

Bail Slip

That the Petitioner/Accused @ Venkatesan, S/O Chellappan was directed to be on bail as per order dated 29.09.2008 in M.P.No.1 of 2008 in CrI.A No.706 of 2008 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 05..12..2017

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.706 of 2008

Venkatesan@ Pattiya
S/O Chellappan

... Petitioner/Accused

-Versus-

State Rep. by
The Inspector of Police,
B-1, North Beach Police Station,
Chennai.
[Crime No.148 of 2007]

... Respondent/Complainant

Appeal filed under Section 374(2) of Cr.P.C. against the judgment of conviction and sentence recorded by the learned Principal Sessions Judge, Chennai, in S.C.No.335 of 2007 dated 25.02.2008.

For Appellant : Ms.Sangeetha Arunachalam

For Respondent : Mr.R.Ravichandran,
Government Advocate
[Criminal Side]

JUDGEMENT

The sole accused in S.C.No.335 of 2007 on the file of the learned Principal Sessions Judge, Chennai, is the Appellant herein. He stood charged for offence under Section 302 of IPC. He denied the charges and opted for trial. After full-fledged trial, he was convicted for offence under Section 304(ii) of IPC and was sentenced to undergo rigorous imprisonment for five years. Challenging the above said conviction and sentence, the accused is before this court.

2. The case of the prosecution in brief is as follows:- The deceased in this case was one Pandian. He was a rickshaw peddler. He used to take the customers on his rickshaw on hire in and around George Town in Chennai City. The accused is an auto driver by profession. P.W.1 is the father of the deceased. P.W.2 is the cousin of the deceased. The deceased was living with P.W.1 and his wife - Mrs.Vadivu in Korukkupettai. Often the deceased used to take one Sathya [P.W.3], who was a meals vendor on the platform, in his rickshaw. On 21.02.2007 at about 09.00 p.m., as usual, the deceased was taking her in his rickshaw. On seeing the deceased taking P.W.3 in his rickshaw, the accused questioned him and had an altercation with him. In the midst of altercation, the accused suddenly attacked the deceased on his face and as a result of which the deceased had fallen to the ground. P.W.1 on noticing that the deceased had fallen down, came to the spot and relaxed him and he laid the deceased on the platform. P.W.2 and P.W.3 were also present in the scene of occurrence at the time of occurrence. On the next day morning, at about 04.00 a.m. P.W.1 took the deceased with the help of P.W.4 in his rickshaw to Government Hospital at Chennai, where the Doctor, who examined the deceased declared him as brought dead. P.W.1 thereafter, went to B-1, North Beach Police Station and lodged a complaint (Ex.P.1).

3. P.W.8, the then Sub Inspector of Police, on receipt of such complaint from P.W.1, registered a case in crime No.148 of 2007 under Section 174 of Cr.P.C. and took up the case for investigation. He visited the scene of occurrence, examined P.W.1 and few other witnesses, prepared an observation mahazar and a rough sketch in the presence of P.W.5 and another. He held inquest on the body of the deceased and then, forwarded the same to the Government Stanley Hospital with a request for post-mortem through P.W.7. P.W.6 on 22.02.2007 at about 12.40 p.m. conducted autopsy on the body of the deceased. He found the following injuries on the dead body of the deceased:-

"Abrasions:

- (1) 1 x 0.5 cm on the upper part of right side back
- (2) 3 x 2.5 c.m. 3 c.m. below and medial to the previous injury
- (3) 2 x 1 c.m. middle part of right side back
- (4) 3 x 2 c.m. on pinna of left ear
- (5) A punctured wound 0.5 x 0.5 x 0.5 c.m. on the centre of occipital region of scalp.

On dissection of scalp:
Sub-scapular haematoma 12 x 7 x 1 c.m. (100 ml) on right side temporal region of scalp.
On further dissection, extra dural haematoma (100 ml) on right side temporal lobe.
A fissure fracture 5 c.m. long on right temporal bone.
Dura mater found tense in the region of left fronto, temporo parietal region.
On further dissection, diffuse sub - dural haematoma and sub-arachnoid hemorrhage on left fronto, temporo, parietal lobes on brain and under surface of left frontal lobe.
On further dissection, a fissure fracture 4 c.m. long in right middle cranial fossa."

Ex.P.6 is the post mortem certificate. P.W.6, the doctor, opined that the deceased would appear to have died of head injury.

4. P.W.8, after the post-mortem was over, recovered the dress material, which were removed from deceased, produced by P.W.7, under Form-95. Since the death was unnatural and due to head injury, P.W.9 handed over the entire case diary his superior, P.W.9, the then Inspector of Police.

5. P.W.9 taking up the case for further investigation, examined P.W.1 and few other witnesses and recorded their statements. He altered the case from Section 174 of Cr.P.C. to one under Section 302 of IPC. He examined the Doctor (P.W.6) who conducted autopsy on the body of the deceased and recorded his statement and also obtained the post-mortem certificate. In the course of investigation, on 22.02.2007, he arrested the accused at Door No.154, Thambu Chetty Street and on such arrest, the accused had voluntarily given a confession statement in the presence of one Mari and another. He thereafter forwarded the accused to the court for judicial remand. Since P.W.2 and P.W.3 refused to give statement, on 01.03.2007 he made a request to the Chief Metropolitan Magistrate for recorded their statement under Section 164 of Cr.P.C. On 08.03.2007, he produced both P.W.2 and P.W.3 before the learned XII Metropolitan Magistrate and the learned Magistrate recorded the statements of P.W.2 and P.W.3. On completing the investigation, P.W.9 laid charge sheet against the accused for offence under Section 302 of IPC.

6. Based on the above materials, the trial court framed a lone charge under Section 302 of IPC against the accused. The accused denied the charges and wanted trial. Accordingly, he was put on trial. In order to prove its case, the prosecuting agency

has examined as many as 9 witnesses and marked 11 documents and 2 material objects.

7. Out of the above said witnesses, P.W.1, the father of the deceased, has spoken about the quarrel that ensued between the accused and the deceased on 21.02.2007 at 09.00 p.m. According to him, the deceased used to take P.W.3, who is a road-side meal vendor, in his rickshaw to market and on suspicion that the deceased was having some illicit affair with her, the accused quarreled with the deceased. Even though, he claimed to have witnessed the occurrence, in his cross examination, he has clearly admitted he came to the spot only after hearing about the occurrence. He has further stated that on seeking the accused found lying on the road side, he took him and laid him at a distance on the platform. On the next day of occurrence, when the deceased complained of uneasiness, he took him to the hospital, where he was declared brought dead. He has further spoken about the complaint lodged by him to P.W.8. P.W.2, the cousin brother of the deceased, has stated that he saw the accused and the deceased quarreling with each other and the deceased falling to the ground. He has further stated that P.W.1 took the deceased to hospital on the next day morning.

8. P.W.3 is a road side vendor who used to sell meals on a push cart. She has also stated about the quarrel between the accused and the deceased in which the deceased had fallen down on the ground. P.W.1 on seeing the deceased lying on the ground and laid him at a distance on the platform. On the next day morning, when the deceased had complained of uneasiness, P.W.1 with the help of P.W.4 took him to hospital in his rickshaw. P.W.4 was known to the deceased. He has spoken that he took the deceased to the hospital on the next day morning. P.W.5 has spoken about the preparation of the observation mahazar and the rough sketch by the police at the place of occurrence. P.W.6, the doctor, who conducted autopsy on the body of the deceased, has spoken about the injuries found on the dead body. According to him, the death of the deceased was due to head injuries. P.W.7, the learned Magistrate has spoken about the statement recorded from P.W.2 and 3 under Section 164 of Cr.P.C. P.W.8 has spoken about the registration of the case on the complaint of P.W.1 and his initial investigation. P.W.9 has spoken about the further investigation conducted by him in this case and the filing of charge sheet against the accused.

9. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C. he denied the same as false, but however, he did not choose examine any witnesses nor did he mark any documents.

10. Having considered the above, the learned Sessions Judge found the accused guilty of offence under Section 304(ii) of IPC instead of 302 of IPC and accordingly convicted and sentenced them thereunder as indicated in the first paragraph of this judgment. Aggrieved by his conviction and sentence the accused has come up with the present appeal.

11. I have heard the learned counsel for the appellant/accused and the learned Government Advocate [Criminal Side] for the State.

12. On 03.11.2017, when the matter was called in open court, the learned counsel who was originally on record for the appellant filed a memo stating that he would be withdrawing his appearance. The memo filed by the counsel was accordingly recorded. On the same day, Ms.Sangeetha Arunachalam was appointed as Legal Aid Counsel for the appellant. When the case was called on 24.11.2017, the learned counsel sought time to submit her arguments defending the appellant. Therefore, the appeal was adjourned to today.

13. Today, I have heard the learned counsel for the appellant/accused and the learned Government Advocate appearing for the respondent/State and also perused the records carefully.

14. The learned counsel for the appellant would submit that there is no eye witness account to establish the alleged guilt of the accused either under Section 302 or under Section 304(ii) of IPC. According to her, even though P.W.1 claimed to have witnessed the occurrence, in his cross examination, he has admitted that he came to the spot only after hearing about the occurrence. The testimony of P.W.2 cannot be believed as he is closely related to the deceased. Even P.W.2 speaks of only about quarrel ensued between the deceased and the accused, in which, according to P.W.2, the deceased had fallen down and sustained injuries. P.W.3 has stated that the accused had beaten the deceased and the deceased had fallen down on the road. Thus, according to her, there is absolutely no direct evidence to connect the accused with the injuries as none of them noticed any injury on the body of the deceased immediately after the occurrence and, more particularly, the evidence of P.W.1 is otherwise.

15. The learned counsel for the appellant would further submit that the occurrence was alleged to have taken place on 21.02.2007 at 09.00 p.m. and on the next day morning, when P.W.1 found the deceased unwell took him to the hospital with the help of P.W.4 where the Doctor on examining the deceased, declared him as brought dead. Therefore, according to her, the

deceased who was suffering from epilepsy, after the occurrence, would have probably fallen down somewhere and had received injuries on his head. Therefore, trial court ought to have discarded the evidence of P.W.1 to 3 and acquitted the appellant from the charge of murder, but, erroneously convicted him for offence under Section 304(ii) of IPC which is not legally sustainable and as such, she prays for acquittal.

16. The learned counsel for the appellant would, however, submit that even assuming that in the quarrel that ensued between the accused and the deceased, the appellant fisted the deceased on his face forcibly and as a result of which the deceased had fallen down on the platform and sustained injuries on the back of his head, there is absolutely no evidence to show that the accused had either intention or knowledge to cause the death of the deceased such a bodily injury. Therefore, according of the learned counsel, the act of the accused would not fall under any of the clauses of Section 300 of IPC and at the maximum the accused would be guilty of offence punishable only under Section 323 of IPC.

17. Per contra, the learned Government Advocate (Criminal Side) for the State would vehemently oppose the criminal appeal. According to him, P.W.1 to P.W.3 have vividly spoken about the quarrel between the accused and the deceased and they have also stated that they saw accused fisting the deceased on his face as a result of which the deceased fell to the ground backward in which the deceased sustained injuries on the back of his head. The medical evidence corroborates the eye witness account of P.W.1 to P.W.3. The trial court has rightly found the accused guilty of offence under Section 304(ii) of IPC and there is no reason to interfere with the judgment of the trial court. He, therefore, prays for dismissal of the appeal.

18. Admittedly, both the accused and the deceased were platform dwellers near George Town in Chennai City. P.W.2 and P.W.3 have vividly spoken about the quarrel ensued between the accused and the deceased in which the accused fisted the deceased with his hands as a result of which the deceased had fallen to the ground. None of them have spoken about any injuries sustained by the deceased. Though P.W.3 claimed to have witnessed the occurrence, in his cross examination, he has tacitly admitted that he heard about the occurrence and on his arrival to the spot, he found the deceased lying on the platform somewhere near the shop run by P.W.3. He removed the deceased and took him and laid him at a distance on the platform. However, it is the consistent evidence of P.W.1 to P.W.4 that on the next day morning at about 04.00 a.m. P.W.1 found the deceased in a discomfort position and P.W.1 gave some water to the deceased. Thereafter, on the same day, at about 06.00 a.m.

P.W.1 found froth coming out from the mouth of the deceased. He immediately took the deceased to the Government Stanley Hospital at Chennai with the help of P.W.4 in his rickshaw. The doctor who examined the deceased had declared him as brought dead. P.W.4 has stated that he accompanied P.W.1 when the deceased was being taken to the hospital where the doctor on examining the deceased declared him as brought dead. It is the uncontroverted case of the prosecution that the deceased died of head injuries. P.W.6* the doctor, who conducted autopsy, had seen a punctured wound on the centre of occipital region of scalp. Correspondingly there was sub scapular haematoma on right side temporal region of scalp and extra dural haematoma on right temporal lobe. There was also a fracture of 5 c.m. long seen on the right temporal bone. In the opinion of the doctor (P.W.7), the cause of death was due to the head injury, which resulted in diffuse sub dural haematoma and sub arachnoid haemorrhage.

19. Though the learned counsel made an attempt to convince this court that the deceased immediately after the occurrence as a result of fits would have fallen some where on the platform on his backward and sustained injuries, this court is not persuaded by the same. The injuries noticed on the head of the deceased would not have occurred, in the ordinary course, if a fits patient falls to the ground. Thus, this argument of the learned counsel for the appellant, in the considered opinion of this court, cannot be endorsed.

20. Next the learned counsel for the appellant contended that even assuming that the accused forcibly fisted the deceased on his face as a result of which the deceased fell down and sustained injuries on the back of his head, neither intention nor knowledge could be attributed to the accused because the altercation was sudden and even if the accused was to be found guilty of offence, an inference of guilt against him, at the most can be drawn only under Section 323 of IPC. This court finds substance in the said argument.

21. The medical opinion of P.W.6 is that the death of the deceased was head injury. The evidence of P.W.1 to P.W.3 would go to establish the prosecution case to the extent that there was an altercation between the accused and the deceased in midst of which, the accused gave a fist to the face of the deceased as a result of which the deceased fell down on the platform and sustained injuries on the back of his head. But, no intention or knowledge on the part of the accused could be inferred from the testimonies of P.W.1 to P.W.3. Thus, in the considered view of this court, the act of the accused which resulted in the death of the deceased shall not fall within anyone of the limbs of Section 300 of IPC. Undoubtedly, there was neither any intention to cause the death nor any intention on the part of

the accused to cause such bodily injury as is likely to cause the death. Thus, the act of the accused would not fall under the first limb or under the 2nd limb of Section 299 of IPC. Similarly, the act of the accused would not fall under the 3rd limb of Section 300 of IPC also, because, the accused could not be attributed with knowledge that by his act, a man would fall and die. In this regard, it would be useful to refer to the judgment of the Hon'ble Supreme Court in Jani Gulab Shaikh vs. The State of Maharashtra in 1969 (2) UJ 598 SC wherein in an identical situation, the Hon'ble Supreme Court has held that the act of the deceased would not fall under anyone of the limbs of Section 299 of IPC and the same is therefore, an offence punishable under Section 323 of IPC. Here in this case, the act of the accused in causing head injuries would amount to voluntarily causing hurt punishable under Section 323 of IPC. Thus, this court concludes that the accused is liable to be punished for offence under Section 323 of IPC alone.

22. Insofar as the quantum of sentence is concerned, it is seen that the appellant had already undergone more than seven months of imprisonment. The learned counsel for the appellant prayed to show leniency in the matter of sentence. Considering the nature of the offence and the mitigating circumstances, this court is of the view that sentencing him to the period already undergone would meet the ends of justice.

23. For the foregoing reasons, the conviction and sentence of the appellant under Section 304(ii) of IPC as recorded by the trial court is liable to be set aside and instead he could be convicted under Section 323 of IPC.

24. In the result, this criminal appeal is partly allowed; the conviction and sentence of the appellant under Section 304 (ii) of IPC is set aside and instead, he is convicted for offence under Section 323 of IPC and period of sentence is reduced to the period already undergone by him.

25. Before parting with the case, I appreciate the services rendered by Ms.Sangeetha Arunachalam, Legal Aid Counsel, appointed by us, to appear on behalf of the appellant and she shall be remunerated by the State Legal Aid Board suitably.

Sd/-

Assistant Registrar(CS V)

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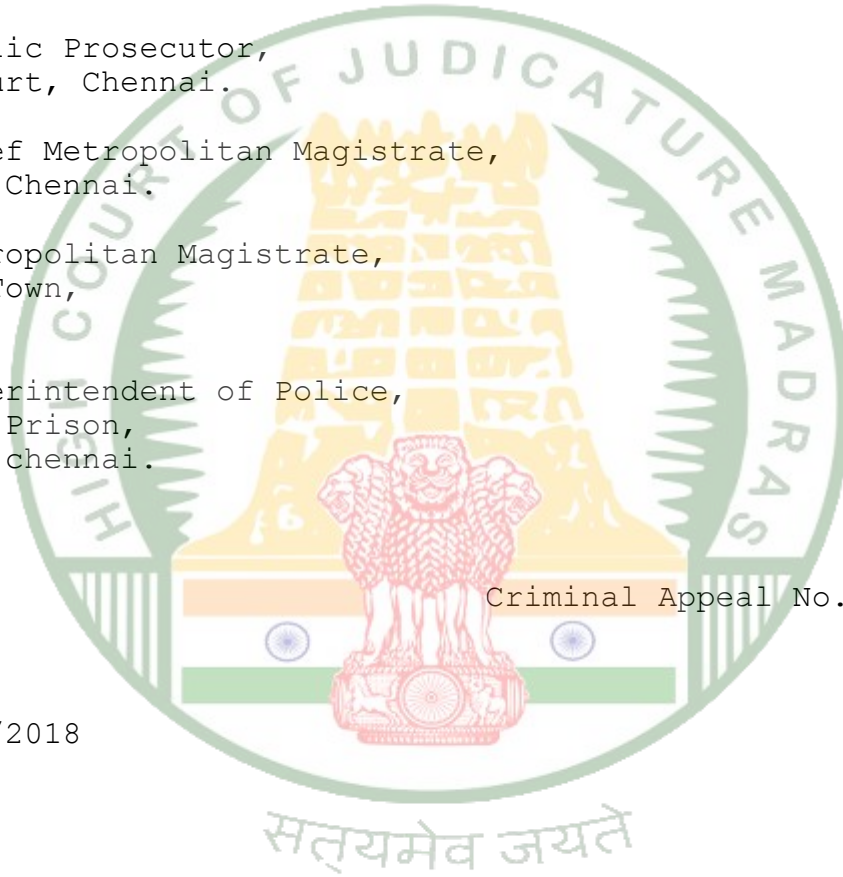
Sub Assistant Registrar

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To

- 1.The Principal Sessions Judge,
Chennai.
- 2.The Inspector of Police,
B-1, North Beach Police Station,
Chennai.
- 3.The Public Prosecutor,
High Court, Chennai.
- 4.The Chief Metropolitan Magistrate,
Egmore, Chennai.
- 5.The Metropolitan Magistrate,
George Town,
Chennai.
- 6.The Superintendent of Police,
Central Prison,
Puzhal, Chennai.

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