



CRL.A.No.587 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.01.2023

PRONOUNCED ON : 09.01.2023

CORAM

THE HONOURABLE Mr. JUSTICE P.N. PRAKASH  
AND  
THE HONOURABLE Mr. JUSTICE N. ANAND VENKATESH

CRL.A.No.587 of 2019

1.Dankinpa @ Benjamin  
2.Simlungthung @ Nihov @ Henri .. Appellants/A-1 & A-2

Vs.

State rep. by  
The Inspector of Police  
V-6 Kolathur Police Station  
Chennai  
Cr.No.745/2015  
Respondent/Complainant

..

Criminal Appeal filed under Section 374(2) Cr.P.C. against the judgment and order of conviction and sentence dated 11.07.2019 passed by the learned XVII Additional Sessions Judge, Chennai, in S.C.No.60 of 2016.



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For Appellants Mr.V.Rajamohan  
For Respondent Mr.M.Babu Muthumeeran  
Additional Public Prosecutor

## **J U D G M E N T**

**N. ANAND VENKATESH, J.**

This Criminal Appeal has been filed against the judgment and order dated 11.07.2019, passed by the learned XVII Additional Sessions Judge, Chennai, in S.C.No.60 of 2016, wherein, the appellants were convicted and sentenced in the following manner:

| <i>Offence</i>  | <i>Sentence</i>                                                                                               |
|-----------------|---------------------------------------------------------------------------------------------------------------|
| Section 302 IPC | Life imprisonment and to pay a fine of Rs.10,000/- each, in default to undergo one year rigorous imprisonment |

2. The case of the prosecution is as under :

2.1. Sheeva (deceased), Keema (injured) and the appellants were working in a hotel at Kolathur, Chennai. A1 is said to have an illicit relationship with a girl and he used to bring that girl to the hotel. This fact came to the knowledge of the hotel Manager and A1 was dismissed from



service. A1 developed enmity against Sheeva and Keema, since he thought that they were responsible for his dismissal from the job.

2.2. While so, on 13.03.2015, A1 entered the hotel room in the midnight. A2 along with Sheeva, Keema and some other persons were sleeping in the terrace of the hotel. A2 was aware about the previous enmity and hence, he decided to help the A1. After A1 entered into the hotel by opening the shutter, came to the terrace with an iron rod (shutter rod-M.O.1) and assaulted Sheeva and Keema with the iron rod (M.O.1). A2 attacked both of them with a wooden stick (M.O.2).

2.3. The above incident was witnessed by P.W.1, who was also one of the persons sleeping in the terrace and he gave a complaint (Ex.P1) before Kolathur Police Station at about 02.00 a.m. on 14.03.2015 and an FIR (Ex.P11) came to be registered in crime No.745 of 2015 for the offences under Sections 326 and 302 IPC against the accused.

2.4. The investigation was taken up by P.W.19 and he went to the



scene of occurrence and prepared the observation mahazar and rough sketch in the presence of witnesses, which were marked as Ex.P6 and Ex.P12, respectively. He also recovered a piece of bloodstained cement floor and a piece of cement floor without bloodstain under a cover of mahazar in the presence of witnesses.

2.5. The Investigating Officer (P.W.19) recorded the statements of those persons, who were present in the scene of crime and also recorded the statement of Keema, who by then, was admitted as an inpatient at Eswaran Foundation Hospital. That apart, P.W.19 also prepared the inquest report in the presence of panchayatdars and the inquest report was marked as Ex.P13.

2.6. The body of Sheeva was sent to Kilpauk Medical College and Hospital for post-mortem through P.W.10 and the post-mortem was conducted by P.W.17. The post-mortem doctor (P.W.17) recorded the following injuries that were found in the body of Sheeva :

“1.Three circular reddish brown over sheen of right leg measuring 3x2cm, 4x3cm, 3x3cm with soft tissue contusion of the underlying tissues. Reddish brown abrasion 4x3cm over the left



elbow.

2. Vertical laceration of size, 3x0.5xmuscle deep over the right forehead. Horizontal laceration measuring 5x0.5cmxmuscle deep laceration just above right eyebrow. Dark periorbital contusion seen around both eyes. Loss of upper jaw lateral incisor on the left. No other external injuries.”

The post-mortem certificate was marked as Ex.P9.

2.7. While Keema was admitted as an inpatient at Eswar Foundation Hospital, he was given first aid by P.W.13. Thereafter, he was shifted to Kilpauk Medical College and Hospital and treatment was given by P.W.16. The accident register with the opinion of P.W.16 was marked as Ex.P8.

2.8. P.W.19 arrested the accused persons on 15.03.2015 at about 11.00 a.m. and their confession was recorded in the presence of witnesses. Based on the admissible portion of their confession, M.O.1 and M.O.2 were recovered. The accused persons were remanded to judicial custody. P.W.19 recorded the statements of other witnesses and doctors and collected chemical analysis reports (Ex.P10 and Ex.P14), serology report (Ex.P15) and ultimately, completed the investigation and filed a final report on 16.04.2015 before the learned V Metropolitan Magistrate, Egmore.



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2.9. The learned Magistrate provided the copies to the accused persons under Section 207 Cr.P.C. and the case was committed to the Court of Session and was made over to the Court below. The Court below framed charges against the accused persons for the offences under Sections 302 and 307 read with 34 IPC.

2.10. The prosecution examined P.W.1 to P.W.21 and marked Ex.P1 to Ex.P15 and identified and marked M.O.1 to M.O.7. The incriminating evidence against the accused persons were put to them during questioning under Section 313(1)(b) Cr.P.C. and they denied their involvement in the case. Since the accused persons knew only Hindi language, the entire evidence was duly translated in Hindi with the help of an official translator and it was provided to the accused persons before they were questioned under Section 313 Cr.P.C.

2.11. The Court below, on considering the facts and circumstances of the case and on appreciation of oral and documentary evidence, came to a



conclusion that the prosecution has made out a case beyond reasonable doubts and proceeded to convict and sentence the accused persons for the offence under Section 302 IPC.

3. Heard Mr.V.Rajamohan, learned counsel for the appellants and Mr.M.Babu Muthumeeran, learned Additional Public Prosecutor appearing for the respondent State.

4. The learned Additional Public Prosecutor brought to the notice of this Court that the 1<sup>st</sup> appellant/A1 died on 12.04.2020 and in order to substantiate the same, a copy of the death certificate was also furnished. In view of this development, this Criminal Appeal stands abated insofar as the 1<sup>st</sup> appellant/A1 is concerned. This Court will therefore proceed to consider this criminal appeal only insofar as the 2<sup>nd</sup> appellant/A2 is concerned.

5. The prosecution has heavily relied upon the eyewitness account of P.W.1 to P.W.3, P.W.14 and P.W.15. These witnesses were present in the scene of crime, since they were also sleeping in the terrace along with



Sheeva and Keema. On carefully going through the eyewitness account of these witnesses, we do not find any major contradictions, except for some minor discrepancies as pointed out by the learned counsel for the appellants. The discrepancies that were pointed out by the learned counsel for the appellants does not in any way impact the credibility of these eyewitnesses and this Court can safely place reliance upon the evidence of these eyewitnesses. These witnesses are known to the accused persons as well as the deceased and the injured and they do not have any axe to grind against the accused persons in order to utter falsehood and rope them in this case.

6. The eyewitness account of P.W.1 to P.W.3, P.W.14 and P.W.15 is further corroborated by the evidence of the post-mortem doctor, who was examined as P.W.17. The injuries recorded in the post-mortem certificate tallies with the overt act attributed against the accused persons by the eyewitnesses. The final opinion of the post-mortem doctor was that the deceased would appear to have died of head injury.

7. The examination of the injured, would have added more strength to



the case of the prosecution. However, for the reasons best known to the prosecution, the injured person (Keema), was not examined as witness in the Court and that is the reason why the Court below rightly acquitted the accused persons for the offence under Section 307 read with 34 IPC. The non-examination of the injured person, does not really impact the case of the prosecution, since this Court has already held that the eyewitness account is reliable and can be acted upon by this Court.

8. The incident is said to have taken place at 01.00 a.m. on 14.03.2015 and the complaint came to be lodged at 02.00 a.m. *i.e.*, within an hour. The express FIR has reached the Court on the same day at 03.35 p.m. Hence, there is no delay in the lodging of complaint and there is no possibility of any deliberation in roping in the accused persons.

9. It will also be relevant to take note of evidence of P.W.16, through whom, the accident register was marked as Ex.P8. Keema was taken to the Kilpauk Medical College and hospital around 02.00 a.m. and in the accident



register (Ex.P8), there is a mention about the attack with the iron rod and a wooden stick. This piece of evidence further corroborates the eyewitness account, with regard to the time at which the incident took place and the manner in which it had taken place, including the weapons that were used by the accused persons.

10. The learned counsel for the appellants also questioned the so-called motive that was projected by the prosecution in this case. It is now well settled that where the prosecution relies upon the eyewitness account and the same is established, the aspect of motive takes a back seat. Hence, it is not necessary for this Court, to give any finding on the issue of motive not being properly established by the prosecution.

11. The learned counsel for the appellants also submitted that the best evidence that is available in this case is the CCTV footage. Admittedly, CCTV footage was available in the hotel. However, CCTV footage was not marked, since no certificate was filed under Section 65-B of the Evidence



Act. It is true that the prosecution is expected to bring in the best evidence.

CCTV footage has been held to be a silent witness in a case. Admittedly, CCTV footage recording was available and it was produced by way of a CD (M.O.3). However, since it was not accompanied with a certificate under Section 65-B of the Evidence Act, the same was not able to acted upon by the Court below. It is not as if the prosecution attempted to burke the CCTV footage. CCTV footage was not able to be relied by the Court below, on a technical reason that the same was not accompanied with a certificate under Section 65-B of the Evidence Act. In any case, CCTV footage not forming part of the evidence, does not really weaken the case of the prosecution, in view of the reliable eyewitness account.

12. The material objects were sent for chemical examination and it is clear from the evidence of P.W.18 through whom the report was marked as Ex.P10, that apart from items 2 and 6, blood was found on all the other items and it tallied with the blood group of the deceased Sheeva. This piece of evidence further strengthens the case of the prosecution.



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13. On a conspectus of the analysis of the entire evidence available on record, we do not find any ground to interfere with the finding rendered by the Court below to the effect that the accused persons were involved in the murder of Sheeva. Having rendered this finding, the next issue to be gone into is, as to whether the 2<sup>nd</sup> appellant/A2 is liable to be punished for the offence of culpable homicide amounting to murder or the offence of culpable homicide not amounting to murder or to see if the facts of the present case falls under any of the exceptions under Section 300 IPC.

14. The learned counsel for the appellants submitted that there is absolutely no explanation as to how, A1 came into the hotel and went to the terrace, when admittedly the hotel was closed by 11.00 p.m. on 13.03.2015. Hence, it was contended that the prosecution has not come out with the true version, as to how the entire incident took place. To support his contention, the learned counsel for the appellants relied upon the evidence of P.W.14, who was one of the eyewitness in this case. For better appreciation, the relevant portion in the chief-examination of P.W.14 is extracted hereunder :

“இரவு 12.00 மணிக்கு சத்தம் கேட்டு வெளியில் வந்து



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பார்த்தேன். எதிரிகள் வெறன்றி, பெஞ்சமின் மற்றும் ஷீவா, கீமா ஆகியோர் சண்டை போட்டுக் கொண்டிருந்தனர், ஷீவா என்பவருக்கு தலையிலிருந்து ரத்தம் வழிந்தது, எதிரிகள் இருவரும் ஷீவா என்ற பையனை படிக்கட்டிலிருந்து கீழே இழுத்துச் சென்றனர். தலையில் காயத்துடன் இருந்த ஷீவாவை நான் கவனித்துக் கொண்டிருந்தேன். பின்னர் கீழே வந்து பார்த்த போது படிக்கட்டின் ஓரத்தில் ஷீவா இருந்தார். எதிரிகளைக் காணவில்லை. ஷீவா உடல் முழுவதும் ரத்தமாக இருந்தது. ஆம்புலன்ஸ்க்கு போன் செய்ததும் அவர்கள் மருத்துவமனைக்கு அழைத்துச் சென்றார்கள். இது சம்பந்தமாக ஓட்டலில் விசாரித்தார்கள்.”

15. The learned counsel for the appellants also placed reliance on the accident register and submitted that there is an indication to the effect that there was a melee and the parties attacked each other. In view of the same, the learned counsel contended that the facts of the present case can be brought under exception 4 to Section 300 IPC. The learned counsel also brought to the notice of this Court the fact that the 2<sup>nd</sup> appellant/A2 has been suffering incarceration from 15.03.2015 onwards, for more than 7 years.

16. We have carefully considered the above submission made by the learned counsel for the appellants.

17. On carefully going through the evidence of eyewitnesses viz.,



P.W.1 to P.W.3, P.W.14 and P.W.15, it is seen that the 2<sup>nd</sup> appellant/A2 was also sleeping along with others, including Sheeva and Keema in the terrace.

If really the 2<sup>nd</sup> appellant/A2 has a prior motive/pre-plan to attack Sheeva and Keema, there was no reason for the 2<sup>nd</sup> appellant/A2 to wait till 01.00 a.m. for A1 to come to the scene of crime. That apart, the overt act attributed against the 2<sup>nd</sup> appellant/A2 is that, he attacked with a wooden stick (M.O.2).

18. On a cumulative reading of the evidence available on record and on applying the test of looking at the case from the perspective of a prudent man, we find that the evidence of P.W.14 sounds more natural and the incident should have taken place only in the manner in which, it has been spoken by P.W.14. There was a free fight between the parties and ultimately, Sheeva came to be attacked with M.O.1 and M.O.2. Hence, we are of the considered view that the facts of the present case can be brought within exception 4 to Section 300 IPC and it has to be held that the 2<sup>nd</sup> appellant/A2 is liable to be punished under Section 304(II) IPC. To that extent, we are inclined to interfere with the judgment and order passed by



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the Court below.

In the result, this Criminal Appeal is partly allowed and the conviction and sentence imposed by the learned XVII Additional Sessions Judge, Chennai, in S.C.No.60 of 2016, by judgment and order dated 11.07.2019, is modified and the 2<sup>nd</sup> appellant/A2 is punished for culpable homicide not amounting to murder under Section 304(II) IPC. Since the 2<sup>nd</sup> appellant/A2 has already suffered incarceration for more than seven years, his punishment can be confined to the period of imprisonment already undergone. The fine amount and the default sentence imposed by the Court below are sustained and if the fine amount is paid, the 2<sup>nd</sup> appellant/A2 shall be set at liberty, unless his presence is required in connection with any other case.

J.]

[P.N.P., J.] [N.A.V.,

09.01.2023

Index : Yes/No

Internet : Yes

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To

15/17



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1.The XVII Additional Sessions Judge  
Chennai  
(S.C.No.60 of 2016)

2.The Inspector of Police  
V-6 Kolathur Police Station  
Chennai  
(Cr.No.745/2015)

3.The Superintendent  
Central Prison  
Puzhal

4.The Public Prosecutor  
Madras High Court  
Chennai

P.N.PRAKASH, J.  
AND  
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