

BAIL SLIP

The Appellant/Accused Viz; Murugan S/o.Aaraan was directed to be released on bail by the order of this Court dated 30/3/2011 and made in Crl.MP.No.1/2011 in CRL.A.NO.708/11

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.03.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

and

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Criminal Appeal No.708 of 2011

Murugan

.. Appellant

- Vs -

State rep by
Inspector of Police,
Avinasipalayam Police Station,
Coimbatore District.
(Cr.No.222 of 2009)

.. Respondent

Prayer:- Appeal is filed under Section 374 of the Code of Criminal Procedure against the judgment passed by the learned Additional Sessions Judge (Fast Track Court No.5 Coimbatore) at Tiruppur in S.C.No.58 of 2011 dated 20.08.2011.

For Appellant : Mr.S.Doraisamy

For Respondent : Mr.M.Maharaja
Additional Public Prosecutor

- - - - -

J U D G M E N T

(Judgment of the Court was delivered by S.Nagamuthu, J.)

The appellant is the sole accused in S.C.No.58 of 2011 on the file of the learned Additional Sessions Judge (Fast Track Court No.5 Coimbatore) at Tiruppur. He stood charged for offence under Section 302 I.P.C. By judgment dated 20.08.2011, the trial Court convicted him under Section 302 I.P.C. and sentenced him to undergo imprisonment for life. No fine has been imposed.

Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

2. The case of the prosecution in brief is as follows:

2.1. The deceased Mrs.Jothi was the wife of the accused. They were living together at Kottaimedu village in Palladam Taluk. P.Ws.1, 2 and 4 are the father, mother and brother respectively of the deceased. They were also residing in the same street few houses away from the house of the deceased. The accused, for quite sometime, had suspicion about the chastity of the deceased. On account of the said suspicion, he used to quarrel with the deceased frequently. Thus, the accused had ill feeling against the deceased and that is stated to be the motive for the occurrence. On 05.10.2009 at about 10.00 a.m., the accused and the deceased alone were there in the house. As usual, there was quarrel between them. On hearing the cry of the deceased, P.Ws.1 to 3 rushed to the house of the accused. At that time, they found the deceased lying inside her house with bleeding injuries. The accused had a hook used for pulling gunny bags. Using the hook, he caused injury on her neck and mouth. He also strangled her with a rope and then dashed her head against the cot. P.Ws.1 to 3 tried to rescue the deceased. The accused ran away from the scene of occurrence taking the rope as well as the hook. P.Ws.1 to 3 cried for help. The deceased was unconscious and there was profuse bleeding.

2.2. When P.Ws.1 to 3 rushed the deceased to the Government hospital, Tirupur, the Doctor advised them to immediately take her to a higher medical center and referred her to Government Hospital at Coimbatore. Though treatment was given at the Government hospital at Coimbatore, the next day night at about 08.00 p.m. the deceased died in the hospital itself.

2.3. On receiving the intimation from the C.M.C. Hospital, Coimbatore, one Mr.Selvakumar the then Special Sub Inspector of Police, Avinasipalayam Police Station rushed to the house and obtained a statement from P.W.4. On returning to the police station, at 01.05 p.m. on 05.10.2009, he registered a case in Cr.No.222 of 2009 under Section 307 I.P.C. Ex.P10 is the FIR. He forwarded Ex.P1 and Ex.P10 to the Court, which was received by the learned Magistrate at 12.30 p.m. on 06.10.2009.

2.4. P.W.13 took up the case for investigation. He went to the place of occurrence at 06.30 p.m. on 06.10.2009 and prepared an observation mahazar and a rough sketch in the presence of P.W.5 and another witness. On going over to the hospital, he recovered the blood stained clothes of the deceased. He examined P.Ws.1 to 4 and recorded their statement on 06.10.2009 at 06.30 p.m. He arrested the accused in the presence of P.W.6 and another witness at 06.30 a.m near Mahalakshmi Bakery at

Koduvai village. On such arrest, he gave a voluntary confession. Then, he produced the hook from his waist and he took the police and the witnesses to his house and produced the rope. He recovered the same under a mahazar. On returning to the police station, he forwarded the accused to Court for judicial remand and also the Material objects. On 06.10.2009 at 08.15 p.m. he received intimation that the deceased died in the hospital. He altered the case into one under Section 302 I.P.C. On 07.10.2009, he conducted inquest on the body of the deceased between 07.00 a.m. and 09.00 a.m. and then, he forwarded the dead body for postmortem. P.W.11, conducted autopsy on the body of the deceased on 07.10.2009 at 01.15 p.m. and he found the following injuries:

"(1) Abrasion 3x2 cm noted on back of left leg, 5x1.5 cm noted on back of right leg, 1.5x0.5 cm noted on back of right leg, 3 cm above to ankle.

(2) Lacerated wound 3x1x1 cm noted on over left side lower lip.

(3) An oblique stab wound with lacerated margins 2x1x1 cm muscle deep noted on lower part of left side neck. The lower sharp end is 1 cm above to inner third of left clavicle. The outer blunt end is 2 cm above to middle aspect of left clavicle.

(4) An oblique stab wound with lacerated margins 0.5 cm in diameter and 0.5 cm muscle deep noted on lower part of left side neck just 1 cm above to wound No.4.

(5) An oblique stab wound with lacerated margins 0.75 cm in diameter and 0.5 cm muscle deep noted on middle part of left side neck, 5 cm above to mid clavicular bone.

(6) two transverse pressure ligature abrasion marks one two cm above the other, each measuring 32x0.75 cm, encircling the middle part of neck with a gap of 3 cm over the back of midline of neck. The ligature marks are found crossing each other in the lateral aspect of left side neck, and seen as four irregular pressure ligature abrasion marks.

Anatomical landmark of the upper ligature mark are as follows: 6 cm below to right ear, 4 cm below to chin, 3 cm below to left ear.

On bloodless direction of neck: The base of the ligature pressure abrasion is soft with areas of intermittent bruising noted beneath the all ligature marks. A transverse contusion 11x4x1 cm noted on middle part of left side and front of neck muscle at the level of thyroid cartilage and another contusion 7x2 cm noted on middle part of left side neck at the level of thyroid cartilage. A vertical fracture noted on midline of thyroid cartilage. Hyoid bone found intact."

Ex.P.6 is the postmortem certificate and Ex.P.7 is his final opinion regarding the cause of death. He opined that that deceased died due to asphyxia due to violent ligature compression of neck and its sequel associated with other injuries. He further opined that the above injuries could have been caused by a weapon like M.O.1.

2.5. Based on the above materials, the trial Court framed a lone charge under Section 302 I.P.C.. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 13 witnesses were examined, 13 documents and 4 material objects were marked.

2.6. Out of the said witnesses P.Ws.1 to 4 were examined as eyewitness. But P.W.3 turned hostile and did not support the case of the prosecution in any manner. But he has spoken only about the presence of the accused at the house of the deceased at the time of occurrence. P.Ws.1, 2 and 4 have vividly spoken about the entire occurrence in the chief examination. P.W.5 has spoken about the preparation of observation mahazar and rough sketch at the place of occurrence. P.W.6 has spoken about the arrest of the accused on 06.10.2009 at 06.30 p.m. and the recovery of the hook and the rope at the instance of the accused. P.W.7 has stated that in his taxi, the deceased was taken to the Government hospital at Tiruppur, from where, she was taken to the CMC hospital, Coimbatore. P.W.8 and 12 have turned hostile and they have not supported the case of the prosecution in any manner. P.Ws.9 and 10 have spoken only about the hearsay information. P.W.11 has spoken about the postmortem conducted and his final opinion regarding the cause of death. P.W.13 has spoken about the investigation done and the final report filed by him.

2.7. When the above incriminating materials were put to the accused, he denied the same as false. However, he did not choose to examine any witness nor mark any document on his side. His defence was total denial. Having considered all the above, the trial Court convicted him as detailed in the first paragraph of this judgment and that is how, he is before this Court with this appeal.

3. We have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records, carefully.

4. The learned counsel for the appellant would submit that the lower Court has erred in believing the eye witness account of P.Ws.1, 2 and 4. The learned counsel would point out that though in the chief examination, they had stated about the entire occurrence, during cross examination, they have stated that they were not present at the time of occurrence and therefore, they did not witness the occurrence at all. The learned counsel would further point out that they have tacitly admitted during cross examination that whatever was said by them in chief examination was only as dictated and tutored by the police and there is no truth in the same. Referring to these evidences of P.Ws.1, 2 and 4, the learned counsel submitted that these witnesses would not have seen the occurrence and therefore their evidence should be rejected.

5. We find it difficult to accept the said argument for more than one reason. First of all, in this case, P.Ws.1, 2 and 4 were examined on 14.06.2011, but there was no cross examination done by the learned counsel for the accused on that date itself. The learned Judge has recorded that there was no cross examination by the learned counsel for the accused. The case was adjourned to several hearings either at the instance of the accused or the prosecution. On the request made by the learned counsel for the accused, the witnesses were recalled for the purpose of cross examination. Accordingly, they were cross examined only on 27.06.2011. On that day, very straight questions, which were leading in nature, were put to these three witnesses. To all these three witnesses uniformly questions were asked, suggesting that they were not present at the time of occurrence and they had gone elsewhere. They have answered in the affirmative. It was also suggested to them that they did not witness the occurrence. For this also they answered positively. Lastly, it was suggested to them that whatever stated by them in chief examination on 14.06.2011 was out of tutoring and as dictated by the police. For this suggestion also they nodded their head. From the way in which questions suggesting the answers were put to the witnesses and they were made to simply nod their head in the affirmative and the fact that they were

not cross examined on 14.06.2011 and they were cross examined only on 27.06.2011 would all go to show that during the interregnum period, these witnesses had been won over by the accused.

6. But the learned counsel for the appellant would submit that had it been true that they had been won over, the learned public prosecutor would have treated them as hostile and cross examined them so as to elicit the truth. Since it was not done by the learned public prosecutor, it is not possible to infer such winning over by the accused he contended. This argument also does not persuade us. Of course, the learned counsel was right that the learned public prosecutor who conducted the case ought to have sought permission from the Court to cross examine these witnesses and treated them as hostile. But the learned public prosecutor did not attempt to adopt this legal course which is obligated upon him. We infer that it may be on account of two factors. One is due to the ignorance of the learned public prosecutor as he would have been under the mistaken impression that after the cross examination is over, a witness cannot be treated as hostile. On many occasions, we have experienced this kind of ignorance exhibited by some of the learned counsel. In the instant case, had really, the learned public prosecutor been ignorant of the legal position and failed to cross examine P.Ws.1, 2 and 4 after getting permission from the Court, the conduct of the learned public prosecutor, as a professional, cannot be doubted. The second one is that the learned public prosecutor himself would have been an obliging counsel for the accused for his own reasons. We wish that this had not happened in the case of the public prosecutor who conducted this case. If really this had been the reason which made the learned public prosecutor not to treat P.Ws.1, 2 and 4 hostile and to cross examine them so as to elicit the truth, it would be certainly a matter of concern for us. At any rate, for the failure of the prosecutor either out of ignorance or due to the deliberate assistance to the accused to come out of the clutches of law, we cannot close our eyes and allow miscarriage of justice to occur. We have got the Constitutional obligation to do justice despite the failure of any one of the stake holders in the criminal justice delivery system to discharge his duty. This Court is not sitting as a referee of a game, who is required to simply declare as to who has won the game. We have got the obligation to decide the issue before us and to do justice to the parties.

7. In Gura Singh Vs State of Rajasthan reported in (2001) 3 SCC 190 the Hon'ble Supreme Court has observed that under the common law, the hostile witness is described as one who is not desirous of telling the truth at the instance of one party calling him and an unfavourable witness is one called by a party

to prove a particular fact in issue or relevant to the issue who fails to prove such facts, or proves the opposite fact. In India, the right to cross-examine a witness by the party calling him is governed by Section 154 of the Indian Evidence Act, which permits him to put any question to him which might be put to him as provided in Section 142 of the Evidence Act. The purpose of Section 154 of the Evidence Act is to provide an opportunity to the party who has called a witness to elicit necessary evidence in order to prove the fact in issue or relevant facts. Even if the witness is so treated as hostile and cross examined with the permission of the Court, the evidence of the said witness is not washed off from the record altogether. It is for the Court to analyse the entire evidence of the said witness and if the Court finds reliance on any part of the evidence of a hostile witness in respect of any fact it is not illegal to act upon the same (vide Narayon Nathu Naik Vs. Maharashtra State reported in 1971 1 SCR 133).

8. In the instant case, since these three witnesses had been won over during the interregnum period between the chief examination and cross examination, we have to simply reject the evidences gathered during cross examination, showing obvious hostility towards the prosecution. Therefore, we reject the cross examination and we are inclined to act upon chief examination alone. In the chief examination, all these three witnesses have categorically stated that they have witnessed the entire occurrence. We do not find any reason to disbelieve their presence as well as their credibility. From these evidences, we hold that it was this accused who caused the death of the deceased.

9. The learned counsel for the appellant would point out that there were lot of lapses in the investigation. It is true. Though it is stated by P.W.1 that the deceased was immediately taken to the Government Hospital at Tiruppur, the records pertaining to the treatment given at Tiruppur Government Hospital have not been produced. The doctor who treated the patient also has not been examined. Similarly, though it is stated that the deceased was treated at CMC Hospital, Coimbatore, where she had undergone treatment for one day, neither the medical records have been produced nor the doctor has been examined. Absolutely, there is no explanation for the same. Even the Sub Inspector of Police who recorded the statement of P.W.4 and registered the case has not been examined. There is no explanation for this also. Thus, it appears, we apprehend, that the endeavour of these agencies was to ensure acquittal of the accused. Fortunately, the trial Court has not allowed it to be swayed by these endeavours. In our considered view, the trial Court was right in holding that this accused had caused the death of the deceased.

10. Now, the question is what offence was committed by the accused by his act. It is in evidence that there were frequent quarrels between the accused and the deceased. On the date of occurrence also there was quarrel. Only on hearing the noise, P.Ws.1, 2 and 4 came all the way from their house and until they reached the house, the quarrel was going on. It was only in that quarrel, the accused had attacked the deceased and caused her death. It is inferable from the evidence narrated that the accused would have been provoked by the deceased. It was only out of the said provocation, in our considered view, which was also sudden and grave, the accused had caused the death of the deceased. Thus, though the act of the accused would squarely fall within the fourth limb of Section 300 I.P.C., since it also falls under the first exception to Section 300 I.P.C., he is liable to be punished only for an offence under Section 304(ii) I.P.C.

11. Now, turning to the quantum of punishment, it is stated that the appellant has got three children who are all female, who have to be taken care of by the accused. He has no other bad antecedents. After the occurrence also, he has not committed any crime. Having regard to all these aggravating and mitigating circumstances, we are of the view that sentencing the accused to undergo Rigorous Imprisonment for five years and pay a fine of Rs.1000 in default to undergo rigorous imprisonment for four weeks would meet the ends of justice.

12. In the result, the criminal appeal is partly allowed in the following terms:

(i) The conviction and sentence imposed on the appellant by the trial Court under Section 302 IPC is set aside and instead, he is convicted under Section 304(ii) IPC and he is sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for four weeks.

(ii) It is directed that the period of detention already undergone by the accused shall be set off under Section 428 Cr.P.C.

(iii) It is reported that the accused is on bail and therefore the learned the Additional Sessions Judge, (Fast Track Court No.5 Coimbatore), Tiruppur, shall take steps to secure the appellant / accused and commit him to prison to serve the remaining portion of sentence, if any.

-s/d-

Assistant Registrar (CSIV)

True Copy

Sub-Assistant Registrar

msk/kk

To

1.The Additional Sessions Judge,
(Fast Track Court No.5 Coimbatore),
Tiruppur

2.The Chief Judicial Magistrate
Coimbatore

3.The Judicial Magistrate, Palladam

4.The Inspector of Police,
Avinasipalayam Police Station,
Coimbatore District..

5.The Superintendent
Central Prison, Coimbatore

6. The Public Prosecutor,
Madras High Court.

7.The District Collector
Coimbatore District

8.The Director General of Police
Chennai

9.The Section officer,
Criminal Section, High Court, Madras
+1 cc to M/s.S.Doraisamy Advocate sr.16889

CrI.A.No.708 of 2011

ala(co)

aa20/06/2016