

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16..02..2017

CORAM

THE HONOURABLE MR . JUSTICE S.NAGAMUTHU
AND
THE HONOURABLE MR. JUSTICE N.SESHASAYEE

Criminal Appeal No.47 of 2017

Sivakami

... Appellant /Sole Accused

-Versus-

State Rep. by
The Inspector of Police,
Jalagandapuram Police Station,
Salem District.
[Crime No.202 of 2006]

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C against the judgement of conviction and sentence passed by the learned Principal and Sessions Judge, Salem, in S.C.No.273 of 2007 dated 31.03.2008.

For Appellant : Mr.S.Mohamed Ansar

For Respondent : Mr.P.Govindarajan, APP

JUDGEMENT

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

The appellant, the sole accused in S.C.No.273 of 2007 on the file of the learned Sessions Judge, Salem, stands convicted for offence under Section 302 of IPC and sentenced to undergo imprisonment for life. (No fine was imposed). Challenging the above said conviction and sentence, the accused is before this court with this criminal appeal.

2. The case of the prosecution in brief is as follows:- The accused was hardly aged 30 years at the time of occurrence. She was already married to one Rajamanickam. Her

husband died six years before the occurrence. Thereafter, it is alleged that she developed illicit intimacy with one Mr.Palanisamy. Because of the said relationship, she became pregnant. When she realised that she was pregnant, she informed Mr.Palanisamy and both of them decided to terminate the pregnancy, because, according to them, the birth of the child would bring shame, disrepute and dishonour to the family of the accused. Immediately, the accused consulted a doctor. The doctor informed her that since the pregnancy was more than twenty weeks, it was not safe to terminate the pregnancy. Thereafter, in order to conceal that she was pregnant, the accused went to Vadapalani Village in Erode District and stayed there. She was doing coolie work in a sugar cane field. She did not return to her village in Salem District at all.

3. On 02.11.2006, she decided to come back to her native place - Edappadi Village in Salem District. By that time, the pregnancy was full term. When she was travelling in a bus bound for her village, suddenly, she developed delivery pain. Therefore, she got down from the bus stop at Moolakadai Village. There was no body in the bus stop. It was around 09.30 p.m. When she was standing alone in the bus stop, the pain aggravated and, at last, she delivered a child while she was in a standing posture. The child fell down, on being delivered, on the cement floor. But, the child neither cried nor was there breathing. After some time, she found a small gunny bag near the bus stop. She took the child in that gunny bag and started walking believing that there would be some houses some where near the said place. Her intention was to go and seek the help of some one. But, there was no house. The road was passing by the side of a lake. At that place, she fainted. The child which was wrapped in the gunny bag also fell down. It became very dark. When she recovered in part from drowsiness, she moved towards bus stop and again fainted. After some time, some one came and inquired. She did not disclose about the occurrence to him. Instead, she simply returned to her house in Edapadi Village.

4. P.W.2, the then Panchayat Board Member of Kattinaickenpatti Village found a dead body of the child by the side of the lake. He informed P.W.1, the then Village Administrative Officer, Periyasoragai Village about the same. P.W.1 immediately rushed to the place of occurrence at 09.00 a.m. on 03.11.2006. He found a new born child with umbilical cord in the lake. Immediately, he went to Jalagandapuram Police Station and made a complaint at 09.30 a.m. on 03.11.2006. On such complaint, a case was registered in Crime No.202 of 2016 under Section 318 of IPC. Neither the identity of the child nor its mother or father was known.

5. P.W.15 took up the case for investigation. He went to the place of occurrence, prepared an observation mahazar and a rough sketch and held inquest on the body of the deceased. He recovered the blood stained gunny bag and other materials found at the place of occurrence. He, thereafter, forwarded the body to the hospital for post-mortem.

6. P.W.10, Dr.Panneer Selvam, conducted autopsy on the body of the deceased at 03.05 p.m. on 03.11.2006. He found the following injuries:

"Injuries: (1) Dark reddish brown abrasions over

- Right side back of abdomen 3 x 0.25 cms

- Right side flank - Five in nos. each measuring 0.25 - 0.25 cms x 0.25 - 0.25 cm

- Outer aspect of right thigh 2 x 0.25 cm

- Outer aspect of middle third of right thigh 2 x 0.25 cm.

- Middle third of outer aspect of right leg - Two in nos. 3 x 2 cms and 1 x 1 cm.

- The inter-scapular region 4 x 2 cm.

- Upper aspect of right thigh - 2 x 1 cm

- Multiple - Dorsum of right foot ranging from 1 - 0.5 cms x 0.5 - 0.25 cm.

- Right cheek, right forehead and right temple - For an area of 5 x 2 cm.

(2) Both eyes black eye present. Both eyes show conjunctival haemorrhage.

(3) On dissection of scalp - Dark red contusion 5 x 4 x 0.3 cm seen over right occipital region of scalp - Anterior and posterior fontanelles were not closed. Sutural separation of both parietal bones were seen for a length of 9 cms. Dura found torn in the underlying area. On further opening of skull bones, diffuse sub-dural and sub arachnoid haemorrhage were seen over both cerebral hemispheres of brain.

(4) On opening the peritoneal cavity, a blood clot of 150 cms was seen over the mesentery of ileum of 5 x 3 cms - Dark red with firm attachment with mesentery 150 cms of blood clot was seen over posterior aspect of liver and stomach nonadherent.

(5) Right kidney showed dark red perinephric haematoma of 3 x 1 cms."

Ex.P.10 is the post-mortem certificate. He opined that the death of the deceased was due to shock and haemorrhage as a result of injuries found on the child. Along with P.W.10, one Dr.S.S.Meera also was in the team which conducted autopsy.

7. P.W.15 thereafter, altered the case into one under Section 302 of IPC on 09.11.2006. Ex.P.10 is the alteration report. When the investigation was in progress, on 12.11.2006, the accused appeared before P.W.1 and made a voluntary confession in which, she confessed that since the child was an unwanted born out of illicit relationship, she threw the child in the lake. Ex.P.2 is the said extra judicial confession. P.W.1 produced the accused along with the confession at 11.00 a.m. on 12.11.2006 before P.W.15. P.W.15, in turn, arrested her and produced her before the court for judicial remand. He also examined few more witnesses. On 14.11.2006 P.W.15 made a request to the learned Judicial Magistrate to record the judicial confession of the accused. Accordingly, the accused was produced before the learned Judicial Magistrate-I, Mettur on 22.11.2006. The learned Magistrate made statutory warnings to the accused as required under Section 164 of Cr.P.C. The accused despite such warnings told that she was willing to confess. The learned Magistrate sent her back to the prison in order to give time for relaxation. On 23.11.2006, at 11.00 a.m. she was again produced before the learned Magistrate. Once again, the learned Magistrate gave the statutory warnings to her. At last, she gave her willingness to make voluntary confession. Accordingly, the learned Magistrate recorded the same. The learned Magistrate appended a foot-note to the judicial confession that he believed that the said confession was made by the accused voluntarily. The investigation was thereafter conducted by P.W.16 and at last, he laid charge sheet against the accused under Section 302 of IPC.

8. Based on the above materials, the trial court framed a lone charge under Section 302 of IPC against the accused. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 16 witnesses were examined, 20 documents and 2 material objects were marked.

9. Out of the said witnesses, P.W.1, the Village Administrative Officer has stated that at 08.00 a.m. on 03.11.2006, he was informed by P.W.2 about the presence of the dead body near the lake and at 09.00 a.m. he visited the place of occurrence and then he made a complaint to the police on the

same day. He has further spoken about the extra judicial confession allegedly given by the accused on 12.11.2006. P.W.2 has stated that he found a dead body of the newly born baby near the lake at Kattinaickenpatti Village and then, he informed the same to P.W.1. P.W.3 has spoken about the preparation of the observation mahazar and the rough sketch and also the recovery of the material objects near the place of occurrence. P.W.4 is the resident of Kattinaickenpatti Village. He has stated that on the day of occurrence around 08.30 p.m. he traveled in the very same bus in which the accused was travelling. At Kattinaickenpatti bus stop, according to him, the accused got down. While doing so, she was pressing her abdomen with her hands indicating that she was suffering from abdominal pain. He later on came to know that there was a dead body of a newly born baby near the lake. P.Ws.5, 6 & 7 have turned hostile and they have not supported the case of the prosecution in any manner. P.W.7 is Mr.Palanisamy with whom, according to the case of the prosecution, the accused had illicit relationship. It is the further case that he is the biological father of the new born child which was found dead. But, he has stated that he never had sexual relationship with the accused. P.W.8 has spoken about the confession made to the police by the accused. P.W.9, the then Judicial Magistrate, has spoken about the judicial confession made by the accused on 23.11.2006. P.W.10, the doctor, has spoken about the post-mortem conducted on the body of the new born baby and his final opinion regarding the cause of death. P.W.11, the Head Clerk of the Court of Judicial Magistrate, has stated that he forwarded the accused and P.W.7 for DNA examination on the orders of the learned Magistrate to find out the identity of the dead body of the new born baby. P.W.12, the Police Constable, has stated that he handed over the FIR to the learned Magistrate on the same day as directed by the investigating officer. P.W.13 has stated that he handed over the dead body of the child to the doctor for postmortem, as directed by the investigating officer. P.Ws.15 and 16 have spoken about the investigation investigation done by them and P.W.16 has further spoken about the filing of charge sheet against the accused.

10. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C. she denied the same as false. However, she did not choose to examine any witness nor did she mark any document on her side. Her defence was a total denial.

11. Having considered all the above, the trial court convicted the appellant/accused and sentenced her as detailed in the first paragraph of this judgement. Challenging the above said conviction and sentence, the accused is now before this Court with the present criminal appeal.

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

13. There can be no controversy over the fact that the dead body of new born baby with umbilical cord was found at 08.00 a.m. on 03.11.2006 near Kattinaickenpatti lake in Salem District. According to the doctor, who conducted autopsy on the body of the deceased child, there were abrasions on the body and there was also a head injury with corresponding internal sub dural and sub arachnoid haemorrhage. His opinion is that the death of the child was due to multiple injuries. He has further opined that the child had died shortly after the birth. From these evidences, it has been clearly established by the prosecution that some time before 08.00 a.m. on 03.11.2006, the new born baby would have been born and the said child soon died on unnatural death.

14. So far as the identity of the child is concerned, it is the case that P.W.7 is the biological father of the child. The accused became pregnant due to the illicit relationship which she had with P.W.7. But, P.W.7 had denied the same. P.W.7 and the accused were sent for DNA examination to find out the identity of the dead body. The Deputy Director and Assistant Chemical Examiner, Forensic Sciences Department, Chennai after conducting DNA examination has submitted Ex.P.16 report which has revealed that the accused is the biological mother and P.W.7 is the biological father of the baby. Thus, the prosecution has clearly established that the baby was born to the accused shortly before its death on the night intervening 02.11.2006 and 03.11.2006.

15. The further case of the prosecution is that because the baby was an unwanted baby, with a view to conceal that such baby was born to her, as it would expose her relationship with P.W.7, she killed the child and threw the dead body into the lake. In order to prove the above said fact, the prosecution relies on two confession statements made by the accused. The first one is the extra judicial confession made to P.W.1 [Ex.P.2] and the other one is the judicial confession made by her on 23.11.2006 [Ex.P.8]. There can be no doubt that the judicial confession was made voluntarily by her. The learned Magistrate had followed the statutory mandate contained in Section 164 of Cr.P.C. before recording the said confession. The learned Magistrate had also believed that the confession was made voluntarily. Nothing has been elicited from the learned Magistrate to doubt his belief in respect of voluntariness of the confession made by the accused.

There was no retraction of the said confession within a reasonable time. Therefore, we hold that Ex.P.8 was made by the accused voluntarily. But, at the same time, Ex.P.2, in our considered view, is a doubtful document. There is no guarantee that Ex.P.2 was made voluntarily. The contradictions on material particulars between the judicial confession and the extra judicial confession would only render the extra judicial confession (Ex.P.2) as unbelievable. In the judicial confession, the accused had, in a quite natural way, narrated the entire occurrence. According to her, she went to Vadapalani village in Erode District when she was five months pregnant only with a view to conceal her pregnancy from her relatives and the other villagers which she had to opt because she felt that birth of child to her would expose her relationship with P.W.7. The fact remains that her husband died six years before. Apprehending that the birth of child would bring disrepute and dishonour to her family, she wanted to conceal her pregnancy. Therefore, she went to Vadapalani village where she had stayed for five months and was doing coolie work and during the interregnum period she did not return to her native village. When she was with ten months pregnancy, she returned back to Moolakadai village as there was no body to help her. When she was travelling in the bus at Kattinaickenpatti, she developed unbearable abdominal pain. Therefore, she managed to get down from the bus. According to the confession, when she was standing near the bus stop by pressing her abdomen in order to reduce the delivery pain, suddenly, the child was delivered while she was standing and the child fell down on the cement floor of the bus stop. According to the confession, the child did not cry nor did the child breathe. She found a small piece of gunny bag and then she took the child in the gunny bag. Further according to her, then she was moving to a nearby village with the intention that she could seek the help of the villagers. When she was near the lake, due to bleeding, she fell down. The child also fell down somewhere. She recovered from her drowsiness shortly and moved towards nearby bus stop. According to her, then, someone came, found her live, sprinkled some water on her face. She gained consciousness. But, she did not inform any one about the child and returned to her village. This confession cannot be fragmented for the purpose of appreciation. This needs to be appreciated in full. If we do so, it is crystal clear that there is no direct evidence that the child was born alive. But, the doctor, who conducted autopsy has opined that shortly after the birth, the child could have died. We find no reason to reject that opinion of the doctor. If this opinion is accepted, then, it is inferable that when the accused was in standing posture, the child was delivered. The child fell on the cement floor at the bus stop and the head hit the cement floor. According to the accused, the child did not cry nor was there any breathing. This is in consonance with the medical opinion. The doctor has opined

that there was a dark red contusion measuring 5 x 4 x 0.3 c.m. over right occipital region of scalp and there was a corresponding sub-dural and sub arachnoid haemorrhage. The doctor had further found that anterior and posterior fontanelles of the scalp were not closed and sutural separation of both parietal bones were seen for a length of 9 cms. This is the foundation for the doctor to say that the child had died soon after the birth, that means, even before the closure of the sutural separation occipital bones. The doctor has further opined that going by the said fact and going by the location of the dark contusion on the right occipital region, possibly, all these injuries could have been caused when the child had fallen on the floor on being delivered. This possibility, according to the doctor, cannot be ruled out. Thus, in our considered view, though the child had born alive, it had died as soon as it fell on the cement floor. Certainly, the small contusion on the right occipital region and corresponding sub dural and sub arachnoid haemorrhage and the other abrasions found on the body which were very negligible in size could have been caused when the child fell on the cement floor. From these facts, in our considered view, the accused did not cause the death of the child at all. In the judicial confession, she had not at all stated that she killed the child and threw the dead body. As we have already pointed out, she had stated in two places in the judicial confession that while she was on standing posture, the child was delivered; the child fell and thereafter there was neither crying of child nor breathing. But, in the extra judicial confession made to the Village Administrative Officer it has been recorded as though the accused said that she killed the child and threw the dead body. This extra judicial confession, in our considered view, which is contrary to the medical opinion and the judicial confession, cannot be accepted. Therefore, we reject the extra judicial confessions.

16. In view of the foregoing discussion, we hold that the accused did not cause the death of the child and the death of the child was not a homicide in terms of Section 299 of IPC. Thus, the conviction of the appellant for the offence under Section 302 of IPC cannot be sustained. But, at the same, the appellant cannot escape from being convicted for the offence that she had committed.

17. As we have already concluded after the child had died, she abandoned it near the lake and returned to her village and she did not inform about the birth of the child to anyone. This, in our considered view was done by the appellant intentionally to conceal the birth of the child. As we have already pointed out, the appellant left the village when she was five months pregnant and stayed in Vadapalani village only to conceal the pregnancy and, therefore, abandoning of the dead

body of the child by appellant was also with a view to conceal the very birth of the child. This act of the accused is an offence punishable under Section 318 of IPC.

18. Now, the question is whether in the absence of any charge under Section 318 of IPC, the appellant could be convicted. As we have already stated, the charge against appellant is for the offence under Section 302 of IPC. In our considered view, since offence under Section 318 of IPC is a minor offence to Section 302 of IPC, even in the absence of a specific charge under Section 318 of IPC, she could be punished for the said offence.

19. Now, turning to the quantum of sentence, the maximum punishment prescribed for the offence under Section 318 of IPC is imprisonment for two years or with fine or with both. We are informed that the accused has been in jail undergoing imprisonment from the date of conviction i.e., from 31.03.2008. Thus, she has already undergone more than three years of sentence.

20. In the result, the criminal appeal is partly allowed. The conviction of the appellant under Section 302 of IPC and the sentence imposed thereunder by the trial court are hereby set aside and instead, she is convicted under Section 318 of IPC and sentenced to undergo rigorous imprisonment for two years. We further direct that the period of sentence already undergone shall be given set off as required under Section 428 of Cr.P.C. We are informed that the appellant/accused has been in prison from 31.03.2008 onwards. Since the appellant/accused had already undergone the period of sentence imposed in this judgement, we direct her to be set at liberty forthwith, if her detention is not required in connection with any other case.

Sd/-

Assistant Registrar(CCC)

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To

1.The Principal and Sessions Judge,
Salem,
Salem District.

2.The Judicial Magistrate II,
Mattur, Salem.

3.-Do- Through The Chief Judicial Magistrate,
Salem.

4.The Inspector of Police,
Jalagandapuram Police Station,
Salem District.

5.The Superintendent,
Women Special Prison,
Vellore.

6.The District Collector,
Salem.

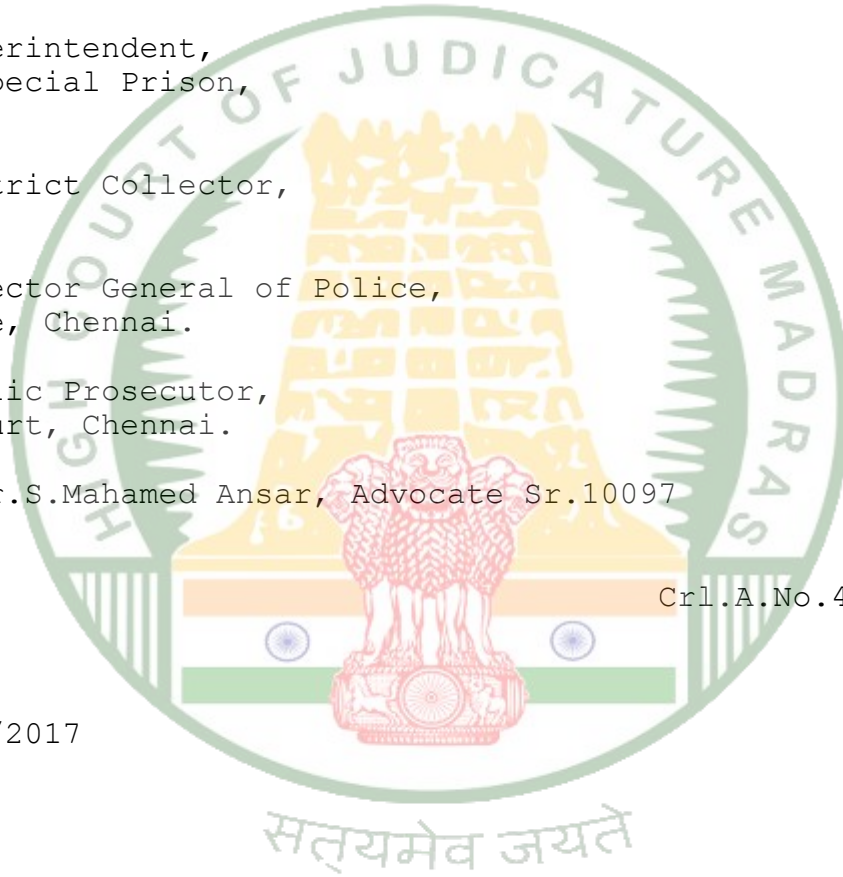
7.The Director General of Police,
Mylapore, Chennai.

8.The Public Prosecutor,
High Court, Chennai.

+1cc to Mr.S.Mahamed Ansar, Advocate Sr.10097

Crl.A.No.47 of 2017

sj[co]
srg 11/05/2017



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