

Bail Slip

The Appellant/Accused namely Kannan S/o Selvam, was directed to be released on bail as per the order of this Court dated 29.9.2015 in Mp.No.1/2015 in Crl.A.No.441/2015 on the file of this Court.

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

and

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.441 of 2015

Kannan

.. Appellant

- Vs -

The State rep. by
The Inspector of Police,
V-6, Kolathur Police Station,
Chennai.
(Cr.No.383 of 2009)

.. Respondent

Prayer:- Appeal filed under Section 374 of the Code of Criminal Procedure against the judgment passed by the learned Sessions Judge, Mahila Court, Chennai in S.C.No.186 of 2010 dated 18.09.2012.

For Appellant : Mr.S.N.Arun Kumar

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.186 of 2010 on the file of the learned Sessions Judge, Mahila Court, Chennai. He stood charged for offence under Section 498A and 302 I.P.C. By judgment dated 18.09.2012, the trial Court convicted him under Section 302 I.P.C. alone and sentenced him to undergo imprisonment for life and to pay a fine of Rs.20,000/- in

default to under go simple imprisonment for six months. 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 in this case was one Mrs.Kalavathi. The accused married her 13 years before her death. Out of the said wedlock, a male and female child were born and all of them were living together. The accused was not doing any work and thus having no income. He also became a drunkard. It was only the deceased who was doing some domestic work as a maid servant in the nearby houses and from out of the meagre income, she was maintaining the entire family. But the accused used to quarrel with her and harass her in drunken state.

2.2. On 08.09.09 at 07.00 p.m. it is stated that when the deceased was at her home, in the presence of P.W.1 his mother-in-law and his son (P.W.2) and his brother-in-law (P.W3), he dashed the head of the deceased against the floor and wall and also fisted on her neck and head. The deceased fell unconscious. The accused ran away from the place of occurrence.

2.3. P.W.1 and others took the deceased in an auto immediately to a private hospital known as Kumaran hospital. The doctor who examined her declared that she was already dead. Then P.W.1 went to the Kolathur police station and made a complaint at 08.45 p.m. on 08.09.2009. P.W.12, the then Sub Inspector of Police, registered a case in Crime No.383 of 2009 under Section 302 I.P.C. against the accused. Ex.P7 is the F.I.R. He forwarded both the documents to Court and the same was received by the learned Magistrate at 06.45 a.m. on 09.09.2009.

2.4. P.W.13 took up the case for investigation. He went to the hospital, examined P.Ws.1 to 3 and recorded their statements. Then he went to the place of occurrence and prepared an observation mahazar and a rough sketch in the presence of P.W.4 and another witness. He conducted inquest on the body of the deceased and forwarded the same for postmortem. P.W.11 conducted autopsy on the body of the deceased on 09.09.2009 at 12.30 p.m. He found the following injuries:

"No external injuries made out. On dissection of scalp, skull was intact. On opening the calvarium membranous were intact, thin film of subdural and diffuse sub arachnoid haemorrhage on right and left fronts, temporo parietal region of the brain. Base of the skull intact. On dissection of the neck, thorax, abdomen and pelvis, hyoid intact, no sub cutaneous haemorrhage, larynx and trachea empty. Heart contains clotted blood in all chambers.

Normal in size. Lungs normal in size cross section congested. Stomach was intact, contained 400 ml of undigested food residue, liver, spleen, kidney normal in size c/s congested. Bladder empty, intestines contained brown chyme. Uterus normal in size empty, spine, spinal cord and pelvis intact and normal."

Ex.P6 is the postmortem certificate. He gave opinion that the injuries on the head of the deceased could have been caused by dashing her head against a wall or the floor. He further opined that the death was due to shock and hemorrhage due to head injuries.

2.5. P.W.13, during the course of investigation arrested the accused on 09.09.2009 in the presence of P.W.3 and another witness. He gave a voluntary confession but no discovery of any fact was made out of the same. Then, he forwarded the accused to Court for judicial remand. The investigation was thereafter taken over by P.W.15. On completing the investigation, P.W.15 laid chargesheet against the accused.

2.6. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgment. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 15 witnesses were examined, 16 documents and no material objects were marked.

2.7. Out of the said witnesses, P.Ws.1 to 3 are the eyewitnesses to the occurrence. They have vividly spoken about the same. P.W.4 has spoken about the preparation of the observation mahazar and rough sketch at the place of occurrence by the investigating officer. P.Ws.5 to 8 have turned hostile and they have not supported the case of the prosecution in any manner. P.W.9 is the constable who has stated that he took the dead body and handed over the same to the doctor for postmortem. P.W.10 Dr.Radhakrishnan has stated that on 08.09.2009 at 08.00 p.m., the deceased was brought to Kumaran Health Centre where he was working as a doctor and on examination he found that the deceased was dead. Ex.P5 is the accident register. P.W.11 has spoken about the postmortem conducted and his final opinion regarding the cause of death. P.W.12 has spoken about the registration of the case on the complaint of P.W.1. P.W.14 the learned Magistrate has spoken about the recording of the statements of the witnesses under Section 164 Cr.P.C. P.Ws.13 and 15 have spoken about the investigation done and the final report filed.

3. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., 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 a total denial. Having considered all the above, the trial Court convicted him under Section 302 I.P.C. alone and that is how, he is before this Court with this appeal.

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

5. As we have already pointed out, P.Ws.1 to 3 are the eyewitnesses to the occurrence. The learned counsel for the appellant would submit that though in their respective chief examination, they have stated that they witnessed the entire occurrence, in which, the accused attacked the deceased and dashed her head against the wall and floor but during cross examination, they have stated that they did not see the occurrence. Thus, according to the learned counsel, these three witnesses cannot be believed as they have disowned as to what they have stated in the chief examination about the occurrence. We find no force in the said argument at all. P.W.1 in this case was examined in chief on 21.09.2010 but the accused did not choose to cross examine him on the same day. The trial Court recorded that there was no cross examination. P.W.2 was examined on 07.10.2010 at that time, P.W.2 was a child aged about 13 years of age, but he was not cross examined on the same day by the accused. The trial Court recorded that there was no cross examination by the accused. P.W.3 was examined on 22.10.2010 in chief examination. On that day also, the accused did not choose to cross examine him. Trial Court recorded that there was no cross examination. On a petition filed by the accused, P.W.1 was recalled and he was cross examined on 08.02.2012 i.e. nearly after 17 months. Similarly, P.W2 was recalled on a request made by the accused and he was cross examined on 09.02.2012 that is again after 17 months of the chief examination.

6. P.W.3, was recalled at the instance of the accused and was cross examined by the accused on 08.02.2012, here again after 14 months. Thus, without assigning any valid reason, the accused did not cross examine these three eye witnesses on the day when they were examined in chief. The accused simply said that he had no cross examination. After several months, they were recalled and then the accused had chosen to cross examine them and when they were so cross examined after several months, they have given certain answers as though they did not witness the occurrence and as though what was stated by them earlier were all not true.

7. In our considered view, the delay of 17 months on the

part of the accused to cross examine these witnesses, which remains unexplained, would give an irresistible inference that the accused had gained time only to win over these three witnesses and that is the reason why during cross examination they have changed their version. In such view of the matter, we are unable to attach any importance to the answers elicited during cross examination. Similarly, we do not find any valid reason to reject the fact spoken by these witnesses during their chief examination.

8. In our considered view, fair trial which is enshrined in Article 21 of the Constitution of India is a concept known not only to the accused but to the victims and the witnesses also. If the witness is recalled after several months at the whims and fancies of the accused without assigning any reason as to why they were not cross examined on the same day when they were examined in chief, in our considered view, would only amount to harassment to the witnesses violating the fair trial as enshrined in Article 21 of the Constitution of India. Section 309 of the Cr.P.C. states that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reason to be recorded in writing.

9. Here, in this case, no such special reasons had been recorded in writing by the Court. As we have already pointed out, the trial Court has recorded that the accused did not come forward to cross examine the witnesses. Thus, it is obvious that there was no special reason placed by the accused for postponement of the cross examination that is the reason why, we feel that the postponement caused by the accused to cross examine these witnesses was only with a view to win over the witnesses and therefore we are not able to attach any importance to the answers elicited during cross examination. In this regard, we may refer to the judgment of the Hon'ble Supreme Court in Vinod Kumar Vs. State of Punjab reported in (2015) 3 SCC 220. That was a case where the chief examination of a particular witness was on 30.09.1999. But, he was not cross examined on the same day. He was cross examined only on 25.05.2001, during which he exhibited hostility. While appreciating his evidence, in paragraph 40 of the judgment the Hon'ble Supreme Court has held as follows:

"40. Reading the evidence in entirety, his evidence cannot be brushed aside. The delay in cross-examination has resulted in his prevarication from the examination-in-chief. But, a significant one, his examination-in-chief and the re-examination impels us to accept the testimony that he had gone into the octroi post

and had witnessed about the demand and acceptance of money by the accused. In his cross-examination he has stated that he had not gone with Baj Singh to the vigilance department at any time and no recovery was made in his presence. The said part of the testimony, in our considered view, does not commend acceptance in the backdrop of entire evidence in examination-in-chief and the re-examination. The evidence of PW6 and PW7 have got corroboration from PW8. He in all material particulars has stated about the recovery and proven the necessary documents pertaining to the test carried with phenolphthalein powder. The fact remains that the appellant's pocket contained phenolphthalein smeared currency notes when he was searched. It is apt to take note of the fact that the currency notes that have been recovered from the right side of the pant pocket were actually prepared by PW8 by smearing them with phenolphthalein powder. The appellant was caught red-handed with those currency notes. In his statement recorded under Section 313 of CrPC he has taken the plea that he is innocent and has been falsely implicated due to animosity. No explanation has been given as regards the recovery. Therefore, from the above facts, legitimately a presumption can be drawn that the accused-appellant had received or accepted the said currency notes on his own volition. The factum of presumption and the testimony of PW6 and 7 go a long way to show that the prosecution has been able to prove demand, acceptance and recovery of the amount. Hence, we are inclined to hold that the learned trial Judge and the High Court have appositely concluded that the charges leveled against the accused have duly been proven by the prosecution. It is not a case that there is no other evidence barring the evidence of the complainant. On the contrary there are adequate circumstances which establish the ingredients of the offences in respect of which he was charged."

10. Applying the said yardstick to the facts of this case, if we appreciate the evidence of these witnesses, it would clearly go to show that it was this accused who attacked the deceased with hands and dashed her head against the wall and the floor.

11. The doctor who conducted autopsy on the body of the

deceased had found head injury and also opined that the said injury could have been caused by dashing her head against a wall or floor. He has further opined that the death was due to shock and hemorrhage due to the head injuries. Since, these head injuries were caused by the accused, we hold that the death of the deceased was caused only by this accused and none else.

12. Having come to the said conclusion, now we have to examine as to what was the offence that was committed by the accused by the above act. Admittedly, there was no motive for the accused to do away with the deceased. Almost it was usual for the accused and deceased to quarrel and on the day of occurrence also, according to P.W.2 the son of the deceased, there was a quarrel between the deceased and the accused and it was only in that quarrel, the accused had pulled her hair and dashed her head against the wall. This act of the accused, in our considered view would squarely fall within the fourth exception to Section 300 I.P.C. Since the accused would not have intended either to cause death or cause any bodily injury, but had knowledge that his act would be imminently dangerous to cause the death of the deceased, the act of the accused would fall within the 4th limb of Section 300 I.P.C. Since it would also fall under the fourth exception to Section 300 I.P.C., the appellant / accused is liable for punishment under Section 304 (ii) I.P.C.

13. Now, turning to the quantum of sentence, the appellant, at the time of occurrence, was aged about 35 years. He is a poor man and he has got no bad antecedents. The occurrence was not pre-mediated; the death of the deceased was caused by the appellant by attacking her with hands and no weapon whatsoever was used. After the occurrence also, the appellant has not shown any deviance from the law. There are lot of chances for reformation. Having regard to all these mitigating as well as the aggravating circumstances, we are of the view that sentencing the appellant to undergo rigorous imprisonment for five years and pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for four weeks would meet the ends of justice.

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

- (i) The conviction and sentence imposed on the appellant by the learned Sessions Judge, Mahila Court, Chennai in S.C.No.186 of 2010 dated 18.09.2012 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/- and 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) The fine amount now imposed shall be adjusted from the fine amount already paid, if any, and the excess, if any, shall be refunded to the appellant.

(iv) Bail bond, if any, executed by the appellant shall stand cancelled. The Trial Court shall take steps to secure the accused and commit him to prison so as to undergo the remaining period of sentence.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

svki/kk

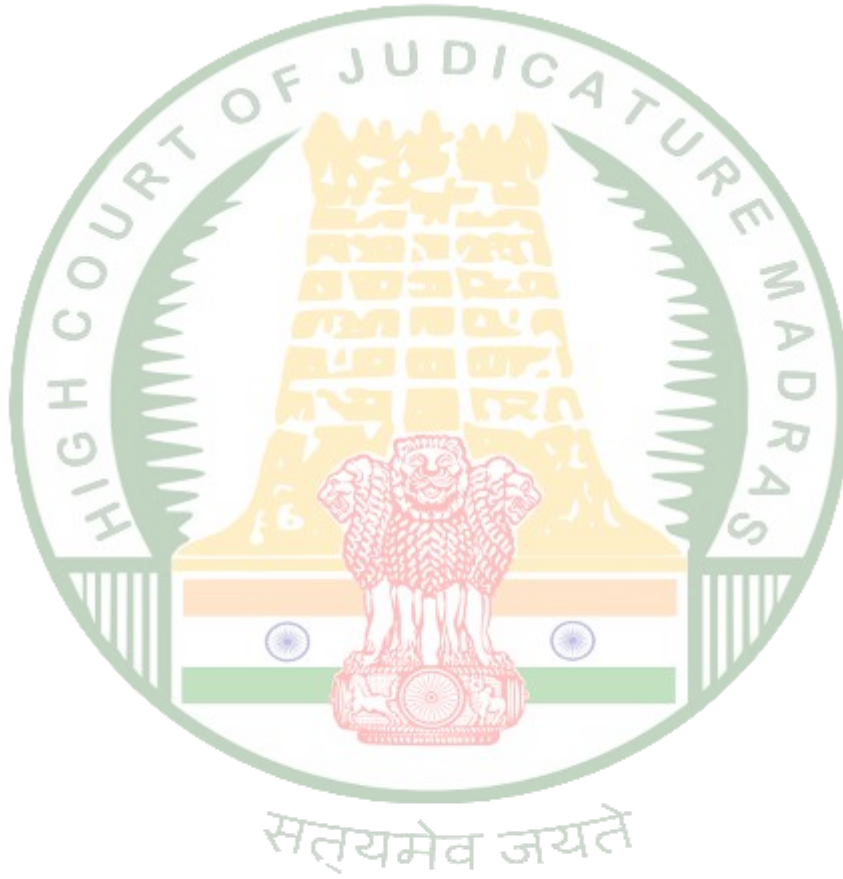
To

1. The Sessions Judge,
Mahila Court, Chennai.
2. The Inspector of Police,
V-6, Kolathur Police Station,
Chennai.
3. The Public Prosecutor,
Madras High Court.
- 4 The Judicial Magistrate
No.V Egmore, Chennai
- 5 The Chief Judicial Magistrate,
Chennai
- 6 The District Collector,
Chennai
- 7 The Director General of Police,
Chennai

8 The Superintendent,
Central Prison, Puzhal, Chennai

Cr1.A.No.441 of 2015

SK (CO)
MD : 14/10/2016



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