

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.07.2017

CORAM :

THE HONOURABLE MR.JUSTICE C.T. SELVAM

Criminal Appeal No.827 of 2008

1.N.Murugavel
S/o.Nagappan

2.Kalaiselvi
W/o.Nagappan

... Appellants

-Vs-

The State rep. by
Station House Officer,
Orathur Police Station,
Chidambaram Taluk,
Cuddalore District.

... Respondent

Criminal Appeal under Section 374 (2) of Cr. P.C. to call for the entire records in connection with Sessions Case No.248/2008 dated 07.11.2008 on the file of the Sessions Judge, Mahila Court, Cuddalore and set aside the judgment passed by the Sessions Judge, Mahila Court, Cuddalore in Sessions Case No.248/2008 dated 07.11.2008.

For Appellants :: Mr.K.Ethirajulu

For Respondent :: Mr.V.Arul,
Additional Public Prosecutor

J U D G M E N T

This appeal arises against judgment of learned Sessions Judge, (Mahila Court), Cuddalore, passed in S.C.No. 248 of 2008 on 07.11.2008, convicting first appellant herein for offence under section 316 I.P.C and sentencing him to undergo 7 years R.I. and fine of Rs.5,000/- i/d 3 months R.I. and second appellant herein for offence u/s.352 IPC and sentencing her to pay a fine of Rs.500/- i/d 2 weeks S.I. A2 was acquitted of charges under Sections 294 and 316 IPC.

2. The case of prosecution is that PW-2, Rajathi, is the victim. She is the wife of PW-1 Senthilkumar. A2, is the mother of A1. On 30.09.2007, at about 7.00 p.m., PW-2 was viewing television in front of the T.V., IN THE house of PW-3, Thangarasu, opposite her own. One Vetrivel, then juvenile, is the brother of A1. He was standing in front and screening her view. PW-2 asked him to move. An argument ensued between vetrivel and P.W.2. A1 beat her on the stomach with M.O.1-stick. She was then 8 months pregnant. She developed pains. She could not be taken to hospital that night. The next day at 6.00.a.m., PW-1 and P.W.2 started on their way to hospital. A2 was then approaching with a cup of tea in her hand. PW-1 told her that if anything happened to PW-2, there would be a price to

pay. A2 again abused and set upon P.W.2, causing injury to her stomach. Thereafter, PW-2 was taken to the Primary Health Centre at Orathur. When P.W.11- nurse was on duty on 01.10.2007, PW-2 approached her at 09.00 a.m and said that she was suffering stomach pain, vomiting and indigestion. She was given some tablets for indigestion and advised to go Government Hospital, Chidambaram. PW-1 and 2 did not go to Chidambaram, as there was no transport facility. While outside the hospital, PW-2 developed labour pains at about 12.00 noon and was attended to by a Doctor. PW-2 delivered a still born male child. Thereafter, PW-1, her husband, went to Orathur Police Station and gave a complaint, Ex.P1.

3. On 01.10.2007 at about 8.00.p.m, P.W.13, Sub Inspector of Police, registered a case in Crime No. 61 of 2007 on the file of respondent under Sections 294(b), 323 and 316 IPC and forwarded complaint Ex.P1 to the Officer concerned. Ex.P.14 is the First Information Report. On 02.10.2017, PW-14, Inspector of Police, Orathur, took up investigation and went to the place of occurrence. He prepared observation mahazar – Ex.P15 and rough sketch – Ex.P16 in the presence of P.W-7 and another. He examined P.Ws 1 to 10 and recorded their statements. Thereafter, he went to Government Hospital, Chidambaram and conducted inquest over the body of the

7 month still born baby in the presence of witnesses. The inquest report is Ex.P19. He arrested accused Murugavel, Vetrivel and Kalaiselvi at Maduranthagannallore bus stop at about 14.00. hrs. He recorded the confession statement of Murugavel in the presence of PWs-9 and 10. At about 15.30 hours, he seized one Eucalyptus wooden stick measuring 82 cms in length, M.O.1, vide seizure Mahazar Ex.P21. On 04.10.2007, he examined PW-11 Nurse and recorded her statement. On 03.12.2007, he sent a requisition letter for post mortem in Ex.P22. On 31.12.2007, he examined P.W.12, doctor, recorded her statement and obtained medical report. On completion of investigation, on 13.03.2008, P.W.14 filed a final report informing commission of offences under Sections 294(b), 323, 352 and 316 of I.P.C. On committal, the case was tried in S.C.No.248 of 2008 on the file of learned Sessions Judge, Mahila Court, Cuddalore.

4. Before the trial Court, the prosecution examined P.Ws 1 to 14 and marked 22 exhibits and 1 material object. None were examined on behalf of the defence nor were any exhibits marked.

5. On appreciation of materials before it, trial Court, under judgment dated 07.11.2008, convicted first appellant for offence under section 316 I.P.C and sentenced him to undergo 7 years R.I. and fine

of Rs.5,000/- i/d 3 months R.I. and second appellant for offence u/s.352 IPC and sentenced her to pay a fine of Rs.500/- i/d 2 weeks S.I. A2 was acquitted of offences under Sections 294 and 316 IPC. Hence, the present appeal.

6. Heard learned counsel for appellants and learned Additional Public Prosecutor for respondent.

7. Learned counsel for appellant submitted that save the evidence of P.W.1 and P.W.2, husband and wife, there was nothing to support the prosecution case. P.W.3 to 6, examined as eye witnesses to the occurrence, have turned hostile. Learned counsel submits that Ex.P.10- Accident Register of P.W.2 informs of an attack by three persons. P.Ws.7 and 8 are witnesses to the Observation Mahazar. P.Ws.9 and 10, allegedly witnesses to recovery of wooden stick-M.O.1 made pursuant to confession of the accused also turned hostile. P.Ws.11 is the nurse at the Primary Health centre who had initially attended on P.W.2. P.W.12 was the Doctor who had issued the wound certificate of P.W.2- Ex.P.9. P.Ws.13 - Sub Inspector of Police registered the case, while P.W.14-Inspector of Police caused investigation and filed charge sheet. Learned Counsel submitted that while the prosecution alleged occurrence of 30.09.2007 the complaint

allegedly preferred on 01.10.2007 has reached the Magistrate on 02.10.2007 and therefore the possibility of false implication loomed large. When the independent alleged eye witnesses had not supported the prosecution case, Trial Court ought to have rendered a finding of acquittal.

8. We have heard the learned Additional Public Prosecutor on the above submissions.

9. This Court would confirm the finding of conviction of the Trial Court, as P.W.2 the victim as also P.W.1 her husband have clearly spoken to the manner in which P.W.2, then eight months pregnant, had suffered injury as a consequence of which a male foetus which Ex.P.13- Post Mortem Certificate informs of having been 24 to 25 weeks old, was aborted. Ex.P.8 – Referral slip issued at the Primary Health Centre confirms that abortion took place there after the child in womb had died. Ex.P.9- Ultrasonogram report of 04.10.2007 reveals that the uterus of P.W.2 was bulky post abortion. There is nothing in Ex.P.13- Post mortem report or Ex.P.12-Viscera report to indicate that the death of child in womb was caused otherwise. Both accused, P.Ws.1 and 2 as also 3 to 6 all resided lived in the same vicinity. There is nothing surprising in P.Ws.3 to 6 turning hostile towards saving the

accused. The conduct of P.Ws.1 and 2 proceeding to the hospital on the morning next to the first occurrence is quite natural, as P.W.1 had explained that they did not immediately proceed to hospital as it was night. The complaint has been preferred immediately after the abortion of foetus and in the circumstance of the case, cannot be seen to be delayed. The Accident Register of P.W.2- Ex.P.10 reflects the correct position of attack by three persons since the first occurrence involved both appellants as also a juvenile.

10. While upholding the conviction of A1 for offence u/s. 316 IPC, this Court, taking into consideration, the fact that the occurrence took place owing to a sudden quarrel which arose when P.W.2/victim, the juvenile brother of A1 as also others were watching television from outside P.W.3's house and A1 has acted on the spur of the moment without any premeditation, would reduce the substantial sentence of imprisonment to 3 years R.I. Fine and default sentence imposed by the Trial Court are confirmed. Conviction of A2 and sentence imposed on her is confirmed. The Criminal Appeal is disposed of with the above observations.

11. Before parting with this case, we are to discuss a position in law. Sec. 316 I.P.C reads as follows:

"316. Causing death of quick unborn child by act amounting to culpable homicide:

Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. "

In the instant case, the prosecution alleged offence u/s. 316 IPC both against A1 as also his mother, A2. Such offence against A1 was alleged on the assertion that on 30.09.2007, A1 dealt a kick to the stomach of P.W.2 who was then 8 months pregnant and caused death of the quick in womb child. Trial court has found such assertion of the prosecution proved beyond reasonable doubt. The prosecution assertion against A2 was that on the next day, 01.10.2007, she dealt a kick to the stomach of P.W.2 resulting in the death of the child. Trial court has found such charge not proved. In the circumstances, there is no difficulty in confirming the finding of conviction of A1 for offence u/s. 316 IPC. The question that arises for consideration is if two or more persons can be accused of commission of offence u/s. 316 IPC when their offending actions are occasioned at different times. For the purpose of explanation, we would presume that in the case before us the actions of A2 complained as offence u/s. 316 IPC also were proved.

The answer would be that in such event there would be absolutely no clarity on which accused's act caused the death of the child quick in womb. We would not know with any certainty that it was the kick dealt by A1 which caused the same or it was that dealt by A2 which did so. In such circumstance, both A1 and A2 would be entitled to the benefit of doubt and would have had to be acquitted unless, of course, there be medical evidence to indicate that the death was caused even before A2 came to deal a blow to the stomach of P.W.2.

18.07.2017

Index:yes/no
Internet:yes/no
kmi/kpr

To

1. The Sessions Judge,
Mahila Court, Cuddalore.
2. Station House Officer,
Orathur Police Station,
Chidambaram Taluk,
Cuddalore District.
3. The Public Prosecutor,
High Court, Madras-104.

C.T.SELVAM, J.,

kmi/kpr



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