CASE NO.:
Appeal (crl.) 44 of 2005

PETITIONER:
Jayendra Saraswathi Swamigal

RESPONDENT:
State of Tamil Nadu

DATE OF JUDGMENT: 10/01/2005

BENCH:
CJI R. C. Lahoti, G. P. Mathur & P.P. Naolekar

JUDGMENT:
J U D G M E N T

(Arising out of SLP(Crl.) No. 6192 OF 2004)

G.P. MATHUR, J.

1. Leave granted.

2. This appeal, by special leave, has been preferred against the order dated 8.12.2004 of Madras High Court, by which the petition for bail filed by the petitioner under Section 439 Cr.P.C. was rejected.

3 An F.I.R was lodged at 7.00 p.m. on 3.9.2004 at Police Station B-2, Vishnu Kanchi by Shri N.S. Ganesan. It was stated therein that at about 5.45 p.m. on 3.9.2004 while he was in the office of Devarajaswamy Devasthanam, two persons armed with aruval came there and caused multiple injuries to Sanakararaman, In-charge Administrative Manager, who was sitting on a chair. Three persons were waiting outside and the assailants escaped on their motor cycles. After the case was registered, necessary investigation followed and several persons have been arrested. According to the case of the prosecution, the actual assault upon the deceased was made by A-6 and A-7, while four persons, namely, A-5, A-8, A-9 and A-10 were standing outside.

4. The petitioner, Shri Jayendra Saraswathi Swamigal, who is the Shankaracharya of Kanchi Mutt, Kanchipuram, was arrested on 11.11.2004 from Mehboob Nagar in Andhra Pradesh. He moved a bail petition before the High Court of Madras, which was rejected on 20.11.2004 and the second bail petition was also rejected by the impugned order dated 8.12.2004.

5. According to the case of the prosecution, the petitioner had entered into a conspiracy with some other co-accused for getting Sankararaman murdered. The motive for the commission of the crime is said to be various complaints alleged to have been made by the deceased levelling serious allegations, both against the personal character of the petitioner and also his style of functioning as Shankaracharya of the Mutt. In the reply statement filed on behalf of State of Tamil Nadu, it is averred that the deceased had filed a complaint before the Commissioner HR&CE not to allow the petitioner to visit China. He filed a writ petition in the Madras High Court claiming the same relief which was later on dismissed as a statement was made by the petitioner that he had no intention of going to the said country. The deceased sent several letters alleging that the petitioner was selling properties of the Mutt; was indulging in corruption and misappropriation of funds. He also made complaint before Special Commissioner, HR&CE that the petitioner was not observing the rules of Sanyasa Asrama Dharma; was leading a luxurious life enjoying mundane comforts; not performing the Pooja and promoting commercial ventures. It is also the case of the

prosecution that the deceased sent a letter under the name of Somasekara Ganapadigal alleging that the petitioner was indulging in immoral activities and was having relationship with women and finally a letter was sent by him on 30.8.2004 to the petitioner as "last warning" wherein it was said that when the petitioner went to Thalakeverj, Kaveri river dried; when he went to the only Hindu Kingdom of Nepal, the entire royal family was wiped out; and when he went to Kumbakonam, there was a fire tragedy and many innocent lives were lost. Shri K.T.S. Tulsi, learned senior counsel for the State, has submitted that after receipt of this letter dated 30.8.2004 described as "last warning", the petitioner called accused A-2, A-3 and A-4 and a conspiracy was hatched for eliminating the deceased.

6. In order to establish the aforesaid motive for commission of crime, the prosecution relies upon copies of 39 letters which were allegedly recovered from the house of the deceased himself. What the prosecution claims is that the deceased used to keep copies of all the letters and complaints which he made against the petitioner and it is these copies which have been recovered from the house of the deceased. The prosecution claims that of these 39 letters or complaints 5 complaints were found in the office of HR&CE, Chennai which relate to the period 14.8.2001 to 23.1.2002, one in the residence of A-4 and 2 in the residence of the petitioner. In our opinion, the recovery of these letters from the house of the deceased himself is not a proof of the fact that they were actually received by the petitioner or were brought to his notice. The deceased was not an employee of the Mutt but was working as In-charge Administrative Manager of another Dharamsthanam which has nothing to do with Kanchi Mutt and at least since 1998 he had no connection with the said Mutt. Though according to the case of the prosecution, the deceased had started making complaints against the petitioner since August 2001, there is absolutely no evidence collected in investigation that the petitioner made any kind of protest or took any kind of action against the deceased. Even otherwise, many letters or complaints etc. are addressed to people holding high office or position and it is not necessary that they read every such letter or complaint or take them seriously. There is absolutely no evidence or material collected so far in investigation which may indicate that the petitioner had ever shown any resentment against the deceased for having made allegations against either his personal character or the discharge of his duties as Shankaracharya of the Mutt. The petitioner having kept absolutely quiet for over three years, it does not appeal to reason that he suddenly decided to have Sankararaman murdered and entered into a conspiracy for the said purpose.

7. Shri F.S. Nariman, learned senior counsel for the petitioner, has submitted that the specific case of the prosecution at the time of the hearing of the first bail application before the High Court was that a huge sum of money amounting to Rs.50 lakhs was withdrawn from an account of the Mutt maintained in ICICI Bank, Kanchipuram for being paid to the hirelings. The same stand was taken by the prosecution when the second bail application was heard by the High Court. In the two orders passed by the High Court by which the bail petitions were rejected, the plea of the State that the money was withdrawn from the account of the Mutt in ICICI Bank, Kanchipuram for payment to the hirelings is clearly mentioned. When the special leave petition was heard for admission on 17.12.2004, a detailed order was passed by this Court, wherein the State was directed to give particulars of the bank account wherefrom money is alleged to have been withdrawn by the petitioner for payment to the assailants and also to produce the copy of the account and the passbook, if any, seized by the investigating agency. However, in the statement in reply which has been filed in this Court by the State on 6.1.2005, a different stand is taken that an agreement had been entered into for sale of 50 acres of land belonging to Kanchi Janakalyan Trust to Bhargava Federation Pvt. Ltd. for Rs.5 crores, wherein an advance of Rs.50 lakhs in cash was received on 30.4.2004 and an endorsement regarding receipt of the said amount was made on the reverse side of the first page of the agreement. It was this money which was retained in cash by the petitioner all along from which payment was made to the hirelings after the conspiracy was hatched soon after the receipt of the

alleged letter dated 30.8.2004 sent by the deceased which was described as "last warning". No documents of the account in ICICI bank have been produced in support of the plea which was twice taken by the prosecution before the High Court while opposing the prayer for bail made by the petitioner.

8. N. Sundaresan (A-23) who is Manager of the Mutt was arrested on 24.12.2004 and was produced before the Judicial Magistrate, Kanchipuram at 1.45 p.m. on 25.12.2004. He stated before the Magistrate that he had received Rs.50 lakhs in cash on 30.4.2004 and the said amount was deposited in Indian Bank, Sankara Mutt Branch on 7.5.2004. Learned counsel for the petitioner has placed before the Court copies of two accounts bearing nos.124 and 125 which the Kanchi Kamakothi Peetham Shri Sankaracharya Swam has in the Indian Bank at No.1, Salai Street, Kanchipuram. This statement of account shows that on 7.5.2004 an amount of Rs.28,24,225/- was deposited in cash in account no.124 and an amount of Rs.21,85,478/- was deposited in cash in account no.125. Thus the total amount which was deposited in cash comes to Rs.50,09,703/-. Learned counsel has explained that in addition to Rs.50 lakhs which received in cash an extra amount of Rs.9,703/- was deposited in order to liquidate the overdraft over which penal interest was being charged by the bank. The statement of account clearly shows that after deposit of the aforesaid amount the entire overdraft was cleared. This clearly shows that the entire amount of Rs.50 lakhs which was received in cash on 30.4.2004 was deposited in Bank on 7.5.2004. This belies the prosecution case, which was developed subsequently after the order had been passed by this Court on 17.12.2004 directing the State to produce copy of the ICICI Bank account, that the cash money was retained by the Petitioner from which substantial amount was paid to the hirelings.

9. The prosecution also relies upon confessional statement of Kathiravan (A-4) recorded under Section 164 Cr.P.C. on 19.11.2004, wherein he stated that he went to the Kanchi Mutt on 1.9.2004 and in the presence of Ravi Subramaniam and Sundaresan, the petitioner said that Sankararaman had written letters and had filed cases and it was not possible for him to bear the torture any longer and, therefore, he should be killed on the same day. It is important to mention here that A-4 retracted his confession on 24.11.2004 when his statement was again recorded under Section 164 Cr.P.C. The prosecution also relies upon confession of Ravi Subramaniam (A-2) which was recorded on 30.12.2004 wherein he made a similar statement that the petitioner offered him Rs.50 lakhs on 1.9.2004 for getting rid of Sankararaman.

10. Shri Nariman has submitted that in view of Section 30 of the Evidence Act confession of a co-accused is a very weak type of evidence which can at best be taken into consideration to lend assurance to the prosecution case. He has referred to the decision of the Privy Council in Bhuboni Sahu v. The King AIR 1949 PC 257, wherein it was observed that confession of a co-accused is obviously evidence of a very weak type and it does not come within the definition of evidence contained in Section 3 as it is not required to be given on oath, nor in the presence of the accused and it cannot be tested by cross-examination. Learned counsel has also referred to Kashmira Singh v. State of M.P. AIR 1952 SC 159 where it was held that the confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3 and it cannot be made the foundation of a conviction and can only be used in support of other evidence. It was further observed that the proper way is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed , it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing such evidence which without

the aid of the confession he would not be prepared to rely on for basing a finding of guilty. Reliance has also been placed upon the Constitution Bench decision in Haricharan Kurmi v. State of Bihar AIR 1964 SC 1184, where it was held that the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. It was further observed that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. It has thus been urged that the confession of A-4 which was retracted by him subsequently and also that of A-2 have very little evidentiary value in order to sustain the charge against the petitioner.

11. Shri K.T.S. Tulsi, learned senior counsel, has, on the other hand, placed strong reliance on Section 10 of the Evidence Act and has submitted that this being a specific provision dealing with a case of conspiracy to commit an offence, the principle laid down in the authorities cited by Shri Nariman would not apply and anything said, done or written by any one of the accused is a relevant fact as against each of the person conspiring to commit a crime. In this connection he has referred to State of U.P. v. Buta Singh 1979 (1) SCC 31, State of Maharashtra v. Damu 2000 (6) SCC 269, Firozuddin Basheeruddin & Ors. V. State of Kerala 2001 (7) SCC 596, Prakash Dhawal Khairnar v. State of Maharashtra 2002 (2) SCC 35 and State of H.P. v. Satya Dev Sharma & Ors. 2002 (10) SCC 601.

12. The opening words in Section 10 are "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence". If prima facie evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by anyone of the conspirators in furtherance of the common object is admissible against all. Therefore, there should first be a prima facie evidence that the person was a party to the conspiracy before his acts or statements can be used against his co-conspirators. No worthwhile prima facie evidence apart from the alleged confessions have been brought to our notice to show that the petitioner along with A-2 and A-4 was party to a conspiracy. The involvement of the petitioner and A-2 and A-4 in the alleged conspiracy is sought to be established by the confessions themselves. The correct import of Section 10 was explained by the Judicial Committee of the Privy Council in Mirza Akbar v. King Emperor AIR 1940 PC 176 as under :

"The words of S.10 are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The words "common intention" signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference."

Here, the confessions of A-2 and A-4 were recorded long after the murder when the conspiracy had culminated and, therefore, Section 10 of the Evidence Act cannot be pressed into service. However, we do not feel the necessity of expressing a concluded opinion on this question in the present case as the matter relates to grant of bail only and the question may be examined more deeply at the appropriate stage.

13. Shri Tulsi has also submitted that there is also evidence of dying-declaration in order to fasten the liability upon the petitioner and for this reliance is placed upon the statement of S. Vaidyanathan, which was recorded under Section 164 Cr.P.C. on 28.12.2004. This witness has merely stated that he knew deceased Sankararaman and used to talk to him and further that at 1.30 p.m. on 3.9.2004 Sankararaman contacted him over phone and told him that his petition presented to HR&CE Department was numbered and if any danger came to him, Jayendra alone will be responsible for the same. Since the telephonic conversation which the Sankararaman had with this witness, did not relate to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, the same does not come within the purview of Section 32(1) of the Evidence Act and is not admissible in evidence.

14. Shri Tulsi, learned senior counsel for the respondent, has also referred to certain other pieces of evidence which, according to him, showed the complicity of the petitioner with the crime in question. He has submitted that the petitioner had talked on phone to some of the co-accused. The material placed before us does not indicate that the talk was with A-6 and A-7 who are alleged to have assaulted the deceased or with A-5, A-8, A-9 and A-10, who are alleged to have been standing outside. Learned counsel has also submitted that there are two other witnesses who have heard the petitioner telling some of the co-accused to eliminate the deceased. The names and identity of these witnesses have not been disclosed on the ground that the interrogation is still in progress. However, these persons are not employees of the Mutt and are strangers. It looks highly improbable that the petitioner would talk about the commission of murder at such a time and place where his talks could be heard by total strangers.

15. Shri Tulsi has lastly submitted that the prohibition contained in Section 437(1)(i) Cr.P.C. that the class of persons mentioned therein shall not be released on bail, if there appears to be a reasonable ground for believing that such person is guilty of an offence punishable with death or imprisonment for life, is also applicable to the Courts entertaining a bail petition under Section 439 Cr.P.C. In support of this submission, strong reliance has been placed on a recent decision of this Court in Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav & Anr. 2004 (7) SCC 528. The considerations which normally weigh with the Court in granting bail in non-bailable offences have been explained by this Court in State v. Capt. Jagjit Singh AIR 1962 SC 253 and Gurcharan Singh v. State (Delhi Admn.) AIR 1978 SC 179 and basically they are \026 the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. The case of Kalyan Chandra Sarkar (supra) was decided on its own peculiar facts where the accused had made 7 applications for bail before the High Court, all of which were rejected except the 5th one which order was also set aside in appeal before this Court. The 8th bail application of the accused was granted by the High Court which order was subject matter of challenge before this Court. The observations made therein cannot have general application so as to apply in every case

including the present one wherein the Court is hearing the matter for the first time.

16. For the reasons discussed above, we are of the opinion that prima facie a strong case has been made out for grant of bail to the petitioner. The appeal is accordingly allowed and the impugned order of the High Court is set aside. The petitioner shall be released on bail on his furnishing a personal bond and two sureties to the satisfaction of the Chief Judicial Magistrate, Chengleput. Shri Nariman has made a very fair statement that till the investigation is under progress, the petitioner shall not visit the Mutt premises. We accordingly direct that till the submission of the charge sheet in Court, the petitioner shall not visit the Mutt premises. He shall also surrender his passport before the CJM.

17. Before parting, we would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for bail made by the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial court seized of the trial. We have only formed a prima facie opinion and placed the same on record in fairness to the learned senior counsel for the State who raised those pleas and vehemently urged the same by citing various provisions of law and the authorities.