



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 18.03.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Crl.A.No.54 of 2013

Selvam ... Appellant/ sole Accused

vs.

The Inspector of Police,
Thiruverkadu Police Station
Thiruverkadu,
Chennai ... Respondent/ Complainant
Crime No.188 of 2010

Criminal appeal preferred under Section 374(2) Cr.P.C.,
against the judgement dated 07.07.2010 passed by the Additional
District and Sessions Judge, Fast Track Court No.II, Poonamallee,
in S.C.No.200 of 2010.

For Appellant : Mr.R.Vivekananthan Legal Aid counsel

For Respondent : Mr.M.Maharaja, Addl.P.P.

JUDGMENT

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

The appellant is the sole accused in Sessions Case No.200 of 2010, on the file of the Additional District and Sessions Judge, Fast Track Court No.II, Poonamallee. He stood charged for the offence under Section 302 of the Indian Penal Code. By judgement dated 7.7.2011, the trial Court convicted him under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1000/-, in default, to undergo rigorous imprisonment for one year. 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:

(a) The deceased in this case was one Mr.Rajesh @ Rajesh Kannan. P.W.1 is the mother and P.W.5 is the father of the deceased. P.W.2 is the maternal uncle of the deceased and P.Ws.3 and 4 are the grand mother and grand father, respectively, of the deceased. The accused is none other than the maternal uncle of the deceased. In other words, he is the brother of P.W.1. The



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deceased was already married and he was living with P.Ws.1 to 4, under a common roof at Green Park, Thiruverkadu, in Chennai. The accused became a drunkard and he used to beat his wife, indiscriminately. On one occasion, prior to this occurrence, he attempted to strangle his wife in drunken state. Out of good will, the deceased intervened and told the accused that he would inform the police and take action against him if he continued to act in such a disorderly manner. This was not to the liking of the accused. This is stated to be the motive for the occurrence.

(b) On 16.05.2010, in the night, the accused came in a drunken state and again quarrelled with the family members. P.W.1 and others tried to persuade him. At last, they succeeded and the accused went to the bed room of the house, which was situated on the back portion of the house and slept. P.W.1 and the deceased were sleeping in the hall of the house. P.Ws.2, 3 and the wife of the deceased were sleeping in a different portion of the house. By about 3.00 a.m., on 17.5.2010, P.W.1 and other inmates heard some foul noise coming from the house. P.W.1 got up and put on the light. She found the accused standing near the deceased with a huge grinding stone. The deceased was still sleeping. Even before P.Ws.1 to 4 would intervene, the accused dropped the said grinding stone intentionally on the head of the deceased. The deceased sustained injuries on his head and he started bleeding through nose and mouth. The accused fled away from the scene of occurrence. P.W.1 and others immediately took the deceased to Sri Ramachandra Medical Hospital at Porur. P.W.9 examined the deceased at Sri Ramachandra Medical Hospital at 5.10 a.m. on 17.5.2010. The deceased was unconscious. P.W.1 told the Doctor that while the deceased was sleeping, a known person dropped a grinding stone on his head. P.W.9 found fracture of the skull, nostril bone and other bones. Since his condition was very bad, the Doctor instructed to rush him to the Government Hospital. Ex.P5 is the Accident Register. Accordingly, they shifted the deceased to the Rajive Gandhi General Hospital at Chenani, at 3.28 p.m. P.W.10 Dr.Praburaman, gave treatment to the deceased. The C.T. scan taken on the head of the deceased revealed that there was a fracture on the left and right parietal bones. There were extensive haemorrhages in the brainstem as well as in the brain. Despite, treatment, the deceased died on 22.5.2010 at 8.05 p.m. Ex.P6 is the death intimation.

(c) In the meanwhile, P.W.1 went to Thiruverkadu Police station, on 17.5.2010 at 8.00 a.m. and made a complaint under Ex.P1. P.W.15, the then Sub-Inspector of Police, on receipt of the same, registered a case in Cr.No.188 of 2010, under Sections 336 and 307 of the Indian Penal Code, on 17.5.2010 at 8.00 a.m. Ex.P14 is the First Information Report. He forwarded both the documents to the Court, which were received by the learned Magistrate at 2.30 p.m. on 17.5.2010. Then he handed over the case diary to his successor in office, viz. P.W.17, the Inspector of Police, for investigation.



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(d) P.W.17 took up the case for investigation. He proceeded to the place of occurrence and prepared an observation mahazar and a rough sketch at 9.00 a.m. on 17.5.2010, in the presence of P.W.6 and another witness. Then, he recovered the grinding stone, blood stained dhoti, blood stained pillow, another blood stained pillow, blood stained cement floor and sample floor under a mahazar, in the presence of the same witnesses. He examined P.Ws.1 to 5 and recorded their statements. On 18.5.2010, at 10.00 a.m., he arrested the accused, in the presence of P.W.7 and another witness and forwarded him to the Court for judicial remand.

(e) On 22.5.2010, after the death of the deceased at 8.05 p.m., on receipt of the death intimation, P.W.17 altered the case into one under Section 302 of the Indian Penal Code. Ex.P.18 is the alteration Report. On the next day, between 7.00 a.m. to 10.00 a.m., he conducted inquest on the body of the deceased and forwarded the dead body for postmortem. He obtained the postmortem certificate and on completing investigation, he laid final report against the accused.

3. Based on the above materials, the trial Court framed a lone charge against the accused under Section 302 of the Indian Penal Code. Since the accused denied the same, on the side of the prosecution, as many as 17 witnesses were examined, 19 documents and 7 material objects were marked. Out of the said witnesses, P.Ws.1 to 4, the family members of the deceased, were eyewitnesses to the occurrence. P.W.5 is the father of the deceased, who has stated that he came to the place of occurrence, on hearing about the occurrence and found the deceased with injuries. P.W.6 has spoken about the observation mahazar, the rough sketch prepared at the place of occurrence, the recovery of material objects, including the grinding stone. P.W.7 has spoken about the arrest of the accused on 18.5.2010 at 10.00 a.m. P.W.8 has stated that at around 3.00 a.m. on 17.5.10 he found the accused roaming elsewhere outside the house of the deceased. P.W.9 has spoken about the treatment given to the deceased at Sri Ramachandra Medical Hospital at 5.10 a.m. on 17.5.2010. P.W.10 has spoken about the treatment given to the deceased at the Government Rajive Gandhi Hospital at Chennai and the death of the deceased on 22.5.2010 at 8.05 a.m. P.W.11 has spoken about the chemical analysis conducted on the material objects. According to her, she found blood stains on all the material objects, including the grinding stone. P.W.12 has spoken about the statement of witnesses recorded by her. P.W.15 has spoken about the registration of the case and the complaint of P.W.1. P.W.16 is the official from the Tamil Nadu Electricity Board. He has stated that at the place of occurrence there was no electricity failure, at the time of occurrence. P.W.17 has spoken about the investigation done and his final report.

4. 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 on his side nor mark any document. His defence was a total denial.



5. Having considered all the above, the trial Court convicted the accused under Section 302 of the Indian Penal Code and that is how he is before this Court with this appeal.

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6. In this appeal, the learned counsel Tmt.K.R.Vairam, who was on record for the appellant, did not come forward to argue the matter and there was no representation. Therefore, this Court appointed Mr.R.Vivekananthan as a Legal Aid counsel to argue the case. According to him, he informed the accused in prison about the same.

7. During the course of argument, on the first day of hearing of the appeal, he pointed out that the postmortem certificate had not been proved properly. The learned counsel pointed out that the post-mortem certificate Ex.P7 had not been proved, in accordance with law, by examining the doctor, who conducted autopsy on the body of the deceased. We found force in the said argument. It is not as though the doctor who conducted autopsy was not available for being examined in Court. In this regard we may refer to the judgement of the Honourable Supreme Court in Vijender vs. State of Delhi, reported in (1997)6 Supreme Court Cases 171, wherein in an identical situation, where the postmortem certificate was marked through a clerk from the hospital and not examining the doctor, the Court has held as follows:

"19.It passes our comprehension how the trial Judge entertained the post-mortem report as a piece of documentary evidence on the basis of the above testimony of a clerk in spite of legitimate objection raised by the defence. In view of Section 60 of the Evidence Act, referred to earlier, the prosecution is bound to lead the best evidence available to prove a certain fact; and in the instant case, needless to say, it was that of Dr.U.C.Gupta, who held the post-mortem examination. It is of course true that in an exceptional case where any of the prerequisites of Section 32 of the Evidence act is fulfilled a post-mortem report can be admitted in evidence as a relevant fact under sub-section (2) thereof by proving the same through some other competent witness but this section had no manner of application here for the evidence of P.W.21 clearly reveals that on the day he was deposing Dr Gupta was in that hospital. The other reason for which the trial Judge ought not to have allowed the prosecution to prove the post-mortem report is that it was not the original report but only a carbon copy thereof, and that too not certified. Under Section 64 of the Evidence Act document must be proved by primary evidence, that is to say, by



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producing the document itself except in the cases mentioned in Section 65 thereof. Since the copy of the post-mortem report did not come within the purview of any of the clause of Section 65, it was not admissible on this score also."

8. This Court in Jerald vs. State, reported in 2001(2) LW (Crl) 615 has held as follows:

"3. The learned counsel appearing for the petitioner submits that the petitioner is entitled for acquittal since the prosecution has miserably failed to prove the cause of death. Ex.P6 the post-mortem certificate, was produced before the Court by the Investigating Officer and the Doctor, who conducted autopsy had not been examined and the prosecution has not given any reason for non-examination of the doctor. According to him, the non-examination of the Doctor is fatal for the prosecution and the contents of the documents are inadmissible as they were not spoken to by the person who prepared it. I see every force in the contention of the learned counsel. The doctor, who issued the certificate, though according to the prosecution conducted autopsy, was not examined and no explanation was offered by the prosecution before the court, as to why he was not examined. This Court cannot presume the cause of death as it cannot rely upon Ex.P6, as the said document was not proved in terms of the provisions of Evidence Act. As the cause of death is not proved, in my view, the petitioner is, entitled for acquittal and he is, accordingly, acquitted. The revision is allowed."

9. In yet another case in Arumugam vs. State, reported in 2001(2) LW(crl) 773, this Court has held as follows:

"When the above document was marked without examining the author of the document, it was objected by the petitioner and therefore, it must be said that the documents were marked without the consent of the petitioner. Secondly, even if a document has been marked under Section 294 Cr.P.C. it must be in accordance with the procedure contemplated under the said Section viz., that the list of documents shall be in such form as may be prescribed by the State Government. The prosecution did not mark the list of documents in the said form prescribed by the State Government. It is to be remembered at this



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stage that the Government of Tamil Nadu passed an Government Order in G.O.Ms.No.258 (Courts-V) dated 8.2.1983, prescribing the proforma stating that the documents can be marked only in the form mentioned in the Government Order. This is an admitted case where the prosecution did not mark those documents in the said form and also there was objection on the side of the accused for marking those documents."

In a number of cases, this Court has taken the similar view following the above judgements.

10. From these judgements, it is crystal clear that the marking of the post-mortem certificate without examining the doctor, when the cause of death or other facts like time of death, weapon used, the manner of the injuries etc. are under dispute, would be fatal to the prosecution. As has been held repeatedly, unless secondary evidence could be admitted by satisfying the legal requirements for the non-production of the primary evidence, the secondary evidence cannot be admitted in evidence at all. In the instant case, in a mechanical fashion, the postmortem certificate was marked in evidence without examining the doctor, who conducted autopsy, giving room for the counsel to argue before this Court that the cause of death has not been proved.

11. Here, the fault lies not only on the public prosecutor, who conducted trial before the trial Court, but on the presiding judge also. For the said fault, on the part of those stakeholders, we cannot afford to allow miscarriage of justice to occur by acquitting the accused on that score. This Court cannot act as an umpire in a match to declare ultimately as to who has won the match. This Court cannot be a silent spectator, watching the performance of the parties and their counsel. In every word that is employed by this Court in its judgement, there should be reflection of judging. The judiciary has the solemn duty to do justice unflinchingly. Every conduct of the Court and the ultimate decision of this Court should be fair, just and reasonable. For that end, the Courts have been given enormous powers under Section 165 of the Evidence Act to put any question to a witness and under Section 311 Cr.P.C. to summon any witness and examine him, if necessary. In the instant case, therefore, in order to do justice, we felt that by invoking Section 391 and Section 311 Cr.P.C., the doctor who conducted autopsy should be examined. After hearing arguments of both sides, we summoned Dr.A.M.Premalatha Gandhi as a Court witness. C.W.1, Dr.A.M.Premalatha Gandhi, deposed that she conducted autopsy on the body of the deceased, on 23.5.2010 at 10.30 a.m,. She found the following injuries:-

"I. Contusion swelling seen over the Right Parietal Region - 12 X 8 cms.

II. On dissection of the skull, I found the following injuries:



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1.Vault:

(i) Contusion, Haematoma seen in the left parietal region - 16 X 8 cms.

(ii) Fracture bone of left parieto temporal region - comminuted fracture - 9 X 7 X 11 cm seen.

(iii) Fracture Right Temporal Region - 7 x 2 cms.

2.Membranes:

(i) Extradural Haemorrhage - over the Parieto Temporal Region - 6 x 6 cms.

(ii) Subarachnoid Haemorrhage seen over the left Parieto Temporal and Occipital Region (10 x 10 cm)

(iii) Subarachnoid Haemorrhage over the right Parieto Occipital Region - (11 x 10 cms)

(iv) Cavities: Haemorrhage present in both lateral ventricles.

(v) Base : Middle Cranial Fossa Fracture seen.

III. On Dissection of the Thorax of the Abdomen:

Ribs: Normal. Heart : Normal size/All Chambers filled with fluid blood, Coronaries, Great Ventricles, Valves are normal.

Lungs: Both Normal size/congested on cut section.

Liver, Spleen, Gall Bladder, Pancreas and intestines: All normal size/congested on cut-section.

Stomach: Yellow fluid 120 ml/Mucosa - Normal. No odour.

Bladder : Empty

Pelvis/Hyoid: Intact

Spinal Column : Intact."

She opined that the deceased would appear to have died of the effects of the head injuries. Ex.P7 is the post-mortem certificate. The accused was ordered to be produced before this Court to question him in respect of the evidence of Dr.Premalatha Gandhi, under section 313 of the Code of Criminal Procedure, 1973, on 17.3.2016. The accused was accordingly produced before this Court by the jail authorities. He was questioned in respect of the oral evidence of Dr.Premalatha Gandhi as well as the post-mortem certificate. He did not deny any of the facts spoken by the Doctor).

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

13. The learned counsel appearing for the appellant would submit that P.Ws.1 to 4 would not have witnessed the occurrence. According to him, since the occurrence had taken place during night, these witnesses would not have seen the occurrence at all.



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We do not find any merit at all in this argument. P.W.1 has categorically stated that on hearing the foul noise, she put on the light and under the light she found the accused standing near the deceased, holding a grinding stone in his hand. But the deceased was still sleeping without knowing the danger. On hearing the cry, the other witnesses namely, P.Ws.2 to 4 also had come to the place of occurrence. Even before they could go to the rescue, it is alleged that the accused dropped the grinding stone on the head of the deceased. This has been spoken clearly by P.Ws.1 to 4. We do not find any reason to reject the evidences of these eyewitnesses.

14. After the occurrence, P.W.1 had taken the deceased to Sri Ramachandra Medical Hospital, where, at the first instance, she had told the Doctor that the deceased sustained injuries on his head on account of dropping of grinding stone by a known person. Apart from that, the evidence of P.W.5 also corroborated the eyewitness account of P.Ws.1 to 4. Since the occurrence had taken place inside the house, where P.Ws.1 to 4 were residing, their presence cannot be doubted, as they have got no axe to grind against the deceased. Thus, from these witnesses, the prosecution has clearly established that it was this accused, who dropped the grinding stone on the head of the deceased intentionally and caused his death.

15. Now the next question is what was the offence that was committed by the accused by his act. The learned counsel for the appellant would submit that the said act of the accused would make out offence under Section 304 of the Indian Penal Code. But, we are not persuaded by the said argument. It is in evidence that for the whole night the accused was fighting with the family members. On an earlier occasion, the deceased warned the accused that he would inform the police and take action against him, if he continued to behave in a disorderly manner. Thus, it has been clearly established that the accused had motive and out of the said motive only, when all were sleeping, the accused had chosen to take the grinding stone and dropped the same on the head of the deceased. Thus, the intention of the accused was only to cause the death of the deceased, falling under the first limb of Section 300 of the Indian Penal Code. Absolutely there is no evidence to bring the act of the accused either under Exception one or under Exception four of Section 300 of the Indian Penal Code. Thus, the appellant is liable to be punished only for offence under Section 302 of the Indian Penal Code.

16. Now turning to the quantum of punishment, the trial Court has imposed only the minimum punishment, which also does not call for any interference at the hands of this Court. Thus, we do not find any scope to interfere with the judgement of the trial Court.



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17. In the result, the appeal fails and the same is dismissed. The conviction and sentence imposed on the appellant is hereby confirmed.

18. We appreciate the services rendered by Mr.R.Vivekananthan, the Legal Aid counsel. We request the Tamil Nadu State Legal Services Authority to pay his remuneration.

Sd/-
Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

To

1.The Inspector of Police,
Thiruverkadu Police Station
Thiruverkadu,
Chennai

2.The Additional District and Sessions Judge,
Fast Track Court No.II, Poonamallee

3. The Member Secretary
Tamil Nadu State Legal Services Authority
High Court, Madras

4.The Public Prosecutor,
High Court, Madras

5. The Superintendent
Central Prison,
Puzhal, Chennai

1 cc to Mr.R. Vivekananthan, Advocate, Sr. 18245

Crl.A.No.54 of 2013

SAI (CO)
kk 18/4