alleged dying declaration to show why A1 was brought to the hospital. Also, if it were recorded as a dying declaration, it should have contained the circumstances that necessitated A1's admission to the hospital. Ex. P-22 lacks that important aspect and hence it cannot be raised to the status of a dying declaration. PW-46 has stated in his testimony that he did not even make an attempt to ascertain who or what was responsible for A1's condition and why he consumed poison. Rather it seems to us that ascertaining the cause of his condition should have been the prime concern for PW-46 who went to the hospital to record the dying declaration. In this regard, it is also pertinent to note that no doctor from L.G. Hospitals who was on duty on the said day has been examined. C D E F

40. This Court in the case of *Sharawan Bhadaji Bhirad & Others v. State of Maharashtra* reported in (2002) 10 SCC 56 held that when a statement is recorded as a dying declaration and the victim survives, such statement need not stand the strict scrutiny of a dying declaration, but may be treated as a statement under Section 164, Cr.P.C. G

41. Therefore, with the said statement inadmissible as a dying declaration, the question that arises is: whether the H

A statement could be admissible either as a confession or as an extra-judicial confession?

42. The events surrounding the confession made by A1 while in hospital, and more significantly, in police custody, are too ambiguous to support conviction of the appellant.

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43. Section 164 Cr.P.C. provides guidelines to be followed for taking the statement of accused as a confession. The one essential condition is that it must be made voluntarily and not under threat or coercion. This Court in *Aloke Nath Dutta & Ors. v. State of West Bengal* reported in (2007) 12 SCC 230 held as under: -

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"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

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88. *This Court in Shankaria v. State of Rajasthan stated the law thus:* (SCC p. 443, para 23)

"23. This confession was retracted by the appellant when he was examined at the trial under Section 311 CrPC on 14-6-1975. It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. Therefore, when in a capital case the prosecution demands a conviction of the accused, primarily on the basis of his confession recorded under Section 164 CrPC, the Court must apply a double test:

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(1) Whether the confession was perfectly voluntary?

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(2) If so, whether it is true and trustworthy?

Satisfaction of the first test is a sine qua non for its admissibility in evidence. If the confession appears to the Court to have been caused by any inducement, threat or promise such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected brevi manu. In such a case, the question of proceeding further to apply the second test, does not arise. If the first test is satisfied, the Court must, before acting upon the confession reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence, there is no rigid canon of universal application. Even so, one broad method which may be useful in most cases for evaluating a confession may be indicated. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test." "

44. In *Babubhai Udesinh Parmar v. State of Gujarat* reported in (2006) 12 SCC 268, this Court held that compliance with statutory provisions is mandatory which should be in letter and spirit and not in a routine or mechanical manner.

45. As has been held by this Court in *State of UP v. Singhara Singh,* reported in (1964) 4 SCR 485, a statement that does not prescribe to the procedure laid down in Section 164 of the CrPC is not admissible as a confessional statement. In this case, the statement has neither been recorded by a Judicial Magistrate nor has it fulfilled procedural requirements, including that of a certificate to be appended by the Magistrate.

A Hence, the statement is not admissible against the appellant as a confession under Section 164.

46. Besides, in the present case, as pleaded by the appellant, A1 gave a representation on 9.5.2005 with a request to the Judicial Magistrate Court, Thenkasi and also Magistrate Court at Senkottai stating that his confessional statement which implicated the appellant was not voluntary and that he was forced to give the same by the police. Therefore, there is a doubt as to whether implication of the appellant by A1, if any, was made voluntarily. Viewed from this angle and under any circumstance, the said statement cannot be regarded as a confession as envisaged under Section 164 Cr. P.C. to implicate the appellant.

47. Therefore, the only issue that remains before us to be decided is whether the statement made by A1 may be considered as an extra-judicial confession. The concept of an extra-judicial confession is primarily a judicial creation, and must be used with restraint. Such a confession must be used only in limited circumstances, and should also be corroborated by way of abundant caution. This Court in *Ram Singh v. Sonia & Others,* reported in (2007) 3 SCC 1, has held that an extra-judicial confession while in police custody cannot be allowed. Moreover, when there is a case hanging on an extra-judicial confession, corroborated only by circumstantial evidence, then the Courts must treat the same with utmost caution. This principle has been affirmed by this Court in *Ediga Anamma v. State of AP*, reported in (1974) 4 SCC 443 and *State of Maharashtra v. Kondiba Tukaram Shirke,* reported in (1976) 3 SCC 775. It is significant to observe that A1 has subsequently sought to retract this statement upon his arrival in Tamil Nadu.

48. In *Maghar Singh v. State of Punjab* reported in (1975) 4 SCC 234, at page 236, while dealing with the question of extra-judicial confession, this Court held as follows: -

"5. .....*If the Court believes the witnesses before*

whom the confession is made and it is satisfied that the confession was voluntary, then in such a case conviction can be founded on such evidence alone as was done in Rao Shiv Bahadur Singh v. State of V.P. where their Lordships of the Supreme Court rested the conviction of the accused on the extra-judicial confession made by him before two independent witnesses, namely, Gadkari and Perulakar. In the instant case also, after perusing the evidence of PW 3 and PW 12 we are satisfied that they are independent witnesses before whom both the appellant and accused Surjit Kaur made confession of their guilt and this therefore forms a very important link in the chain of circumstantial evidence. In our opinion the argument proceeds on fundamentally wrong premises that the extra-judicial confession is tainted evidence."

49. The evidentiary value of the extra-judicial confession must be judged in the facts and circumstances of each individual case. Extra-judicial confession, if voluntarily made and fully consistent with the circumstantial evidence, no doubt, establishes the guilt of the accused. The extra-judicial confession, if voluntary, can be relied upon by the court along with other evidence in convicting the accused. However, the extra-judicial confession cannot ipso facto be termed to be tainted. An extra-judicial confession, if made voluntarily and proved, can be relied upon by the Courts.

50. This Court in *State of A.P. v. S. Swarnalatha & Others* reported in (2009) 8 SCC 383 held as follows: -

"16. .....Extra-judicial confession as is well known is a weak piece of evidence, although in given situations reliance thereupon can be placed. *(See* State of U.P. *v.* M.K. Anthony, *SCC p. 517, para 15 and* State of Rajasthan *v.* Kashi Ram, *SCC p. 262, para 14.)*"

51. In *Pakkirisamy v. State of T.N.* reported in (1997) 8 SCC 158, at page 162, this Court held: -

A "8. .....*It is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.* It is no doubt true that extra-judicial confession by its very nature is rather a weak type
B of evidence and it is for this reason that a duty is cast upon the court to look for corroboration from other reliable evidence on record. Such evidence requires appreciation with a great deal of care and caution. If such an extra-judicial confession is surrounded by suspicious
C circumstances, needless to state that its credibility becomes doubtful and consequently it loses its importance. The same principle has been enunciated by this Court in Balwinder Singh v. State of Punjab. ....."

D 52. This Court in *State of A.P. v. Kanda Gopaludu* reported in (2005) 13 SCC 116 held that extra-judicial confession is admissible if it inspired confidence and made voluntarily.

E 53. This Court in *Kavita v. State of T.N.* reported in (1998) 6 SCC 108, at page 108 held as follows: -

"4. *There is no doubt that convictions can be based on extra-judicial confession but it is well settled that in the very nature of things, it is a weak piece of evidence.* It is
F to be proved just like any other fact and the value thereof depends upon the veracity of the witness to whom it is made. It may not be necessary that the actual words used by the accused must be given by the witness but *it is for the court to decide on the acceptability of the evidence*
G *having regard tc the credibility of the witnesses.*"

54. In view of the above case law, it is made clear that an extra-judicial confession is a weak piece of evidence. Though it can be made the basis of conviction, due care and caution
H must be exercised by the Courts to ascertain the truthfulness

of the confession. Rules of caution must be applied before accepting an extra-judicial confession. Before the Court proceeds to act on the basis of an extra-judicial confession, the circumstances under which it is made, the manner in which it is made and the persons to whom it is made must be considered along with the two rules of caution. First, whether the evidence of confession is reliable and second, whether it finds corroboration.

55. In the present case, the purported dying declaration was recorded in the hospital. A1 was discharged from the hospital on the same day that his statement was recorded. That A1 later made a representation stating that the confession was not given voluntarily, raises doubts as to its truthfulness. Under these circumstances, it is to be said that the authenticity of A1's confession is not free from doubts. In the present case, A1 being the co-accused, it is not proper to convict the appellant solely on the basis of the confession of A1 – more so, when the confession is not corroborated by any evidence. Such corroborating evidence that may confirm the appellant's involvement in Aladi Aruna's murder is totally missing in this case.

56. Furthermore, we find that the statement made by A1 is insufficient to implicate the appellant in the said conspiracy as the same is hit by Section 10 of the Evidence Act. Section 10 refers to the statement of a fellow conspirator that pertains to the common intention behind the act, and such a statement can be used against the other conspirators. In the present case, we have found and held that the prosecution has failed to substantiate the allegation of conspiracy against the appellant and therefore, he could not be under any circumstance be called a co-conspirator so as to attract the provisions of Section 10 of the Evidence Act. Furthermore, this Court in *Mohd. Khalid v. State of West Bengal* reported in (2002) 7 SCC 334 and *State of Gujarat v. Mohd. Atik & Others* reported in (1998) 4 SCC 351 has held that a post-arrest statement would not fall

A within the ambit of Section 10 of the Evidence Act. Therefore, the statement made by A1 in police custody cannot be used to implicate the appellant in the conspiracy to murder Aladi Aruna.

B 57. Thus, viewed from any angle, the evidence adduced by the prosecution against the appellant is not sufficient to justify his conviction either under Section 302 or Section 307 or under Section 120-B of the Indian Penal Code.

C 58. In view of the aforesaid conclusions, we find no merit in the arguments of the Respondent. These appeals are allowed and the decision of the High Court is reversed and the appellant stands acquitted of the charges against him purely and simply on benefit of doubt. He shall be released forthwith from jail, if not wanted in any other case.

B.B.B. Appeals allowed.