

THE HIGH COURT OF JUDICATURE AT MADRAS

Judgement Reserved on : 27..02..2017

Judgement Pronounced on : 21..03..2017

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Criminal Appeal No.633 of 2015

Iqbal Mansoory [A1] ... Appellant/Accused No.1

-Versus-

State Rep. by
The Inspector of Police,
R-1, Mambalam Police Station,
[Crime No.1234 of 2012] ... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C against the judgement of conviction and sentence imposed by the learned Additional Sessions Judge, Krishnagiri, in S.C.No.140 of 2006 dated 19.04.2011.

For Appellant : Mr.R.Sankarasubbu

For Respondent : Mr.P.Govindarajan, APP

JUDGEMENT

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

The appellant is Accused No.1 in S.C.No.140 of 2006 on the file of the learned Additional Sessions Judge, Krishnagiri. The respondent police laid a chargesheet against a total number of 7 persons including the appellant herein. But, 3 persons arrayed as accused in the police report by name (1) Rajendra Sharma @ Pandit Sharma @ Rajkumar, (2) Soni @ Kembasoni and (3) Rajarathinam absconded. Therefore, the case against them was split up by the learned Magistrate and the same is pending separately. Thus, 4 persons namely (1) Iqbal Mansoory @ Iqbal Khan [A1, the appellant herein] (2) Jaleelshah [A2]; (3) Mohammed Isan @ Hasan [A3]; and Balakrishnan [A4] faced the trial. The trial court framed as many as three charges against

the accused. The first charge is against A1 to A4 for the offence under Section 120-B r/w 302 of IPC; the second charge is under Section 302 of IPC against the appellant (A1) alone; and the third charge is under Section 27(1)(b) of The Arms Act against A1 alone. By judgement dated 19.04.2011, the trial court acquitted A2 to A4, but however, convicted the appellant (A1) alone under Section 302 of IPC and under Section 25(1)(b) of The Arms Act and sentenced him to undergo imprisonment for life and to pay a fine of Rs.10,000/- in default to suffer rigorous imprisonment for five months for the offence under Section 302 of IPC and to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/- in default to suffer rigorous imprisonment for two months for the offence under Section 27(1-b) of the Arms Act. Challenging the above said conviction and sentences, A1 is before this court with this criminal appeal.

2.0. The case of the prosecution in brief is as follows:- The deceased in this case was one Madhanagopal. He was an Advocate by profession practicing in the Madras High Court as well as before the Subordinate Courts. P.W.1 is his daughter and P.W.2 is his wife. They were all residing at Alandur in Chennai. A3, A4 and the absconding accused Rajarathinam were all involved in NARCOTIC offences. When the NARCOTIC drug was transported from Madhya Pradesh to Bangaluru, A4 was arrested. The deceased had married the sister of A1 also. A4 had the feeling that it was the deceased who gave intimation to the authorities which resulted in his arrest. All these accused were acting in a gang involving in NARCOTIC Drug smuggling. Because of the above occurrence, it is alleged that all these four accused along with the three absconding accused hatched conspiracy to do away with the deceased. The conspiracy took place in Madhya Pradesh and in Central Prison at Bangalore.

2.1. On the above said allegations, all these accused were charged for offences under Section 120-B r/w 302 of PC. On 06.07.2002, the deceased along with P.W.1 and P.W.2 went in his car to T.Nagar for shopping. The deceased drove the car. They parked the car in front of Andhra Bank in Pondy Bazaar, T.Nagar, Chennai. The Shopping Mall was just opposite to Andhra Bank known as "Maya Plaza". After parking the car, around 07.40 p.m. all the three went into the shopping mall. After finishing the shopping, they were returning to the car. The deceased went near the car and opened the door near the driver's seat. P.W.1, the daughter of the deceased was standing two feet behind him and P.W.2 was standing few more feet behind him. At that time, it is alleged that in pursuance of the above said conspiracy, A1, who was lying in wait, went near the deceased and from a distance of 7 feet, shot him with a gun. The bullet hit the back of the head of the deceased. Soon the deceased fell down with

bleeding injuries on his head. A1, the appellant herein, fled away from the scene of occurrence with the gun. [At that time, the identity of the assailant was not known]. P.Ws.1 and 2 were shocked over the said incident. The others who were some where near the said place also noticed the occurrence.

2.2. The said occurrence took place around 08.20 - 08.25 p.m. Immediately, P.W.1 and P.W.2 took the deceased in an auto to Government Royapettah Hospital and reached the hospital between 08.45 - 08.50 p.m. The doctor on duty in the said hospital after examining the deceased declared him dead. At 09.15 p.m., when P.W.33, the then Inspector of Police, Mambalam Police Station was on duty, he received a telephonic message from the Government Royapettah Hospital. Immediately, he rushed to the Government Royapettah Hospital and received a written complaint [Ex.P.1] from P.W.1. On returning to the police station at 10.30 p.m., he registered a case in Crime No.1234 of 2002 under Section 302 IPC and 27(1) of the Arms Act. Ex.P.17 is the FIR. He forwarded both the complaint and the FIR to the court. P.W.33 took up the case for investigation and immediately visited the scene of occurrence at 10.30 p.m. and prepared an observation mahazar and a rough sketch in the presence of the witnesses. He recovered the blood stained earth and sample earth from the place of occurrence under a mahazar. Early in the morning, on 07.07.2002, he examined P.Ws.1, 2 and few others and recorded their statements. A motor cycle bearing Regn. No. TN 02 Z 0112 was found abandoned at Pondy Bazaar in front of Komatha Milk Booth. He seized the same under a mahazar (Ex.P.21). The said motor cycle is M.O.1.

2.3. On the same day, he conducted inquest on the body of the deceased and forwarded the same for postmortem. P.W.28 Dr.Baskar, the then Professor and Head of the Department of Forensic Medicine, Government Kilpauk Medical College Hospital and Government Royapettah Hospital, conducted autopsy on the body of the deceased on 07.07.022 at 01.20 a.m. He found the following injuries:-

"Injuries: (1) A circular penetrating wound 3 x 2.5 cm x cavity deep seen over the back of head 3 cms below occipital protuberance 1.5 cms to the left of mid-line and 3 cms above the hairline with singeing of surrounding hair. The wound is directed forwards slightly upwards and slightly to the left staining of the margin is seen between 3 and 8' 0 clock position of the wound.

(2) Contusion abrasion over right side of fore-head 5 cms above middle 3rd of right eye brow 3 x 2.5 cm

(3) Contused abrasion involving outer 3rd

of right orbit 2.5 x 1 cms.

O/D of Head: Marginal bruising of scalp tissue seen over the injury No.1 gaping avorted stellate fracture of the left mastoid adjoining left temporal bone with diastic fracture involving outer 3rd of left side of coronal suture and left temporal parietal suture made out extending on to the base with bruising of adjacent tissues. Meninges collapsed. Irregular laceration of meninges seen involving the portion overing the back and outer aspect of left cerebellar and cerebral hemisphere. Shattering of the brain tissue seen involving the left cerebellar hemisphere, outer and under surface of left occipital, temporal and adjacent parietal lobes of left cerebral hemisphere.

O/D of Brain: Right cerebral hemisphere appear pale. Left cerebral hemisphere shown injury as shown wide supra multiple small pellets 13 in number and large pellets five in number are recovered from the brain tissue and between the tables of base of skull. Shattering of the base of the skull seen involving the petrous part of left temporal bone exposing the left maxillary sinus and the nasal cavity. Pellets of varying sizes recovered as shown vide supra along with the wad.

Fracture base of skull seen involving the left middle cranial fossa with fissured extension into adjacent anterior and posterior cranial fossa.

Neck structures, hyoid bone and thoracic cage - Intact."

Ex.P.4 is the postmortem. He opined that the deceased had died due to gun shot injury involving the head and brain. During the course of investigation, on 05.08.2002, P.W.33 arrested A2 in Madhya Pradesh and recovered his pocket diary. On being identified by him, at 06.00 p.m., he arrested the absconding accused Rajendra Sharma @ Pandit Sharma @ Rajkumar. On such arrest, he also made a voluntary confession. Out of his confession, P.W.33, recovered a note containing the details of the deceased was seized, which is Ex.P.32. Then, P.W.33 produced both the accused before XVII Metropolitan Magistrate for judicial remand. Then, he took police custody of these two accused on 10.08.2002. During interrogation, many more facts were discovered.

2.4. On 22.11.2002 at 07.00 a.m., P.W.33 arrested A1 in

Ujjaini in Madhya Pradesh State. On such arrest, he made a voluntary confession. P.W.33 reduced the same into writing. He produced him before the learned Chief Judicial Magistrate, Ujjaini and in pursuance of the transit warrant, he brought him to Chennai and produced him before the XVII Metropolitan Magistrate, Chennai, on 25.11.2002. Then, as per the order of the learned Magistrate, he took police custody of A1 for five days on 29.11.2002. While in custody, on 29.11.2002, at 08.00 a.m. A1 made a voluntary confession in which he disclosed the place where he had hidden the gun. In pursuance of the same, he took the police and the witnesses to Natesan Park in T.Nagar, and near a bush, he removed the earth and took out the gun (M.O.7) and 12 gauge cartridge. P.W.33 recovered the same under Ex.P.50 mahazar. Then, he produced A1 before the learned Magistrate on the same day for judicial remand. On 16.12.2002, he made a request to the Chief Metropolitan Magistrate, Chennai, to conduct test identification parade for A1. Accordingly, the test identification parade was conducted on 07.01.2003 in the Central Prison at Chennai in which P.Ws.1 and 2 identified A1 and others correctly. Then, he forwarded the gun and the cartridge to the court. The cartridge which was recovered from the dead body of the deceased during postmortem, the gun and the other materials were sent for ballistic expert's opinion. P.W.33 also collected the call details of various cellphone(s) used by different accused. He arrested the rest of the accused. On completing the investigation, P.W.33 laid charge sheet against all the accused. After filing the charge sheet, the absconding accused-Rajarathinam died. Thus, according to the case, it was A1 who shot the deceased dead with gun and so, the trial court framed charges under Section 302 of IPC and another charge under Section 25(1-b) of The Arms Act against A1, besides charges under Section 120-B r/w 302 of IPC.

2.5. Based on the above materials, the trial court framed three charges as detailed in the first paragraph of this judgement. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 36 witnesses were examined, 62 documents and 14 material objects were marked.

2.6. Out of the said witnesses, P.Ws.1 and 2 the daughter and wife of the deceased have vividly spoken about the entire occurrence. P.W.3 was a resident at Korukkupet in Chennai. On the day of occurrence, he was engaged in issuing tokens to the vehicles parked in front of Andhra Bank at T.Nagar in Chennai. According to him, at 08.00 p.m., he heard a cracker sound from a distance of 50 meters. He rushed to the place of occurrence where he found a woman and a daughter crying. He further found a man lying in a pool of blood. He has not stated anything about these accused. The prosecution has treated him as hostile and cross examined him. P.W.4, yet another person employed along with P.W.3 has also stated that he heard noise ,

went to the place of occurrence and found the deceased lying in a pool of blood. P.W.5 has turned hostile and he has not supported the case of the prosecution in any manner. P.W.6 was carrying on garments business near the place of occurrence. He has stated that he heard noise and when he went to the place of occurrence, he found two ladies holding a male. There was profuse bleeding from the head of the male. Then, he was taken to the hospital.

2.7. P.W.7 is the sister of A4. She was born and brought up in Sri Lanka. In the year 1995, she came down to India. Mr.Rajarathinam, the absconding accused, yet another brother, was staying in Mumbai. P.W.7 was staying for some time with him in Mumbai. According to her, the deceased was known to her as an Advocate. In due course, the deceased developed a love for her and accordingly, he married P.W.7 on 12.09.1999. The marriage was not known to A4 and the other brothers. Out of the said wedlock, P.W.7 has a son. She has further stated that the deceased was appearing for A4 and others in the criminal cases. P.W.8 was having a platform retail shop at T.Nagar near Andhra Bank. He has stated that he only heard the sound and he could not see the actual occurrence. P.W.9 has stated that he parked his car near Andhra Bank around 08.00 p.m. on the day of occurrence. He heard sound and that when he went to the place of occurrence, he found two ladies crying and a male was lying in a pool of blood. P.W.10 was working as an Auto Consultant. He has stated that the motor vehicle bearing Regn. No.TN 02 Z 0112 (M.O.1) was sold by him to one Rajakhan @ Iqbal Mansoori and on Rajkumar @ Rajendharsharma. P.W.11 was then working in a hotel in T.Nagar. He was examined to speak about the preparation of the observation mahazar and the rough sketch. He did not support the case of the prosecution and therefore, he was treated as hostile. Similarly, P.W.12 was also treated as hostile. P.W.13 is the brother-in-law of the deceased. He has stated that after the deceased had married P.W.7, there arose some family problem. He has not fully supported the case of the prosecution and therefore, he was also treated as hostile. P.W.14, who was carrying on the business of selling ready made garments, has stated that he was present at the time of occurrence near the place of occurrence. He heard noise and found two ladies carrying a male with blood injuries. He was also treated as hostile. P.W.15 has spoken about the same facts that he heard noise and found the deceased lying in a pool of blood. P.W.16 has turned hostile and he has not supported the case of the prosecution in any manner. P.W.20 has stated that he was running a photo studio at Saidapet, Chennai. According to him, as requested by the investigating officer, he went to the place of occurrence and took photographs from different angles.

2.8. P.W.21 was then working as Grade I Police Constable at

Mambalam Police Station. He has stated that he knew Hindu language and he was very conversant with the same. He has stated that when A2 and the absconding accused-Rajaratnam were arrested, he translated the confession statements made by them to the Inspector of Police. Similarly, when A1 was arrested on 24.11.2002, he translated the confession statement of A1 which was made in Hindi into Tamil and then, P.W.33 reduced the same into writing. Similarly, he has stated that when A3 gave confession, he translated the same from Hindi to Tamil.

2.9. P.W.22, Dr.Nazir Ahmed, has stated that on 06.07.2002 when he was on duty at casualty department at Government Royapettah Hospital, around 08.50 p.m. the deceased was brought before him with bleeding injuries on his head by his wife and daughter. On examining him, he found him dead. Ex.P.2 is the Accident Register. P.W.23, a Police Constable, has stated that he handed over the dead body to the doctor for postmortem as directed by P.W.33. P.W.24 has spoken about the arrest of A1 in Ujjaini in Madhya Pradesh and the confession made by him. P.W.25 has turned hostile.

2.10. P.W.27 was the then Assistant Director of Forensic Science Department, Chennai. He was well trained in the field of examination of questioned documents. He examined the specimen materials received on 23.01.2003 with the questioned documents. He has stated that he was not able to offer any opinion. P.W.28 has spoken about the postmortem conducted and his final opinion regarding the cause of death. P.W.29, the then Head Clerk of the Metropolitan Magistrate Court has stated that he forwarded the material objects to the Forensic Science Lab for examination as directed by the Magistrate.

2.11. P.W.30 was the then Fire Arms Expert and Scientific Assistant Gr.I in Forensic Science Department, Chennai. He examined the bit of tissue with skin and hair and two cotton swabs with dark stains. On examination, he found nitrate, a gun shot residue due to the combustion of the propellant, on the tissue and in the cotton swabs. He further found 11 small lead pieces in Item No.3 which were all one size pellets and 2 fragmented portions of pellets and 5 lead pieces which were from distorted large pellets. The green plastic Item No.4 - is a broken portion of a 12 gauge air cushion wade. According to him Item Nos.3 and 4 were fired from a smooth shot gun designed to fire 12 gauge cartridges. The said gun has been marked as M.O.7. In the same case, according to him, one shot barrelled hand gun with over all length of 22.5 cm barrel - length 13.8 cm and bore diameter 18.78 mm and one 12 gauge one size cartridge were received from the XVII Metropolitan Magistrate on 23.01.2003. He marked the gun as Item No.1 and the cartridge as Item No.2. He, on examination, opined that Item No.1 is a

country made shot barrelled hand gun designed to fire 12 gauge cartridges. It is a lethal fire arm. Combustion products of smokeless powder were detected in the barrel of the above gun indicating that it was used for firing some time before the examination. But, exact time of firing could not be ascertained. On test firing, the above gun was found to be in working condition. Item No.2 is a 12 gauge one size cartridge. It misfired in the gun Item No.1. The lead pellets in Item No.2, and 11 small lead pieces described as Item No.3 in the earlier report are of the same size. The pellets described as Item No.3, in the earlier report dated 26.07.2002, was fired from a shot gun designed to fire 12 gauge cartridges, like the gun Item No.1. ExP.10 is his second report.

2.12. P.W.31 was the Deputy Inspector General of Prison (In charge), Head Quarters, Bangalore. According to him, during the course of investigation he gave certain relevant information pertaining to some of the accused in this case who were lodged in the Central Prison, Bangalore.

2.13. P.W.32, the then Metropolitan Magistrate, Egmore, Chennai, has stated about the test identification parade conducted on 07.01.2003. In the said test identification parade, A1 was put up. During the test identification parade held at Central Prison, Chennai, (1) Sri.K.Nagaiah, (2) Sri. Navas Khan and (3) Amjath Khan (4) Smt. Suguna (P.W.2) and Ms.Arthi (P.W.1) identified A1 correctly.

2.14. P.W.33 has spoken about the registration of the case and the entire investigation done by him. P.W.33 was a civil contractor during the year 2002. He has stated that when A1 was in police custody on 29.11.2002, he made confession voluntarily in Hindi language. P.W.34 is well conversant in Hindi and also Tamil. Therefore, as spoken by A1 in Hindi, he translated the same into Tamil. P.W.35 and P.W.36 have turned hostile and they have not supported the case of the prosecution in any manner.

3. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C. he denied the same as false. They did not choose to examine any witness, however, they marked the Remand Report of A1 dated 25.11.2002 as Ex.D.1 and an order of the XVII Metropolitan Magistrate, Chennai, as Ex.D.2. Their defence was a total denial.

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

5. 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.

6. Let us, at the first, take up the argument advanced by the learned counsel for the appellant/A1 that the trial which culminated in the conviction is vitiated as violative of the fair procedure contemplated in Article 21 of the Constitution of India since the evidence was recorded in the language not known to the accused and that the same was not translated to him. The learned counsel placed reliance on Section 279 of Cr.P.C. which reads as follows:-

"279. Interpretation of evidence to accused or his pleader.- (1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary."

A plain reading of the above provision would make it abundantly clear that the evidence recorded in the language not understood by the accused should be interpreted to him in open court in a language understood by him. In the instant case, the accused neither knew English nor Tamil. He knew only Hindi. There is no controversy over the said fact because it is the admitted case of the investigating officer that since the accused spoke only Hindi, he had to seek the help of a translator to translate the same to him into Tamil and then only he recorded the same in Tamil language. Even before us, it is not the case of the prosecution that the accused knew either Tamil or English at the time when he faced the trial. Undoubtedly, Section 279 of Cr.P.C. regulates the procedure so as to ensure that there is a fair trial to the accused as guaranteed under Article 21 of the Constitution of India. The purpose of Section 279 of Cr.P.C. obviously is to make the accused to understand as to what are the charges faced by him and what is the evidence let in against him. It is only to serve the said purpose, Section 279 of

Cr.P.C. states that the evidence recorded in the language not understood by the accused should be interpreted to him in open court in the language understood by him. But, in the instant case, there is no record to show that the evidence which was recorded in English was interpreted to the accused in open court. Thus, there is a gross violation of Section 279 of Cr.P.C. committed by the trial court.

7. Now, the question is, on that score, whether the entire trial could be held to be violative of Article 21 of the Constitution of India and thus, vitiated. Admittedly, in this case, the accused had engaged a counsel to promptly defend him throughout. Even before this court, he has engaged an eminent lawyer. It is not as though the Advocate who defended the accused did not know to speak and read English and Tamil. Certainly, the learned counsel who was so sincerely defending the accused on his instructions would have understood the evidence spoken in Tamil and recorded in English without there being any need for interpreting the same to him as required under sub-section (2) of Section 279 of Cr.P.C. Notwithstanding the fact that the counsel engaged by the accused understood the evidence spoken in Tamil and recorded in English, the failure of the trial court to interpret the evidence in open court in the language known to the accused vitiates the trial, it is contended by the learned counsel for the appellant.

8. In this regard, we may refer to the judgement of the Hon'ble Supreme Court in *Shivanarayan Kabra v. The State of Madras*, AIR 1967 SC 986 wherein, while dealing with a similar situation arising out of sub section (1) of Section 361 of the Code, 1898 which is in pari materia to sub-section (1) of Section 279 of Cr.P.C. of 1973, the Hon'ble Supreme Court has held as follows:-

10. We pass on to consider the next contention of the appellant that there was a breach of Section 361 of the Criminal Procedure Code which states:

"361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language understood by him.

(2) If he appears by Pleader and the evidence is given in a language other than the language of the court, and not understood by the Pleader, it shall be interpreted to such Pleader in that language.

* * *

It was said that the evidence of the prosecution witnesses was given either in Tamil or in the

English language and the appellant did not know either of the languages and so he was not able to take part in the trial. Mr Naunit Lal contended that there was a breach of the requirement of Section 361(1) of the Criminal Procedure Code and the trial was vitiated. We do not think there is any substance in this argument. Even if it is assumed that the appellant did not know English or Tamil the violation of any of Section 361(1) of the Criminal Procedure Code was merely an irregularity and it is not shown in this case that there is any prejudice caused to the appellant on this account. It is pointed out by the Sessions Judge that the appellant did not make any objection at the time the evidence was given and it appears that he was represented by two eminent advocates – Sri V.T. Rangaswami Iyenger and Sri R. Krishnamoorthy Iyer – in the trial court who knew both these languages and who would not have allowed the interest of the appellant to be jeopardized even to the smallest extent. In our opinion, the irregularity has not resulted in any injustice and the provisions of Section 537 of the Criminal Procedure Code are applicable to cure the defect."

[Emphasis supplied]

As held by the Hon'ble Supreme Court in the above judgement in the instant case, the failure to interpret the evidences in Hindi to the accused is only an irregularity. Neither the accused nor his counsel raised any objection at any stage in this regard. Even in the memorandum of criminal appeal, no ground is taken by the accused that prejudice has been caused to him because the evidence recorded in English in open court was not interpreted to him. This appeal has been pending from the year 2015. For the first time, during the final hearing of this appeal, such a oral submission is made by the learned counsel appearing for the appellant that the trial is vitiated for want of compliance of Section 279 of Cr.P.C. coupled with Article 21 of the Constitution of India . The very fact that there was no plea of prejudice take throughout the trial and also in this appeal memorandum would go to show that no prejudice has been caused to the accused on this ground. Even before this court, during his oral submission, the learned counsel for the appellant/A1 was not able to demonstrate any prejudice to the accused. Therefore, we hold that the failure of the trial court to comply with sub section (2) of Section 279 of Cr.P.C. since has not caused any prejudice to the accused, would not vitiate the trial. Similar view has been taken by Gujarat High Court in

Chhotu v. State of Gujarat, AIR 1967 Guj 115.

9. But, the learned counsel for the appellant would make reliance on the judgement of Andhra Pradesh High Court in K.M.Subramani v. State of Andhra Pradesh, 2003 CrL.L.J. 3526. That was the judgement from a learned single Judge. In that case on facts, while referring to Section 279 of Cr.P.C. the learned single Judge found that there was miscarriage of justice caused to the accused. It was only on that factual finding, the trial court held that the conviction and sentence imposed on the accused were liable to be set aside. In that case, there is no reference to the judgement of the Supreme Court in Shivanarayan Kabra as referred to above. In the instant case, since we have come to the conclusion that there is no prejudice caused to the accused and that no miscarriage of justice on account of the above failure by the trial court to comply with sub-section (2) of Section 279 of Cr.P.C. has been caused, we reject the argument of the learned counsel for the appellant.

10. The learned counsel for the appellant would next contend that A1 was arrested according to the case of the prosecution on 22.11.2002 in Ujjaini in Madhya Pradesh State. It is the evidence of P.W.33 that within twenty four hours on such arrest, he produced A1 before the learned Chief Judicial Magistrate, Ujjaini, who in turn, issued a transit warrant and in pursuance of the same, he produced A1 before the jurisdictional Metropolitan Magistrate in Chennai on 25.11.2002 and thereafter, the accused was remanded to judicial custody. But, the learned counsel for the appellant would submit that there is no record to show that the accused was also produced before the learned Chief Judicial Magistrate at Ujjaini, on 22.11.2002 nor is there any evidence to show that any transit warrant was issued by the learned Chief Judicial Magistrate, Ujjaini. The learned counsel would therefore contend that between 22.11.2002 to 25.11.2002, A1/Appellant was in illegal custody.. He would further submit that discovery of any fact made under Section 27 of the Evidence Act while the accused was in the illegal custody is not admissible in evidence and the same cannot be given any credence. In our considered view, this argument finds no substance. We find no reason to reject the evidence of P.W.33 that the accused was produced before the learned Chief Judicial Magistrate at Ujjaini on 22.11.2002 and on the transit warrant issued by the learned Magistrate he was produced Metropolitan Magistrate, Chennai, on 25.11.2002. Assuming that there is some substance in the argument of the learned counsel for the appellant, on that score, we cannot reject the recovery of gun in pursuance of the disclosure statement made by the appellant on 29.11.2002, when he was in police custody as ordered by the learned Metropolitan Magistrate. On 25.11.2002, he was produced before the learned Metropolitan Magistrate, Chennai, who passed

a valid order of remand. Assuming that between 22.11.2002 and 25.11.2002, there was no valid order of remand that would not have deterred the learned Magistrate to pass a valid remand order on 25.11.2002. Thus, from 25.11.2002 onwards, A1 (Appellant) was in custody on a valid remand order made. After he was handed over to police custody, as per the order of the learned Magistrate on 29.11.2002 out of his disclosure statement made by him, M.O.7-Gun was recovered in which we find no illegality.

11. The learned counsel for the appellant/A1 would submit that on 22.11.2002, when A1 was arrested, he allegedly made a confession in which there was no disclosure statement made about the concealment of the gun; whereas in the disclosure statement made on 29.11.2002 it was disclosed by the accused as to where he had hidden the gun. The learned counsel would submit that the statement allegedly made on 29.11.2002 and the consequential recovery of gun cannot be true and such story has been planted by the police. In this argument also we find no force. Fundamentally, the confession of the accused should be voluntary. On 22.11.2002, as soon as his arrest, the appellant/A1 while making confession, had omitted to mention about the concealment of the gun by him. At that stage, P.W.33 was not free to coerce him to disclose about the concealment of the gun. For his own reasons, the appellant/A1 had not disclosed about the concealment of the gun. On 29.11.2002, there was change in his thought process and that is how, voluntarily then he had disclosed the place where he had hidden the gun. In our considered view there is no illegality in the recovery of the gun out of the disclosure statement made by the appellant/A1 on 29.11.2002.

12. Now, turning to the eye witness account, the evidences of P.Ws.1 and 2 cannot be doubted at all. They have stated that they went along with the deceased for shopping and they witnessed the occurrence from a few feet from the place where A1 shot the deceased dead. The other witnesses, who were present at the scene of occurrence, have also spoken about the presence of P.Ws.1 and 2 at or about the time of occurrence. They have stated that one single male person shot the deceased from the distance of seven feet. At that time, the identity of the assailant was not known to P.Ws.1 and 2. From this part of the evidence, the prosecution has clearly established that one male person shot the deceased from behind with a gun which hit the back of the head of the deceased resulting in his death.

13. Now, the question is as to who was that man who shot the deceased from behind. P.Ws.1 and 2 have stated that it was this accused who shot the deceased. They have identified him in court during trial. They had also identified this accused in the test identification parade conducted on 07.01.2003 by P.W.32, the

then Metropolitan Magistrate. The learned counsel would submit that though the accused was arrested on 22.11.2002, the identification parade was held only on 07.01.2003. Therefore, no weightage could be attached to the said identification made after such a long gap of time, he contended. It is true, that no explanation what so ever has been offered by the prosecution as to why it took more than a month's time for conducting test identification parade. But, on that score, in our considered view, we cannot hold that the identification parade has lost its significance. As has been consistently held by the Hon'ble Supreme Court, the identification of the assailants made during test identification parade by the witnesses by itself is not a substantive evidence. Such identification has got only a corroborative evidentiary value. The identification made in court alone is the substantive evidence. It is not necessary that in every case there has to be test identification parade and it is also no a law that in a given case for want of test identification parade, the identification made for the first time in court should be simply rejected. It all depends upon the facts and circumstances of each and every case. Even in the absence of any test identification parade, going by the facts and circumstances of the case, if the court is convinced that the identification of the accused made for the first time in court is sufficient there is no legal embargo to act upon the same. In the instant case, though there was delay in holding the test identification parade on that score, we cannot reject its corroborative evidentiary value.

14. The learned counsel for the appellant would make reliance on the judgement of the Hon'ble High Court in Vijayan v. State of Kerala, 1999 SCC (Cri) 378 to substantiate his contention that the delay in holding test identification has caused dent in the case of the prosecution. A perusal of the said judgement would go to show that in that case, of course, test identification parade was conducted belatedly, but, in the mean while, the photographs of the accused appeared in all news papers and thus, there was every possibility for the witnesses to have seen the said photographs. It was in that factual situation, the Hon'ble Supreme Court rejected the test identification parade. The learned counsel next made reliance on the judgement of the Hon'ble Supreme Court in Satrughana @ Satrughana Parida v. State of Orissa, 1995 Supp (4) SCC 448. In that case, there was a delay of 1 1/2 months in holding the test identification parade for which no explanation was offered by the prosecution. But, a perusal of the said judgement of the Hon'ble Supreme Court would go to show that the Hon'ble Supreme Court found that there was nothing on record to show that the prosecution had taken care to ensure that the identity of the accused was not revealed when they were taken to court and produced as required by law. In those circumstances, when the

prosecution witnesses had admitted in their oral statements that they had not noticed any special identifying features, it becomes unsafe to place implicit reliance on the evidence regarding identification emanating from the proceedings at the test identification parade.

15. In the instant case, there is no such allegation that no pre-caution was made by the prosecution to ensure that the identity of the accused was not revealed before the test identification parade and it is also not the case that P.Ws.1 and 2 could not notice the identifying features of A1. Therefore, this argument is also rejected.

16. From the evidences of P.W.1 and 2 coupled with the other witnesses from that locality, in our considered view, the prosecution has clearly established that it was this accused who shot the deceased from behind.

17. P.W.28, Dr.Baskaran, who conducted autopsy on the body of the deceased found multiple small pellets [13 in number] and large pellets [5 in number] embedded in the brain matter and the same were collected by him. They were found between tables of base of skull. They were sent for examination by ballistic expert. Similarly, P.W.28, took a bit of tissue with skin and hair and two cotton swabs with dark stains which were also sent for chemical examination. On such examination, the Expert (P.W.30) issued Ex.P.7 - Certificate wherein he has stated that nitrate a gun shot residue due to the combustion of the propellant was detected on the tissue (Item No.1) and in the cotton swabs (Item No.2). He further found 11 small lead pieces in Item No.3 are one size pellet and two fragmented portions of pellets and five lead pieces are from distorted large pellets. He further opined that they were fired from a smooth shot gun designed to fire 12 gauge cartridges.

18. Similarly, after the arrest of the accused, the gun and one 12 gauge "KF-99" '1' were recovered from the possession of A1 in pursuance of the disclosure statement made by him and they were also sent for ballistic opinion. The expert [P.W.30*] after due examination issued Ex.P.10 report. In that report, he has stated that the shot barrellled gun is a country made one designed to fire 12 gauge cartridges. It is a lethal fire arm at close ranges. Combustion products of smokeless powder were detected in the barrel of the gun indicating that it was used for firing. But, the time of firing could not be ascertained. He further opined that 12 gauge one size cartridge was misfired in the gun (Item No.1) The lead pellets in Item No2, and 11 small lead pieces described as Item No.3 examined earlier are also of one size and they could have been fired from the shot barrellled hand gun which was examined by him. From the evidence

of P.W.28 it has been clearly established that pellets found embedded in the brain matter of the deceased could have been fired from M.O.7. But, the learned counsel for the appellant would, however, submit that the gun was examined after three months after its seizure and, therefore, manipulation of the same cannot be ruled out. This argument is the manifestation of ill-founded suspicion. We find no material even to remotely conclude that the gun or other pellets would have been manipulated by police.

19. The learned counsel for the appellant would next contend that there is no evidence connecting the pellets recovered from the brain matter of the deceased with the gun in question. But, we find evidence to that effect. It cannot be, though precisely, said by the expert that the pellets which were found embedded in the brain matter of the deceased were fired from M.O.7, he gave opinion of that these pellets could have been fired from M.O.7. This, in our considered view, would be sufficient to hold that M.O.7 would have been used by the accused. When the accused has got no explanation for the possession of M.O.7 in his hand, we find no reason to accept the argument of the learned counsel for the appellant/A1 that M.O.7 would not have been used by the accused.

20. From the above evidence, in our considered view, the prosecution has clearly established that it was this accused who shot the deceased from behind and killed him. So far as the conspiracy is concerned, the trial court has acquitted the other accused as well as the appellant/a1 for want of evidence. Since there is no appeal challenging the said acquittal, we cannot express any opinion regarding the same.

21. The act of the accused using gun with premeditation and killing him on the spot by shooting with a country made gun would squarely fall within the first limb of Section 300 of IPC. The act of the accused would not fall under any of the exceptions to Section 300 of IPC. Therefore, he is liable to be punished for offence under Section 302 of IPC. Similarly, for M.O.7-Gun, the appellant/A1 has got no licence to own. Therefore, he is liable to be punished for offence under Section 25(1-b) of The Arms Act.

22. Now, turning to the quantum of punishment, the trial court itself has imposed only a minimum punishment and, therefore, the same also does not require any interfere at the hands of this court. Thus, we find no merit in the criminal appeal and the same deserves only to be dismissed.

23. In the result, the criminal appeal is dismissed. The conviction and sentences imposed on the appellant/A1 by the

trial court are hereby confirmed. The sentences imposed on the appellant/A1 by the trial court and confirmed by this court shall run concurrently. The period of detention already undergone by the appellant/A1 shall be given set off as required under Section 428 of Cr.P.C.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kmk

To

To

- 1.The Additional Sessions Judge, Krishnagiri, Krishnagiri District.
- 2 do Thro The Principal Sessions Judge, Krishnagiri
- 3 The Judicial Magistrate No.I, Krishnagiri
- 4 Do Thro Chief Judicial Magistrate, Krishnagiri
- 5 The Superintendent Central Prison, Vellore
- 6 The District Collector, Krishnagiri
- 7 The District Central of Police, Mylapore, Chennai 4
- 8.The Inspector of Police, R-1, Mambalam Police Station, Chennai.
- 9.The Public Prosecutor, High Court, Chennai.
- 10 The 17th Metropolitan Magistrate, Saidapet, Chennai 15

Copy to:

The Section Officer,
Crl. Section, High Court, Madras 104

rj (CO)
md(11/04/2017)

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