

Bail slip

That the Appellant/Accused namely Mariappan was directed to be released on bail as per the order of the court dated 20.07.2009 made in CrI.MP.No.1 of 2009 in CrI.A.No.399 of 2009.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.09.2016

Coram:

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

CrI.A.No.399 of 2009

Mariappan .. Appellant

vs.

State rep. by
The Inspector of Police,
Pallapatty Police Station,
Salem.

Cr.No.999 of 2007 .. Respondent

Prayer: Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, against the order of conviction and sentence passed by the learned Principal Sessions Judge, Salem in S.C.No.12 of 2008 dated 19.06.2009.

For Appellant : Mr.S.Siva Kumar

For Respondent : Mr.P.Govindarajan
Additional Public Prosecutor

J U D G M E N T
सत्यमेव जयते

The Appellant/Accused has preferred the instant Criminal Appeal as against the judgment dated 19.06.2009 in S.C.No.12 of 2008 passed by the Learned Principal Sessions Judge, Salem.

2.It comes to be known that the Learned Principal Sessions Judge, Salem while passing the impugned Judgment in S.C.No.12 of 2008 dated 19.06.2009, on an appreciation of entire oral and documentary evidence available on record had ultimately found the Appellant/Accused not guilty under Section 302 IPC. However, the Appellant/Accused was found guilty in respect of an offence under Section 323 IPC and was convicted and sentenced to

undergo imprisonment for a period of one year and he was also directed to pay a fine of Rs.1000/-, in default of payment of fine, he was directed to undergo further Simple Imprisonment for a period of one month.

3.Heard Mr.S.Sivakumar, Learned counsel for the Appellant/Accused and Mr.P.Govindarajan, Learned Additional Public Prosecutor for the Respondent/Complainant.

4.According to the Learned counsel for the Appellant/Accused, the trial Court had failed to take into account the statement of P.W.1 and P.W.2 that the Appellant/Accused sat on the deceased and beat him on his neck with hands. But P.W.5/Doctor had clearly stated in his evidence that there were injuries on the thigh, knee, left elbow and abrasion over the neck.

5.The Learned counsel for the Appellant urges before this Court that P.W.5(Doctor) had mentioned in his evidence, the cause of death was due to head injury and consumption of more alcohol. As such, it is projected on the side of the Appellant that even assuming that the occurrence took place, the cause of death of the deceased was not due to beating on the neck.

6.Advancing his argument, the Learned counsel for the Appellant takes a plea that non recovery of playing cards and bet amount created doubt whether the occurrence took place, as projected on the side of the prosecution.

7.The Learned counsel for the Appellant strenuously submits that the trial Court had failed to consider that P.W.2 had clearly stated in his evidence that they went to the spot at 3.00 p.m. for playing cards and the Appellant came there at 5.15 P.M. and that the quarrel took place for nearly one hour.

8.Added further, the Learned counsel for the Appellant brings it to the notice of this Court that in the instant case that P.W.1 had deposed that Ex.P1 was written by the Inspector of Police and he had not deposed about the address of the Accused. Further that, the police enquired him only at the time of registering the complaint.

9.By adverting to the evidence of P.W.3, that after hearing the news, he went to the spot at 5.45 p.m. and there are number of persons on the spot but he did not see the Appellant at the scene of occurrence, the Learned counsel for the Appellant takes a stand that if really the occurrence had taken place as alleged by the Respondent/Prosecution, then P.W.3, who have been an eye witness ought to have deposed the name of the accused to the Investigating Officer.

10.The Learned counsel for the Appellant by pointing out to the evidence of P.W.5 (Doctor), who found that 220 gms of partly digested food particles mixed with boiled egg and fruit juice and hence, he submitted that the occurrence could not be taken place at 5.15 p.m., as alleged by the prosecution.

11.It is the contention of the Learned counsel for the Appellant that the prosecution had failed to establish the case beyond reasonable doubts as regards the time of occurrence, place of occurrence and injuries found on the deceased.

12.Finally, it is projected on the side of the Appellant that non examination of one Velu (who administered the water) and who fetched the deceased to the bank of the lake and added further, the non examination of Karthik, Vignesh and parents of the deceased are fatal to the case of the prosecution.

13.Per contra, it is the submission of the Learned Additional Public Prosecutor that before the trial Court, on behalf of the Respondent/Prosecution, witnesses P.W.1 to P.W.7 were examined and Ex.P1 to Ex.P12 were marked and that Ex.M.O.1 to M.O.4 are marked. As a matter of fact, the trial Court on an appreciation of the entire oral and documentary evidence available on record, it came to a resultant conclusion that the Appellant/Petitioner was not guilty in respect of an offence under Section 302 IPC but he was found guilty under Section 323 of IPC and was awarded with a punishment of Simple Imprisonment for a period of one year and he was also directed to pay a fine of Rs.1000/-, in default, he was further directed to undergo Simple Imprisonment for a period of one month and the same does not suffer from any legal infirmities in the eye of Law and prayed for dismissal of the Criminal Appeal.

14.At the outset, it is to be pointed out by this Court that the Appellant/Accused was charged with an offence under Section 302 IPC to the effect that on 03.06.2007, within the jurisdiction of Pallapatti Police Station, near the thorny bush at the time of playing cards and he asked for his inclusion in the game of cards which was refused by the Shanmugam, as a result of which, a quarrel broke out and knowing fully well that it would cause death, the Appellant gave a blow on the Shanmugam's cheek and also pushed him down and sat on his chest and also by holding the head of Shanmugam with two hands dashed against the floor and also pressed his neck and strangled him, as a result of which, he sustained serious injuries on the Head and also suffered more bleeding and died on the spot.

15.At this stage, it is just and necessary for this Court to refer to the evidence of prosecution witnesses viz., P.W.1 to P.W.7 for a fuller and better appreciation of the present case in a proper and realistic fashion.

16.It is the evidence of P.W.1 that Shanmugam died in the occurrence and approximately 1 $\frac{3}{4}$ years before, on Sunday at about 5.00 p.m., he along with Shanmugam, Karthik, Vignesh, Sakthivel were playing cards (Mangatha) at thorny bush on the side of the Pallapatti lake and at 5.15 p.m., in the evening, Mariappan (Appellant/Accused) came to the place and asked Shanmugam that he would also come for playing the game of cards and for that, Shanmugam said that if he comes for playing cards, he would not pay money and cause problems/Nuisance.

17.It is the further evidence of P.W.1 that the Appellant/Accused immediately said that he is a big person in the village and gave a blow on the Shanmugam's cheek for not permitting him to play the card game and that Shanmugam fell down and further, P.W.1 proceeds to say in his evidence that Shanmugam asked the Appellant as to why he bet him, for which, the Appellant/Accused said that he was speaking against him and sat on the chest of Shanmugam and gave beating on his neck 2 to 3 times and also squeezed his neck and later he ran away. At that point of time, one Velu who was grazing the goats nearby came there and P.W.1 along with Velu joined together and poured the water in the mouth of Shanmugam which was taken from the nearby pond but the water was not dropping inside and Shanmugam was carried by himself (P.W.1) and Velu and was placed on the bank of the lake and Shanmugam was not alive at that time. Further, P.W.1 asked Velu to remain near the body of Shanmugam and he went to Pallapatti Police Station for lodging an oral complaint and that police had written the complaint which was read over to him and the complaint is Ex.P1/FIR.

18.P.W.1 (in his cross examination) had categorically denied the suggestion made on the side of the prosecution before the trial Court to the effect that only because deceased Shanmugam had scolded the Appellant's mother in bad words, the incident had taken place.

19.P.W.2 in his evidence had deposed that on the evening approximately at 5.30 p.m., the Appellant/Accused came to the place where he was playing cards with Shanmugam, Vignes, Karthick and Ganeshan at the thorny bush of the lake and in fact, the evidence of P.w.2 proceeds on the line of P.W.1 inter-alia to the effect that the Appellant/Accused pushed the Shanmugam (deceased) and also that the Appellant sat on the chest of Shanmugam and also squeezed his neck and that Shanmugam was not able to speak and that when 'Velu and Ganeshan' poured

water, water was not passing inside and there was no sign of breath of Shanmugam.

20.It is the evidence of P.W.3 that he along with another Shanmugam was taken by the police and the Inspector had wrote an Observation Ex.P2 Mahazar, in which, he had affixed his signature and also Shanmugam had signed in the said document. Continuing further, it is the evidence of P.W.3 that there was one Lungi at the place where the game of cards was played and the same was seized in Ex.P3 Mahazar and that Lungi was marked as M.O.1 and in the Ex.P3, he along with Shanmugam had signed.

21.Also that, Shanmugam's dead body was inspected and Ex.P4/Observation Mahazar was prepared, in which, he along with Shanmugam affixed their signature.

22.P.W.4 (Photographer) in his evidence had deposed that on being called from the Pallapatti Police station, he went to the spot and took photos about the scene of occurrence from two angles and thereafter, he went along with the Inspector of Police at about 8.45 p.m. and took photographs of the Shanmugam's body kept at big bank of the lake near Kalliamman Koil from five angles and he handed over two photographs along with the five other photographs and the said seven photographs were marked as Ex.P5 (series).

23.It is the evidence of P.W.5 (Dr.R.Selvakumar) that on 04.06.2007, when he was serving at Government Mohankumaramangalam Medical College and Hospital, Salem as Forensic Science Associates Professor, based on the requisition of Pallapatti Police Inspector, when he was on duty, he conducted the post mortem on the 35 years male body of the deceased Shanmugam and found that R.M. present all over the body and also observed the following:

"Appearance found at the post-mortem moderately nourished body of a male. INJURIES :- Reddish brown abrasions seen over the following areas. [1] 2x1.5 c.m. over outer aspect of upper part of Rt.thigh. [2] 2x1 cm front of Rt.knee. [3] 0.5x0.5 cm over inner aspect of Lt.knee. [4] 0.5x0.5 cm inner aspect of Rt.elbow. 5. Scratch abrasion 2.5 c.m. long over outer aspect of Lt.elbow. 6. Multiple linear scratch abrasions seen over of upper part of Lt.fore arm, outer aspect of Lt.side of abdomen, back of middle of both thighs ranging in length from 3cm to 6cm. II. Irregular reddish brown abrasion measuring 9x1 cm over front and Lt.side of neck below the thyroid cartilage. III.Horizontal reddish brown abrasion measuring 7x0.5-1c.m seen over Rt.side of neck above the

middle of sterno mastoid muscle.

O/D OF NECK : The tissue under the above mentioned injuries II, III and IV are pale and dry. There is no underlying soft tissue contusion. Hyoid bone intact. Thyroid and Cricoid cartilage-intact.

O/D HEAD : Bluish black contusion measuring 3x2x0.5 cm seen over Rt.frontal region of scalp. Bluish black contusion measuring 2.5x2x0.5cm seen over Rt. temporal region of scalp. Skull-intact. Diffuse subdural haemorrhage seen over both cerebral hemispheres. Extensive sub arachnoid haemorrhage seen all over the brain surface. Blood vessels of the base of the brain are thickened and has a beaded appearance ventricles filled with clotted blood. Base of the brain is covered with fluid and clotted blood. Brain : Multiple petichial haemorrhagic spots seen in the white matter. Finger nail bluish. HEART : Normal in size. Chambers contain fluid blood. Valves normal. Coronaries patent. Great vessels normal. LUNGS : C/S.congested. STOMACH : 220 gms of partly digested food LIVER, SPLEEN, KIDNEYS all are normal in size C/S congested. INTESTINE : Yellowish chyme present. BLADDER : Empty. HEAD, MEMBRANE, BRAIN : Vide injury column. PELVIS, SPINAL COLUMN : Intact."

the requisition of the Inspector of Police was marked as Ex.P6 and post mortem certificate was marked as Ex.P7, the visitor report was marked as Ex.P8. It is the further evidence of P.W.5 that the deceased Shanmugam would not have died if he was not assaulted when he was in a drunken state.

24.In Ex.P8, P.W.5 (Doctor) had rendered his final opinion that the deceased would have died of head injuries with alcoholic intoxication.

25.The evidence of P.W.6 is that on 03.06.2007 at about 17.15 p.m. when he was present in the Police Station taken the oral complaint of one Ganeshan S/o.Mani when he appeared (in person) before him and registered a case in P.S.Cr.No.999 of 2007 under Section 302 IPC and Ex.P9 is the registered First Information Report and gave information to the Inspector over phone and sent the FIR through express tapal to the Learned Judicial Magistrate and the Inspector of Police through one Gr.I Constable, Prabakaran 1396 by means of a passport ticket and was assisting the Inspector in his investigation.

26.P.W.7 (the Inspector of Police) in his evidence had deposed that he received the FIR of Pallapatti Police Station in Cr.No.999 of 2007 from the Sub-Inspector of Police, Manikandan and based on telephone information on 03.06.2007 at 19.10 p.m. along with Head Constable 1396 went to the spot and took up the case for investigation. Further, he examined the witnesses Kannan, Shanmugam and after inspecting the place of occurrence at 19.15 hrs prepared Ex.P2/Observation Mahazar, Rough Sketch/Ex.P10 and he took photographs through Velusamy about the place of occurrence and also in the presence of witnesses through Mahazar at 19.45 p.m. seized Lungi and at about 20.00 hrs, prepared another Observation Mahazar/Ex.P11, where the body of the Shanmugam was kept, in the presence of the witnesses and also examined the photographer Velusamy and the panchayathars through issuance of summons and inquest report is Ex.P12.

27.Proceeding further, it is the evidence of P.W.7, at the time of inquest enquiry, he examined witnesses Ganeshan, Karthick, Vignesh, Sakthivel, Velu, Sarajo and recorded their statements. Also through Police Constable 772/Saravanan at Pallapatti police station, he gave a requisition to find out the real cause of the death of Shanmugam and also recorded the statements of Karthick and Shanmugam after examining them. Further, he also examined one Tiruppati and Mallika on 04.06.2007 and recorded their statements.

28.Furthermore, based on the secret information obtained, he arrested the Appellant/Accused on being identified by witness Ganeshan and when he examined the Appellant/Accused at 5.15 hrs on his own volition gave statement and after taking a physical examination of his body, brought him to the police station at 16.45 hrs and handed over the Appellant to the para and on the same day, sent him to judicial custody. Also on the same day, he examined one Selvaraj and Gobi and recorded their statements. Besides this, on 07.06.2007 he examined Velusamy, Gr.I Police Constable 1396, Saravanan Police 772, Sub-Inspector of Police Manikandan and recorded their statements. On 25.06.2007, he obtained the Post mortem report and examined Dr.Selvakumar (P.W.5) and recorded his statement. Also, he sent the seized articles under Form 95 to the Judicial Magistrate Court, Salem and after completion of investigation on 06.07.2007, he laid a final report under Section 302 IPC against the Accused.

29.Besides the above, P.W.7 in his evidence had deposed that after completion of post mortem, he handed over the articles given by the Constable in the Police Station namely, 1) M.O.1-Orange Parrot green coloured checked polyster lungi; 2) M.O.2-torned polyster shirt; 3)M.O.3-red coloured underwear and 4)M.O.4-blue and cement coloured checked lungi which is brown in colour.

30.It is to be pointed out that the intention to cause hurt may be presumed from the nature of injury/hurt caused and the circumstances under which it was caused. Further, under Section 323 of IPC, the Prosecuting Agency is to establish a)that the Accused by his act caused bodily pain, disease or infirmity to the complainant and b)that he did such act intentionally or with knowledge that it would cause hurt etc.

31.At this stage, this Court aptly points out that in the decision Bikash Ch. Mondal V. Sasanta Mondal and others reported in 1984 CRI. L.J. at page 1191 (Calcutta) and at Special Page 1192 wherein it is held as follows:

"Where the accused stood charged along with four other accused persons under Sec.302/34, but there was no evidence to show as to on which part of the person of deceased the accused had struck with lathi, it was held that as the prosecution could not establish by satisfactory evidence that the death of deceased was caused by the accused by striking on some vital parts of his body, e.g., on his scalp or parietal bone on which injuries were noticed by the doctor at the time of holding post-mortem examination, conviction of the accused was liable to be converted from S.304 Part II IPC to one under Section 323 IPC for voluntarily causing hurt to the deceased."

32.Also this Court worth recalls and recollects the decision of Hon'ble Supreme Court Abani K. Debnath & Another V. State of Tripura reported in 2006 CRI. L.J. at page 314 and at Special page 315 wherein at para 6, it is observed and held as follows:

"6.With regard to the conviction of Amar Debnath A-5 the evidence clearly discloses that he caused the injuries on the deceased as well as prosecution with a bamboo stick. The opinion of medical Doctor is that all the injuries to others were simple in nature. His conviction under Section 323 IPC imposed by the trial Court and affirmed by the High Court and sentence of one year R.I. is justified. His conviction is accordingly maintained. It is needless to say that A-5 is also entitled to the benefit of Section 428 Cr.P.C. It is stated that both the appellants are on bail, their bail bonds and sureties stand cancelled and they are directed to be taken back to custody to serve the remaining part of sentence."

33.As far as the present case is concerned, P.W.1 in his evidence had clearly deposed about the manner of happening of occurrence. In fact, the evidence of P.W.2 had corroborated the evidence of P.W.1. Just because the Appellant/Accused was not permitted to join to play the game of cards along with the deceased Shanmugam and others, the Appellant/Accused owing to eruption of quarrel, gave a blow on the cheek of Shanmugam (since deceased) and also pushed him down and sat over his chest and hold the head of the deceased with his two hands and dashed his head on the floor, pressed his neck and squeezed it, as a result of which, he sustained Head injury and also because of oozing out of the blood, he died. Hence, the Appellant was charged under Section 302 IPC.

34.In the instant case on hand, there was no previous motive or dispute between the Appellant/Accused and the deceased Shanmugam. In reality, the Appellant/Accused had caused injury all over the sides of the neck namely, front, left, right and back sides and while pressing the neck, its effect may be on the backside of the head and due to which, the blood oozed out from the blood vessel under base of the brain, especially, when the deceased Shanmugam was under the influence of alcohol. At this stage, it cannot be ignored Ex.P8/Viscera report about the presence of ethyl alcohol in the stomach, intestine, liver, kidney, brain, blood etc. As such, in all probabilities because of the damage of blood vessel, under the base of the brain due to pressing of neck and corresponding press on the backside of the neck by the act of Appellant/Accused, Shanmugam had died. Really speaking, the Appellant/Accused had no intention or motive to kill the deceased Shanmugam or he had no prior knowledge that his act would cause death or the injury inflicted would result in death. Viewed in that perspective, this Court is of the considered view that the Appellant/Accused could not be found guilty under Section 302 IPC. Per contra, the evidence adduced on the prosecution side, unerringly point out that the Appellant/Accused had committed an offence under Section 323 IPC. There is no second opinion of the fact that Section 323 of IPC is a general section for the punishment of voluntarily causing hurt. When the death is caused by a blow by fist, there being no intention or knowledge that death would be caused, then the conviction under Section 323 of IPC is held to be proper as per decision of Jamuna Chowdhury Vs. State of Bihar, 1971 CrL. J 898.

35.In the upshot of detailed discussions, this Court holds that the trial Court had rightly found the Appellant/Accused not guilty under Section 302 IPC. However, it found him guilty under Section 323 of IPC which in the considered opinion of this Court does not suffer from any material irregularities or patent

illegality in the eye of Law. However, this Court considering the facts and circumstances of the present case in an integral manner imposes a punishment of 10 months Simple Imprisonment to the Appellant/Accused which would meet the ends of justice. Also that, this Court sets aside the fine of Rs.1000/- imposed on the Appellant/Accused by the trial Court.

36. Accordingly, the Appeal is allowed in part. It is open to the Appellant to claim the refund of Rs.1000/- paid by him from the trial Court in S.C.No.12 of 2008. The Learned Principal Sessions Judge, Salem is directed to take steps to secure the presence of the Appellant/Accused and to immure in prison for serving the remaining period of sentence.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

DP

To

1. The Principal Sessions Judge,
Salem.

2. The Public Prosecutor,
High Court, Madras.

3. The Judicial Magistrate No.II Salem

4. The Chief Judicial Magistrate
Salem

5. The Inspector of Police
Pallapatty Police Station
Salem District

+1 cc to Mr.S.Sivakumar Advocate sr 54179

CrI.A.No.399 of 2009

aa21/10/2016