

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30-11-2015

Coram

The Honourable Mr.Justice R.SUDHAKAR
and
The Honourable Mr.Justice P.N.PRAKASH

Criminal Appeal No.499 of 2013

Ishad Ahamed @ Asalam Appellant

Vs.

State, represented by
Inspector of Police,
Mathikri Police Station,
Hosur
(Crime No.17 of 2012)

..... Respondent

This Criminal Appeal has been filed under Section 374(2) of Code of Criminal Procedure, questioning the conviction and sentence imposed by the learned Additional District and Sessions Judge, Krishnagiri in S.C.No.97 of 2010 dated 24.11.2012.

For Appellant : Mr.R.Sankarasubbu
for Mr.S.Manoharan

For Respondent : Mr.V.M.R.Rajendran
Additional Public Prosecutor

Reserved on	Pronounced on
5-11-2015	30-11-2015

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P.N.PRAKASH, J.

Ishad Ahamed @ Asalam, who was convicted and sentenced on 24.11.2012 in S.C.No.97 of 2010 by the Additional District and Sessions Judge, Krishnagiri, is the appellant before us.

2. The charges against which the said Ishad Ahamed @ Asalam was convicted and sentenced are as follows:

Charge u/s.	Conviction & Sentence
341 IPC	Simple Imprisonment for one year
394 r/w 397 IPC	Rigorous Imprisonment for ten years and to pay a fine of Rs.1,000/- in default, Simple Imprisonment for two months
302 IPC	Life Imprisonment and to pay a fine of Rs.1,000/-, in default Simple Imprisonment for two months
25(1b)(a) r/w.3 of Indian Arms Act	Rigorous Imprisonment for three years and to pay a fine of Rs.500/-, in default, Simple Imprisonment for one month

3. The case of the prosecution can be set out in a nutshell as under:

(a) The deceased Muniraj is the Brother-in-law of Ramamurthy (PW-3), who owns J.R.Petrol Bunk in Hosur, in which G.Anandareddy (PW-1) was working as Cashier.

(b) On 11.1.2002, the deceased Muniraj came to the Petrol Bunk and Anandareddy (PW-1) handed over the collections to the tune of Rs.3,25,070/- to Muniraj for being delivered to the owner Ramamurthy (PW-3). After collecting the money from Anandareddy (PW-1), the deceased left the Petrol Bunk by his Bajaj Scooter. Since Anandareddy's (PW-1) duty time got over, he also left the Petrol Bunk by his TVS-50. It is the case of the prosecution that Anandareddy (PW-1) was going ahead of the deceased Muniraj.

(c) Around 10.45 in the morning on 11.1.2002, Anandareddy (PW-1) heard bursting sound twice as if a tyre had burst. When he turned back, he found Muniraj had fallen from his Scooter and three persons were there next to him. One of them pulled the cash bag from Muniraj and the other two were in a Two-wheeler. Anandareddy (PW-1) came near Muniraj and he was told by Muniraj that they had opened fire on him, and that, he should move away lest they will shoot him also. Immediately Anandareddy (PW-1) informed the Manager of the Petrol Bunk over phone.

(d) Around that time, Sampangi (PW-2), then President of the Panchayat came by his Jeep, and he found the deceased Muniraj with injuries and carried him to the dispensary of Dr.Balasubramanian (PW-5), who provided immediate First Aid and referred him to the Government Hospital. Muniraj told Sampangi (PW-2) that he was shot at and the money bag was taken away. Dr.Balasubramanian (PW-5) took X-Ray, which showed presence of bullet in the stomach region.

(e) Muniraj was taken to the Government Hospital, Hosur, where Dr.Navaneethan (PW-6) examined him and made entries in the Accident Register (Ex.P-3). Dr.Navaneethan (PW-6), both in his evidence and Accident Register (Ex.P-3) has recorded three wounds, two of which are entry wounds and one is an exit wound. When Dr.Navaneethan (PW-6) examined, Muniraj told him that he was attacked by three persons, and they opened fire at him.

Dr.Navaneethan (PW-6) referred Muniraj for Specialized Treatment in view of the bullet injuries sustained by him.

(f) For Specialized treatment, Muniraj was rushed to the St.John's Medical College Hospital, Bangalore, where Dr.S.Krishna (PW-17) and Dr.Arun B.Gilpadi (PW-18) operated upon him and removed one bullet (MO-2) from his body. Dr.S.Krishna (PW-17) in his evidence as well as in the case sheet has stated,

"....., The said patient was referred from G.H.Hosur. Patient was conscious. On a examination hear

1. bullet injury 3 cm 1 cm in the left infra clavical bone, there was no exit wound.

2. 1 cm x 1 cm penetrating wound on the left side of xiphisternun. Peri.

3. 1 cm x 1 cm exit wound in right renal angle with surrounding hametoma 1 cm x 1 cm no active bleeding. X-ray bullet lodged retrosterenel region near by right apex of the chest."

The medical records viz., Case Sheets for the surgery were marked as Exs.P-22, P-23 and P-24. The bullet that was recovered from the body was handed over by Dr.Ashok J.D'Cruz (PW-19) to the Sub-Inspector of Police, HUDCO Police Station, Dharmapuri on 23.1.2002.

(g) In the meantime, on the statement (Ex.P-1) given by Anandareddy (PW-1) to the Police, Sivalingam (PW-12), Sub-Inspector of Police registered a case in Cr.No.17 of 2002 under Sections 394, 307 IPC r/w Section 25(1)(a) of the Indian Arms Act and prepared the printed FIR (Ex.P-15), which was received by the jurisdictional Magistrate at 5.00 p.m. on 11.1.2002 as could be seen from the endorsement made therein. Anandareddy (PW-1) gave the approximate age of the three assailants and also the skin colour and bare details about one of the assailants.

(h) Investigation of the case was taken up by Selvaraj (PW-10), Inspector of Police, who went to the scene of occurrence and prepared a Rough Sketch (Ex.P-12) and an Observation Mahazar (Ex.P-2) in the presence of independent witness T.M.Kumar (PW-4) and K.Munusamy (not examined).

(i) As the Police were proceeding with the investigation, Muniraj died in St.John's Medical College Hospital, Bangalore on 22.1.2002. Andi (PW-11), Inspector of Police, who succeeded Selvaraj (PW-10), conducted inquest over the body of Muniraj in the presence of Panchayatdars and the Inquest Report was marked as Ex.P-14.

(j) At the request of Police, Dr.Varghees (PW-7), Professor of Forensic Medicine, St.John's Medical College and Hospital, Bangalore, performed autopsy on the body of Muniraj on 23.1.2002 and issued Post Mortem Certificate (Ex.P-5). In the Post Mortem Certificate (Ex.P-5) and evidence before the Court Dr.Varghees (PW-7) has opined as follows:

"Death was due to septiceamia as a result of injuries sustained."

(k) After the death of Muniraj, the Police filed an Express Report (Ex.P-13) before the Jurisdictional Magistrate altering the offence into one under Section 396 IPC and Section 25(1)(a) of the Indian Arms Act on 23.1.2002.

(l) Noorullah Khan (PW-13), who succeeded Andi (PW-11), proceeded with further investigation and produced the Bullet (MO-2), recovered from the body of Muniraj before the Judicial Magistrate No.II, Hosur, for sending the same to the Ballistic Expert for opinion.

(m) On information that the accused involved in this case have been arrested in Chithoor Police Station Crime No.17 of 2002 and are in Sub-Jail, Chithoor, the Police made an application before the concerned Court and transferred the appellant herein to Sub-Jail, Hosur. On 28.2.2003 Police Custody of the appellant was given by the learned Judicial Magistrate No.II, Hosur and the appellant was interrogated by the Police.

(n) Thereafter the Police made an application to the Chief Judicial Magistrate, Krishnagiri for deputing a Magistrate for Test Identification Parade. On the orders of the learned Chief Judicial Magistrate, Krishnagiri, Sanjeev Baskar (PW-15) Judicial Magistrate conducted Test Identification Parade on 7.4.2003 at the Central Prison, Salem, observing the due formalities. Anandareddy (PW-1) identified the appellant in three shuffled rounds as one of the three persons involved in the offence. The Test Identification Parade Report was marked as Ex.P-20.

(o) The weapon used was already recovered by the Andhra Pradesh Police and at the request of the Tamil Nadu Police, the weapon was secured and sent along with the bullets by the learned Judicial Magistrate No.II, Hosur, to the Tamil Nadu Ballistic Expert, where the same were examined by Dr.Tirunavukkarasu (PW-14), who in his opinion has stated that the bullet (MO-2) could have been fired from the Country Made Weapon, that was sent to him for testing. The Ballistic Report was marked as Ex.P-11.

(p) Further investigation was continued by Muthamil Muthalvan (PW-16), who came to know that two of the co-accused in this case had died in a Police encounter in Andhra Pradesh in Sudandelpalli Police Station Cr.No.4 of 2003. The Tamil Nadu Police collected the Post Mortem Certificates of the said co-accused. Sanction under Section 39 of the Arms Act was obtained from the District Magistrate and Collector and was marked as Ex.P-21. After completing the investigation, Muthamil Muthalvan (PW-16) filed the Final Report for the offences under Sections 341, 392, 394, 397, 302, 109 r/w 302 IPC and Section 25(1)(b) of the Indian Arms Act before the Judicial Magistrate, No.II, Hosur.

(q) According to the Final Report four persons namely, (1) Ishad Ahamed @ Asalam (Appellant herein), (2) Yousuf @ Pappu, (3) Wasim Ahmed @ Shameem, and (4) Qayum @ Naseer Ahmed were involved in the offence. Of the four accused, A-3 and A-4 died in a Police encounter in Andhra Pradesh and A-2 is absconding. It is the case of the Prosecution that A-4 came in Maruti Car TL-3-CE-4530 and dashed behind the Scooter of Muniraj and after he fell down, A-1,

A-2 and A-3 robbed him of his cash of Rs.3,25,070/- and A-1 and A-3 opened fire at him.

4. The appellant was furnished with the copies of documents under section 207 of Cr.P.C. and the case was committed to the Court of Sessions and made over to the Additional Sessions Court, Krishnagiri, where Charges under Sections 341, 392, 394, 397, 302 IPC and Section 25(1b) of the Indian Arms Act were framed and when the accused was questioned, he pleaded not guilty.

5. To prove the charges, the Prosecution examined 19 witnesses, marked 25 exhibits and two Material Objects.

6. When the appellant was questioned under Section 313 Cr.P.C. in respect of the incriminating materials against him, he denied the same and gave a written explanation contending that he was innocent; that he has been falsely implicated in this case; and that, the Police showed him to several persons when he was in their custody. No witness was examined on behalf of the accused/appellant.

7. After considering the evidence adduced by the Prosecution and hearing both sides, the Sessions Court convicted and sentenced the appellant as aforesaid in paragraph No.3, challenging which this appeal has been preferred.

8. Mr.R.Sankarasubbu, learned Counsel appearing for the appellant submitted that the entire case rests on the solitary evidence of Anandareddy (PW-1), who has taken conflicting stands viz., in the Complaint given by him he has stated that three persons were involved in the offence, whereas in his evidence he has improved the version and stated that four persons are involved in the offence. Mr.R.Sankarasubbu also contended that even going by the evidence of PW-1, the accused/appellant was only a By-stander, and there is no material to show that he was involved in the offence.

9. It is true that the entire prosecution case rests on the sole testimony of Anandareddy (PW-1), and therefore this Court scrutinized his evidence with great care and circumspection. Anandareddy (PW-1) in his evidence before the Court has stated that he was working as Cashier in J.R.Petrol Bunk, owned by Ramamurthy (PW-3) and that deceased Muniraj is the Brother-in-law of PW-3. On 11.1.2002 Muniraj came to the Petrol Bunk and collected the cash from him and left in his Scooter to go home. At that time, Anandareddy's duty time got over and he also left in his TVS-50. While Anandareddy (PW-1) was going ahead of Muniraj, he heard loud explosive noise twice and immediately he stopped his vehicle and turned and witnessed that Muniraj had fallen down and three persons, including the appellant herein were present there in a Motorbike and one of them took away the cash bag from the Scooter. PW-1 clearly identified the appellant as one of the three persons, both in the Test Identification Parade as well as before the Court.

10. The contention of Mr.R.Sankarasubbu that Anandareddy (PW-1) had stated in the Chief examination that four persons were involved in the offence, is not true. Anandareddy (PW-1) stated in his evidence that three persons were there, of which one person pulled the bag and two other persons were in the Motor Cycle. Anandareddy deposed that the appellant was in Motor Cycle and therefore the contention that the appellant was a mere By-stander at the time when the incident took place, does not cut ice.

11. Mr.R.Sankarasubbu further contended that if really Anandareddy (PW-1) had gone by his TVS-50, he could not have gone ahead of deceased Muniraj, who was going by Scooter, and therefore the evidence of Anandareddy becomes suspect. It is not the evidence of Anandareddy (PW-1) that Muniraj started from the Petrol Bunk first, and he followed him. If really the Police had wanted to implicate the appellant, by planting Anandareddy (PW-1) as a witness, they would have easily made the case in such a way that Anandareddy was behind Muniraj, and that he saw the entire incident by himself. On the contrary, even in the complaint given by Anandareddy, he had stated that he was going ahead of Muniraj and only when he heard the loud noise as if a tyre had burst, he turned back and found Muniraj on the ground, and went near and witnessed one of the accused pulling the cash bag from Muniraj and the appellant was in the two-wheeler with another accused. Thus, Anandareddy (PW-1) has been maintaining a consistent version, and there is a ring of truth in his testimony.

12. Though Anandareddy (PW-1) did not see anyone firing at Muniraj, yet his evidence that he heard a loud noise of tyre burst twice; on turning back he saw Muniraj on the ground; one person taking away the cash bag; two persons of whom one is the Appellant, standing nearby in a Motorbike; and Muniraj telling him that he was shot at, are all relevant under Section 6 of the Evidence Act. The statement of Muniraj to PW-1 that he was shot at is also relevant under Section 32 as Dying Declaration.

13. The fact that Muniraj died of bullet injuries, has been proved beyond a pale of doubt by the examination of all the Doctors, who had treated Muniraj after the incident.

14. Mr.R.Sankarasubbu contended that there was inordinate delay in the conduct of the Test Identification Parade and so the identification of the Appellant by PW-1 should be ignored. It is the case of the Police that the Appellant and the other accused were involved in a similar offence in Andhra Pradesh and after reliably ascertaining that the Appellant is one of the accused involved in the case, he was brought to Tamil Nadu by due process of law. Thereafter the delay of one month in conducting the Test Identification Parade is not very huge and is quite understandable in the facts and circumstances of the case. Rajamannar, J. in

Sangiah v. Emperor (1947 MWN (Cr1) 130) sardonically observed, "Identification Parades are held not for the purpose of giving defence advocates material to work on, but in order to satisfy Investigating Officers of the bona fides of the prosecution witnesses."

The Hon'ble Supreme Court in Malkhan Singh v. State of M.P. (2003 (4) Supreme 394) has held that even failure to conduct Test Identification Parade in a given case cannot ipso facto make the identification of the accused in the dock by the witness, suspect.

15. Mr.R.Sankarasubbu, learned Counsel contended that the Post Mortem Report shows that Muniraj died of septicemia after about eight days and therefore Section 302 IPC will not be attracted, and only the offence under Section 304(ii) will be attracted. In support of his contention the learned Counsel relied upon the judgment of the Supreme Court in Jayaraj vs. State of Tamil Nadu (1976 SCC (Cr1) 293 : (1976) 2 SCC 788) and laid emphasis on paragraph 30, which reads as follows:

"30. Again this opinion of the doctor was to be appraised in the light of the circumstance that the death occurred nine or ten days after the receipt of the injury, and during this period he had been operated upon in the hospital. There is therefore no escape from the conclusion that the prosecution had failed to prove beyond all manner of doubt that this injury on the abdomen of the deceased, was sufficient to cause death in the ordinary course of nature. The act of the appellant did not amount to murder, the nature of the offence committed would be culpable homicide not amounting to murder."

Relying upon the said ruling, learned Counsel submitted that the Doctor had not given evidence that the injury sustained by Muniraj was sufficient to cause death in the ordinary course of nature. In Jayaraj's case (supra), the accused had attacked the deceased with knife and in that circumstance, the Hon'ble Supreme Court had stated so. In the case on hand, Dr.Arun.B.Gilpadi (PW-18), who operated upon Muniraj has clearly stated in the evidence that the patient died on 22.1.2002 without responding to the treatment for eight months (it should read as eight days), on account of bullet injuries. That apart, when a person opens fire from a point blank range at another, it will be ludicrous for any prudent man to infer that the assailant had no intention of causing death.

16. In this case fire was opened twice as could be seen from the evidence of PW-1, who has stated that he heard the bursting noise twice, supported by the three injuries in the body of Muniraj, of which two are bullet entry and exit injuries and one is a bullet entry injury, which did not exit and the bullet (MO-1) was surgically removed by PW-17 and PW-18. In the considered opinion of this Court, the act of opening fire twice would clearly fall

within the first portion of Section 299 and 300 IPC, which is punishable under Section 302 IPC. The opinion of the Doctor that the injury is sufficient in the ordinary course of nature to cause the death will come only when the act falls under the second part of section 299 and third part of section 300 IPC.

17. Mr.R.Sankarasubbu lastly contended that the appellant was merely a By-stander and he ought not to have been convicted even with the aid of Section 34 IPC, in the light of the judgment of the Supreme Court in Munnilal v. State of M.P. (AIR 2009 SC 1759 : (2009) 11 SCC 395). In that case, the allegation of the prosecution was that when the other accused were attacking the deceased, the appellant therein pulled the leg of the deceased, thereby facilitating the other assailant to attack the deceased to death. After having projected such a case, the prosecution failed to adduce evidence that the accused therein had pulled the leg of the deceased. This has clearly been observed by the Supreme Court in paragraph 9 (in AIR) of the above Judgment, which reads thus,

"9. The evidence of PWs.2 and 3 did not attribute any overt act to the appellant. The mere fact that he was in the company of the accused, who were armed would not be sufficient to attract Section 34 IPC. It is undisputed that the appellant was not armed and he had no animosity with the deceased. This position is also accepted by the prosecution. Additionally, the stand that he pulled the leg of the deceased has not been established."

(Emphasis Supplied)

Only under those circumstances, the Hon'ble Supreme Court held that a mere By-stander cannot be convicted under section 34 IPC.

18. In this case, the appellant is not a mere By-stander, but an active participant in the offence, inasmuch as he was found in the two-wheeler, when his accomplice pulled the money bag from the deceased and decamped.

19. The last question that falls for determination is, "what are the offences for which the appellant can be convicted based on the available evidence in this case ?" Based on the Final Report, Police Statements of witnesses, and other materials, the Trial Court framed the charge under Section 25(1-B)(a) of the Arms Act, against the appellant for possession of unauthorized Fire Arm in violation of Section 3 of the Arms Act. Police also obtained necessary sanction from the District Collector under Section 39 of the Arms Act, for prosecuting the Appellant for the offence under Section 25(1-B)(a) of the Arms Act. Anandareddy (PW-1), who is the solitary witness in this case has not stated in his evidence that the Appellant was in possession of Fire Arm, and that, he opened fire at Muniraj. The Fire Arm that was allegedly used in the commission of the offence was also not marked as a Material Object during trial. There is absolutely no evidence to show that

the Appellant was in possession of the Fire Arm at the time of the incident. It is true that someone from the group had opened fire at Muniraj, but in the absence of evidence to show that the Appellant was in possession of Fire Arm, his conviction under Section 25(1-B) (a) of the Arms Act is not sustainable, and hence he is acquitted of the said charge.

20. Just because the Appellant is acquitted of the charge under Section 25(1-B) (a) of the Arms Act, this Court cannot come to the inference that no Fire Arm was ever used for causing the death of Muniraj. The Prosecution has satisfactorily proved that three persons accosted the deceased Muniraj of whom one is the Appellant and fire was opened at Muniraj and the cash bag was snatched away from him. Though a charge under Section 302 IPC was framed by the Trial Court against the Appellant on the premise that he was in possession of a Fire Arm, and that he opened fire at Muniraj, yet the evidence of Anandareddy (PW-1) falls short of proving this assertion in its entirety. Anandareddy (PW-1) heard the sound of tyre burst and when he turned back, he found that Muniraj had already fallen on the ground; three persons were near him; one pulled the cash bag; two were sitting in the Motorbike of whom one was the Appellant. Hence there is no direct evidence to show, who among the three had opened fire at Muniraj. Of course, this cannot absolve the appellant from the criminal liability. The following verse from John Milton's Sonett "On His Blindness" that was employed by the Privy Council in Barendra v. King Emperor (AIR 1925 PC 1) for expatiating the contours of Section 34 IPC can be applied here too in all fours;

"They also serve, who only stand and wait"

21. Though a charge under Section 302 read with 34 IPC was not framed by the Trial Court, yet the conviction of the Appellant for the offence under Section 302 IPC with the aid of Section 34 is not illegal as held by the Supreme Court in Ramji Singh v. State of Bihar (2001 (7) Supreme Today 751). Unlike Section 149 IPC, Section 34 IPC does not create any substantive offence, and that, it is only a rule of evidence. Similarly, it can be seen from the evidence of Anandareddy (PW-1) that it was not this Appellant, who had pulled the cash bag from the victim, but one of his accomplice.

22. In the result,

(a) the conviction and sentence of the Appellant under Section 25(1-B) (a) of the Arms Act is set aside;

(b) the conviction and sentence of the Appellant under Section 341 IPC is upheld;

(c) the conviction of the Appellant under Section 394 read with 397 IPC is altered to one under Section 397 read with 34 IPC, and the sentence imposed by the trial Court is confirmed; and

(d) the conviction of the Appellant under Section 302 IPC is altered to one under Section 302 read with 34 IPC, and the sentence imposed by the Trial Court is confirmed.

With the above modifications, the Criminal Appeal stands dismissed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

vr

To

1. The Additional District and Sessions Judge,
Krishnagiri, through
The Principal District and Sessions Judge, Krishnagiri
 2. The Judicial Magistrate
Hosur
 3. The Public Prosecutor, High Court, Madras.
 4. The Superintendent, Central Prison, Salem.
 5. The Inspector of Police, Mathikri Police Station,
Hosur.
 6. The Superintendent of Police, Krishnagiri.
 7. The Superintendent
Central Prison
Bangalore
- 1 cc to Mr.S. Monoharan, Advocate, sr. 65272

C.A.No.499 of 2013

KGK (CO)
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