

Bail Slip:- The accused 1 & 2 namely 2. Seeman (a) Subash S/o. Doss 2. Rajeswari W/o. dass (now died) as per order this court dated 5.12.2016 in CrI.A.1006/07) were released on bail as per order of this court dated 14.11.2007 made in M.P.No.1/2007 in. CrI.A.No.1006 of 2007.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30-11-2016

PRONOUNCED ON : 05.12.2016

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

CrI.A.No.1006 of 2007

1 Seeman @ Subash
2 Rajeswari (died) ... Appellants/A-1 & A-2

Versus

State by
The Inspector of Police,
K-2 Ayanavaram Police station,
Chennai. ... Respondent/Complainant

Criminal Appeal filed under Section 374 of Cr.P.C against the Judgment of the learned Additional District and Sessions Judge, (Fast Track Court-V), Chennai in S.C.No.308 of 2007 dated 31.10.2007.

For Appellants : Mr.V.Krishnamoorthy,
Senior Counsel for Dr.J.Daniel.

For Respondent : Mr.R.Sekar, G.A. (CrI.side)

JUDGMENT

A-1 and A-2 in the Sessions case in S.C.No.308 of 2007 on the file of the learned Additional Additional Sessions Judge (Fast Track Court-V), Chennai are the appellants.

2. A-1 was tried for charges under Sections 302, 341, 325 IPC and A-2 was tried for charges under Section 341, 302 r/w 34, and 325 r/w 34 IPC.

3. After trial, the trial Court acquitted them from the charges under section 302 and 302 r/w 34 IPC respectively. However, found them guilty and sentenced them as detailed below:

Accused	Conviction	Sentence
A-1	(i) Section 341 IPC	6 months R.I.
	(ii) Section 325 IPC	2 years R.I. and fine Rs.2000/- i/d 3 months R.I.
	(iii) Section 304 (ii) IPC	4 years R.I. and fine Rs.8000/- i/d 6 months R.I.
A-2	(i) Section 304 (ii) r/w 34 IPC	2 years R.I. and fine Rs.8000/- i/d 6 months R.I.
	(ii) Section 325 r/w 34 IPC	2 years R.I. and fine Rs.2000/- i/d 3 months R.I.
	(iii) Section 341 IPC	6 months R.I.

4. Their multiple sentences were directed to run concurrently. Out of the total fine amount of Rs.20,000/-, Rs.15,000/- has been ordered to be paid to PW-1 as compensation under Section 357 Cr.P.C.

5. The case of the prosecution briefly runs as under:

(1) PW-1 and Rajasukumar are spouses. They are running a Provision Stores at door No.55, Madurai street, Ayanavaram, Chennai. A-2 is wife of one Doss. Their son is A-1. They are residing nearby. Doss has to pay Rs.1000/- to Rajasukumar. Doss passed away. PW-1 and Rajasukumar asked the said amount from A-1 and A-2. In this regard, enmity arose between them.

(2) On 6.2.2007, at about 9.30 p.m., when PW-1 and her husband were in their shop, A-1 and A-2 came. A-1 assaulted Rajasukumar with MO-1 stick on his head. He fell down. A-2 restrained PW-1. A-1 kicked Rajasukumar on his chest. A-1 and A-2 assaulted PW-1. PWs-2 and 3, brother and mother of Rajasukumar witnessed the occurrence. The accused have threatened to kill them. And they sped away.

(3) At about 10 p.m., Rajasukumar was rushed to the nearby Railway Hospital in Perambur. PW-9 Dr.Venkatesh examined him and referred him to VHS hospital, Adyar.

(4) On 7.2.2007, at about 4.10 a.m., at K-2 Ayanavaram Police station, Head Constable 3636 Karuppasamy received phone message from Railway hospital that Rajasukumar and PW-1 were brought to the said hospital for treatment.

(5) At V.H.S. hospital Dr.Vikram treated Rajasukumar. On 7.2.2007, at about 5 a.m., in the said hospital, PW-12 S.I. Of Police, K-2 Ayanavaram Police Station seen PW-1 and her husband. As they were not well, he could not examine them (Ex.P-9 Certificate).

(6) At about 9 a.m., in the said hospital, PW-12 recorded Ex.P-1 statement from PW-1. At about 12 noon, he returned to his Station and registered a case in Cr.No.88 of 2007 under section 341, 324 and 307 IPC (Ex.P-12 FIR).

(7) PW-13 Inspector took up his investigation. He visited the scene place. In the presence of PW-5 and Amulu (DW-1), prepared Ex.P-13 Observation Mahazar. Drew Ex.P-14 Rough sketch of the scene place. He examined PWs-2, 5 and DW-1 and other material witnesses and recorded their statement under Section 161 Cr.P.C.

(8) At about 2 p.m., at the Gandhi Nagar bus-stop, in New Avadi Road, Chennai, in the presence of PW-4 and one Kirubakaran, PW-13 arrested A-1 and A-2. Recorded Ex.P-15 confessional statement from A-1. In pursuance of that from a bush near a canal in Appadurai street and Palayakara junction A-1 took MO-1 stick and produced. In the presence of said witnesses PW-13 seized under Ex.P-2 Seizure Mahazar.

(9) PW-13 went to V.H.S. Hospital, Adyar. He could not examine the injured Rajasukumar. He recorded further statement of PW-1.

(10) On 8/9.2.2007, at about 9.45 a.m., at the said hospital, Rajasukumar died (Ex.P-11 death intimation). The dead body was sent to the Railway hospital. PW-13 altered the section of law to Section 302 IPC. And sent Ex.P-16 express report to the jurisdictional Magistrate.

(11) At the Railway Hospital, in the presence of Panchayatdars, PW-13 held inquest over the dead body of the deceased (Ex.P-17 inquest report). Photographer Annamalai photographed the dead body (MO-2 series). PW-6/Head Constable handed over the dead body to the Kilpauk Medical College Hospital, Chennai for postmortem.

(12) On 9.2.2007, at about 3.25 p.m., at the said hospital, PW-10 Dr.Kuppusamy conducted autopsy on the dead body of the deceased and found the following:

Injury: Right half of the head is shaved

There is operation suture wound over the right fronto parieto temporal region measuring 22 cm in length. On dissection, there is blood clot seen over the right half of the skull.

Craniotomy done on the right fronto

parieto temporal bone measuring 10 c.m. X 8 cm. There is blood clot seen over the sub dural area of brain. No other wound or injury seen.

Internal examination: Hyoid bone intact. Trachea and Larynx intact. Heart - No blood clot seen. Normal c/s congested. Lungs - normal. c/s congested; Stomach - 50 ml of green colour fluid present. Small intestine empty. Liver, Kidney spleen - normal. c/s congested. Bladder - empty. Scalp and skull - vide injury column. Membrane and brain vide injury column.

(13) PW-10 opined that the deceased would appear to have died of head injury (Ex.P-4 Postmortem Certificate). PW-6 handed over the dead body to PW-2 for performing last rites. He also handed over viscera to Forensic Science Lab, Chennai. PW-7 Forensic Scientific Assistant, after analysis found no poison in the viscera. (Ex.P-4 report). PW-8 staff of the Tamil Nadu Electricity Board certified that on 6.2.2007 at the place of occurrence, there was light (Ex.P-18 report).

(14) Concluding his investigation, PW-13 filed the final report against the accused before the committal Court for offences under Sections 341, 325, 302 r/w 34 IPC.

6. The learned Magistrate took cognizance on the final report. Furnished the accused copies of documents under Section 207 Cr.P.C. The learned Magistrate committed the case to the Court of Principal Sessions Judge, City Civil and Sessions Courts, Chennai. The learned Judge made over the case to the learned Additional Sessions Judge, (Fast Track Court-V), Chennai for trial.

7. The Trial Court after hearing both sides and on consideration of the case-records framed charges as stated already. Explained the charges to the accused. They pleaded not guilty.

8. To substantiate the charges, prosecution examined PWs-1 to 13, marked Exs.P-1 to P-18 and exhibited MOs-1 and 2.

9. The Trial Court examined the accused under Section 313 Cr.P.C. on the incriminating aspects appearing in the prosecution evidence. They denied their complicity in this case.

10. A-1 replied that the deceased only indebted to the accused, however, he has been implicated in this case.

11. A-2 replied that the deceased borrowed money from her husband and cheated him. The deceased is a drunkard. Very often quarreled with them. On 6.2.2007 afternoon, the deceased was inebriated and abused her. At about 9.30 p.m., A-1 and A-2 crossed his shop. PW-1 abused them. At about 9.45 p.m., when

they returned, PW-1 assaulted A-2 with broomstick. Rajasukumar stoned A-2. A-1 intervened. The deceased fell on the speed-breaker.

12. Amulu, wife of Kennedy is having her shop near the shop of the deceased. She was cited as a prosecution witness. But she was given up. However, accused examined her as DW-1.

13. According to DW-1, on the occurrence day, at about 9 p.m., near her shop, A-1 and A-2 came. The deceased and PW-1 stood outside their shop. The deceased was inebriated. He told PW-1 to beat A-2. Quarrel arose between them. A-1 separated them. The deceased caught hold of A-1 by his shirt. The deceased fell down on a speed-breaker. A-1 and A-2 gave him water. PW-3 kept him on her laps. PW-2 told PW-3 to leave him and they will wait for the arrival of the police. After 15 minutes, they took Rajasukumar to the nearby 24 Hours hospital. They refused to treat him. Then he was taken to Railway Hospital, Perambur. They scolded them for bringing him late. Around 12 midnight, he was treated. Thereafter he was sent to Government hospital for further treatment.

14. Upon hearing the arguments of both sides and on consideration of the evidence on record, the Trial Court acquitted them from the charge under Section 302 IPC. However, convicted them under Sections 341, 304(ii) and 325 IPC and punished them as already stated.

15. Aggrieved, A-1 and A-2 have directed this appeal.

16. Pending the appeal, A-2 passed away. Charges against her abated. Now, this appeal survives only with reference to A-1.

17. According to the learned counsel for the first appellant/ A-1, prosecution has failed to establish the offences under Sections 304(ii), 341 and 325 IPC as against the accused beyond all reasonable doubts.

18. PWs-1 to 3 who are closely related and who are highly interested cannot be believed. They made lot of improvements in their evidence before the Trial Court.

19. In this connection, the learned counsel for A-1 cited Mahendra Singh vs. State of Rajasthan {1998 (1) Crimes 394}.

20. The learned counsel for A-1 further contended that PWs-1 to 3 in not venturing to save the deceased from A-1 and A-2 exhibited a strange conduct. They lacks credibility.

21. The learned counsel for the first appellant further contended that at the time of occurrence, the deceased was drunk, quarreled with A-1 and A-2. He fell on a speed-breaker and sustained injury on his head. DW-1's evidence also establishes this. Further, PW-10/the Postmortem Doctor did not rule out the possibility of the deceased having so sustained the injury. On this aspect, PWs-1 to 3 have also been cross-examined.

22. The learned counsel for the first appellant further contended that in the circumstances, it is the duty of the prosecution to establish that the deceased sustained mortal wound on a single blow. The treatment records of the deceased from the VHS Hospital, Adyar have not been produced. At this Hospital, Dr. Vikram conducted surgery on the deceased. However, he has not been examined. In his place, PW-9 had been examined.

23. The learned counsel for the first appellant further contended that the deceased died after 3 days. In such circumstances, by relevant medical evidence, prosecution has to establish that the deceased had died due to the blow given to him by A-1. The medical record of the said hospital has not been produced.

24. In this connection, the learned counsel for A-1 cited Devendiran and Another vs. Inspector of Police, Gingee {(2003) MLJ (Crl.) 590}.

25. The learned counsel for A-1 also contended that there was no external injury on PW-1. In such circumstances, it cannot be held that she had sustained grievous injury.

26. In this connection, the learned counsel for the first appellant cited Kathi Odhabhai Bhimabhai and Others vs. State of Gujarat {1993 Crl.LJ 187}.

27. The learned counsel for A-1 also contended that the FIR is doubtful because there is delay in lodging the FIR. PW-12 admits that after recording a statement from PW-1 under Section 161 Cr.P.C., he has registered FIR. Thus, even before FIR, the investigation has been started. So the investigation is faulty.

28. The learned counsel for A-1 also contended that Section 27 Evidence Act recovery of MO-1 weapon in the presence of PW-4 is farce as PW-4 has not witnessed the actual recovery.

29. The learned counsel for A-1 also contended that during his examination under Section 313 Cr.P.C., question Nos.1 to 3 are couched in such a way that he has been confused. In such view of the matter, the trial is vitiated.

30. In this connection, the learned counsel for A-1 cited *Latu Mahto and Another vs. State of Bihar* {(2008) 3 SCC (Cr1.) 500}.

31. On the other hand, the learned Government Advocate contended that there is ample evidence that A-1 had assaulted the deceased on his head with a stick. He had fallen on the speed-breaker is a myth. Merely because PWs-1 to 3 are closely related their testimony cannot be rejected.

32. The learned counsel for the first appellant contended that PW-1 has been coached up to speak falsehood. She did not say such a thing in her statement under Section 161 Cr.P.C. At the time of occurrence since the accused are threatened, PWs-1 to 3 did not go near the deceased. Further, PW-1 herself was injured.

33. The learned Government Advocate further contended that there is clear cut medical evidence that the deceased sustained injury on his head. There was blood clot in his head. It is because of the mortal assault unleashed on him by A-1. The evidence of PW-11/ Doctor reveals that his death was due to the head injury. The evidence of Pws-9 to 11 clearly establishes that there was corresponding injury on the head of the deceased and he died out of that.

34. The learned Government Advocate further contended that the delay in lodging the FIR has been properly explained.

35. The learned Government Advocate further contended that at the hospital PW-12 obtained statement from PW-1. Then he returned to Police Station and registered the FIR. There is no flaw in it. Smell of arrack was not noted by PW-9.

36. The learned counsel for A-1 further contended that all the incriminating evidence has been put to A-1 under Section 313 Cr.P.C. The questions are very elaborate.

37. The learned Government Advocate also contended that the decisions cited by the learned counsel for A-1 are not applicable to the facts of this case.

38. I have anxiously considered the rival submissions, perused the impugned judgment, the entire materials on record and the decisions cited.

39. Now, the question is whether the prosecution has established offences under Sections 304 (ii), 325 and 341 IPC as against A-1 beyond all reasonable doubts ?

40. PW-1's husband is having a Provision Stores at

Door No.55, Madurai Street, Ayanavaram, Chennai. It is alleged that on 6.2.2007, at about 9.30 p.m., A-1 assaulted the deceased with a stick on his head violently. He also assaulted PW-1 on her head with the stick and subsequently, on 9.2.2007, her husband died.

41. As A-2 has been passed away, now this appeal survives only with reference to A-1 only.

42. PWs-1 to 3 have been examined as eye witnesses. They are wife, brother and mother respectively of the deceased. Merely because they are so related, their testimony cannot be rejected, however, it has to be scrutinised with much care and caution.

43. Ex.P-12 FIR has been lodged by PW-1. She had stated that at the time of occurrence A-1 assaulted her husband with a stick on his right head. Thereafter only he fell down on the speed-breaker. PWs-2 and 3 have corroborated her.

44. From the evidence of PWs-1 to 3, it is seen that the occurrence has taken place in a spur of moment. PW-1 was very near to her husband. She herself was hurt in the occurrence. PWs-2 and 3 were also near the scene of occurrence but A-1 has threatened to harm them. In such circumstances, they could not do anything further. In the circumstances, we do not find any unnatural conduct on their part.

45. DW-1 is the wife of PW-5. They are neighbouring shop owners. She also attested Ex.P-13 observation mahazar along with her husband. DW-1 stated that then the deceased was drunk. However, PW-9/the Railway Doctor immediately examined the deceased, he did not say that then he was drunk. PW-11/Doctor at the VHS Hospital, Adyar also did not say so. There is no mentioning about that in the postmortem report.

46. In her statement recorded under Section 161 Cr.P.C., DW-1 did not say that PW-1 and the deceased have assaulted A-1 and the deceased himself has fell on the speed-breaker and got injured. That is not the evidence of her husband/PW-5.

47. The defence suggestion to the said effect to PWs-1 to 3 has been rejected by them. Mere suggestion is not equivalent to proof. If one violently fell on a speed-breaker, naturally he will get head injury. This is what the reply of PW-10/the Postmortem Doctor to the suggestion of the defence.

48. In the facts and circumstances, the defence theory that the drunk deceased and PW-1 assaulted A-1 and A-2 and he himself fell on the speed-breaker has not been probabalised.

49. The occurrence was at about 9.30 p.m. The deceased was rushed to the nearby Railway Hospital in Perambur. PW-9 seen the injured. Immediately referred him to VHS Hospital, Adyar. There was blood clot on his head. Dr.Vikram conducted surgery. However, on the night of 8/9.2.2007, the deceased passed away. The postmortem on the dead body of the deceased by PW-10 revealed that to remove the blood clot in his head, surgery was done and he has opined that the deceased died of head injury.

50. There is abundant evidence that the deceased was assaulted on his head by A-1 with a stick. His fall on the speed-breaker itself was due to the effect of he having been so assaulted. In the facts and circumstances, through sufficient medical evidence, the deceased having died because of the mortal blow unleashed upon him by A-1 has been established. In the circumstances, Devendiran and Another vs. State through by Inspector of Police, Gingee {(2003) MLJ (CrL.) 590} is not applicable to the facts of this case.

51. Immediately after the occurrence, PW-1's husband was taken to the nearby Railway Hospital in Perambur. At the Ayyanavaram Police Station, Head Constable 3636 Karuppasamy received telephonic message of the same from the said hospital. As his condition was very critical, the injured was immediately sent to VHS Hospital, Adyar. PW-12/S.I of Police visited the said hospital at 5 a.m. The injured PW-1 was hospitalised and her husband was in unconscious stage. In such circumstances, PW-12 could not examine them immediately (see Ex.P-10 Certificate of VHS Hospital). Thereafter between 9 to 10.15 a.m., PW-12 recorded Ex.P-1 statement from PW-1, returned to his Station and around 12 noon he registered the FIR (Ex.P-12).

52. In the occurrence, a stick having been used as a weapon of offence by A-1 has been spoken to very clearly by PWs-1 to 3. The medical evidence also does not rule out the possibility of such a weapon having been used in committing the offence.

53. In the facts and circumstances, the delay in lodging the FIR and the factum of registration of FIR has been very clearly explained by the prosecution. In such circumstances, Ex.P-1 statement given by PW-1 will not be a statement under Section 161 Cr.P.C.

54. On the incriminating aspects appearing in the prosecution evidence, the Trial Court examined A-1 threadbare. The question posed to him contains the incriminating information. It is not that any piece of incriminating information has not been put to him during his examination under Section 313 Cr.P.C. In such circumstances, Latur Mahto and

Another vs. State of Bihar {(2008) 3 SCC (Cr1.) 500} is not applicable to the facts of this case.

55. In the facts and circumstances, the prosecution has successfully established an offence under Section 304 (ii) IPC as against A-1.

56. PW-1 also has been injured. PW-9 had noticed swelling on her head (Exs.P-6 and P-7 Wound Certificates). There is corresponding injury swelling on her head since A-1 had beaten her with a stick on her head.

57. In Ex.Ex.P-7, Wound Certificate, the Doctor mentioned that PW-1 had grievous injury. Except the said swelling on her head, she had no other injury. There is no X-Ray that she had sustained any fracture. In such circumstances, the injury sustained by her will be only a simple hurt. Thus, an offence under Section 325 IPC is not made out. However, an offence under Section 323 IPC is made out.

58. There is no evidence that A-1 has wrongfully restrained either PW-1 or the deceased. Thus an offence under Section 341 IPC is not made out.

59. The learned counsel for A-1 citing State of Karnataka vs. Harijan Dharma and Another {1992 Cr1.LJ 2840} submitted that the Court can release A-1 on probation under Probation of Offenders Act, 1958.

60. The facts in the said case and the facts in the present case are not similar. In the said case, a young man was involved, however, A-1 is not so and he has unleashed mortal blow on an aged man. In the facts and circumstances, the benevolent provisions of Probation of Offenders Act, 1958 shall not be extended to him.

61. In view of the foregoing, it is held as under:

(1) This Criminal Appeal is allowed in part;

(2) The conviction of first appellant/A-1 under Section 304 (ii) IPC and the sentence imposed upon him by the Trial Court are maintained;

(3) His conviction under Sections 341 and 325 IPC and the sentences imposed thereon are set aside;

(4) Instead he is convicted under Section 323 IPC and fined Rs.2,000/-, i/d 1 month RI;

(5) He is entitled to set off under Section 428 Cr.P.C.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

vaan/Svn

To

1. The Additional Sessions Judge,
(FTCNo.V),
Chennai
2. The Principal Judge,
City Civil Court,
Chennai.
3. The V Metropolitan Magistrate
Egmore at Allikulam, Chennai
4. The Superintendent,
Central Prison,
Puzhal,
Chennai.
5. The Inspector of Police,
K-2 Ayanavaram Police station,
Chennai.
6. The Public Prosecutor
High Court,
Madras.

1 cc to Dr.J. Daniel, Advocate, Sr. 71936

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