

Bail Slip

Mr. Murugan

The above said appellant was directed to be released on bail as per order of this court dated 21.11.2011 made in Crl.M.P. 1/2011 in Crl.r.C.No.1537 of 2011 on the file of this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.08.2018

PRONOUNCED ON : 20.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE RMT. TEEKAA RAMAN

CRL.R.C.No.1537 of 2011

Murugan

... Accused / Appellant / Petitioner

-vs-

The State of Tamil Nadu,
represented by,
The Inspector of Police,
Mannaloorpettai Police Station,
Vilupuram District.
(Crime No.9 of 2006)

.. Complainant/Respondent/Respondent

PRAYER: Criminal Revision Case filed under Section 397 and 401 Cr.P.C., praying to call for the entire records relating to the judgment dated 09.09.2011 made in C.A.No.33 of 2011 on the file of the Court of Principal Sessions Judge, Villupuram in confirming the judgment dated 16.06.2011 made in S.C.No.298 of 2008 on the file of the Court of II-Additional Assistant Sessions Judge, Villupuram convicting the petitioner/accused for the offence under Section 451 IPC., sentenced for 1 year RI with fine of Rs.500/-, in default, to undergo 3 months S.I., and convicting for the offence under Section 307 IPC, sentenced for 5 years R.I., with fine of Rs.2,000, in default, to undergo 6 months S.I., and set aside the same and acquit the petitioner/accused.

For Petitioner : Mr.N.S.Sivakumar

For Respondent : Mrs.V.Sarathadevi,

Government Advocate (Criminal side)

ORDER

Convicted accused is the revision petitioner herein. This criminal revision is filed against the judgment dated 09.09.2011 made in C.A.No.33 of 2011 on the file of the learned Principal Sessions Judge, Villupuram confirming the judgment dated 16.06.2011 made in S.C.No.298 of 2008 on the file of the learned II-Additional Assistant Sessions Judge, Villupuram.

2. The case of the prosecution in brief is as follows:

The accused and the defacto complainant PW1 had illicit relationship. Since PW1's parents advised her not to continue with the accused, she stopped. Due to that reasons, there was enmity arose between PW1 and the accused. On 10.01.2006 at 2.45 hrs, in PW.1's house at Mettucherry Village, while PW1 was sleeping with her children, accused with intention to commit murder of PW1, trespassed into the house of PW1 and scolded her as to why she was talking with one mason for Rs.100 and Rs.50 and there was a wordy quarrel arose between PW1 and the accused. Suddenly, the accused took the kerosene cane and poured on PW1 and set fire on her. PW1 got burns over her body. Based on the complaint statement of PW1, a case was registered in Crime No.9 of 2006 for the offence under Section 307 IPC.

3. After completing investigation, the respondent police filed final report for the alleged offence punishable under Sections 451 and 307 IPC against the accused.

4. The prosecution has examined PW1 to PW15 and marked Exs.P1 to P8 and M.O.1 (4 in nos.).

5. Based upon the evidence adduced before the trial Court, P.W.1 to P.W.15 and Exs.P.1 to Ex.P8 and M.O.1 to M.O.4, the learned trial Judge came to the conclusion that the charges are framed against the accused have been proved by the prosecution beyond reasonable doubt and accordingly laid the conviction and sentence against the accused.

6. On appeal, in C.A.No.33 of 2011, the learned Principal Sessions Judge, Villupuram has dismissed the same and hence this revision.

7. The learned counsel for the revision petitioner would submit that both the Courts below have erred in relying upon the witnesses and no independent witness have been examined and the presence of the petitioner at the scene of crime is highly doubtful and non-examining of the Doctor, who has given complete treatment at the JIPMER hospital is fatal to the prosecution.

8. The learned counsel for the petitioner contend that the Courts below failed to see the oral evidence of PW.13 and the earliest version of PW.1 recorded by PW.13 in the Accident Register-Ex.P7 would categorically establish that PW.1 has attempted to commit suicide by self-immolate herself by pouring kerosene and lit fire herself as she being ridiculed of her extra-marital relationship with the petitioner/accused known to his family and her parents as well. Even according to PW.1, the alleged occurrence taken place at about 2.45 a.m., and the quarrel with the petitioner/accused long lasted for about 1 ½ hours inside the house and there is every possibility of resort to the help of others by that time as the elders are available in the scene of occurrence and her evidence is unbelievable. He would further contend that the Courts below simply overlooked the material evidence PW.13-Doctor Premkumar, who clearly stated that "PW.1 herself set fire and thus got burns. He found burns all over the head, face, both cheeks, upper portion of head, chest and further opined that there is possibility of getting burns on front and back side while committing suicide by pouring kerosene over the head". The Courts below erred in placing much reliance on the evidence of the child witness PW.11, who was 7 years old at the time of occurrence and she may be incapable of giving statement before the police and the evidence before Court is a parrot like version of the other witnesses and also failed to see that it is unsafe to rely upon the evidence of PW.11-child witness to form basis of conviction and the evidence of susceptible to tutoring.

9. The learned Government Advocate (Criminal side) made submission in support of the judgment of the Courts below.

10. Points for consideration:

1. Whether conviction under Section 451 and 307 IPC is sustainable in law?
and
2. Whether sentence awarded therein is excessive?

11. A perusal of the prosecution witness, it is seen that P.W.1-Kala is the victim girl, while P.W.2 is her sister. P.W.4 is the brother and PW.5 is the husband of PW1 and PW7 is the elder brother of the husband and PW9 is also a relative. Except PW1 and PW4, all other witnesses have deposed that after they came to see the victim in the JIPMER hospital, they came to know about the incident after few days. Thus for the purpose of determination of the revision, the version of PW1, PW4 and PW.11-Porkodi, child witness is relevant.

12. It is seen from the records that PW1 and accused have illicit relationship, as PW1 has left her husband and

living separately, since her husband has married another girl of his choice. On the previous day of the occurrence, she went to the town to withdraw certain amount from the Bank, along with one mason, which was wrongly understood by the accused and hence on 10.01.2006, at about 2.45 hours, the accused came to the house of PW.1. When she heard the noise of knocking at the doors, she went and saw that the accused was standing and the accused told her that's why she met the mason for money. When PW1 asked the accused to get out of the house, at that time, the accused, by telling that he will kill her, took kerosene cane and poured all over her face, head and set fire by scratching match stick. PW.1 ran out and fell down. Her saree and jacket got fire. She got burn injuries on her face, neck, both hands. After hearing noise, her maternal junior aunt, namely, Vasantha and neighbour Thangadurai brought her to the Government Hospital, Thirukoilur for treatment. From there, she was referred to Pondicherry. She was brought by her sister-in-law, his brother-in-law to JIPMER hospital. Her complaint statement is Ex.P.1.

13. P.W.13-Doctor, who had given treatment on the very same day at 05.15 a.m., deposed that when he was in duty at Government Hospital, Tirukoilur, PW.1 was brought by one Vasantha (PW.2), with burns. On examination, PW.1 stated that at 2.30 a.m., she herself set fire and thus got burns. Since PW.1 was stated the above with hesitation, PW.13 recorded with a question mark against the column 'self immolation' in the Accident Register-Ex.P7. On examination, he found burns over head, face, both hands, upper portion of head, chest in PW.1's body. He referred to further treatment. There is possibility of getting burns on front and back side of the body while committing suicide by pouring kerosene over the head. It is also possible to have burns all over the body. The percentage of burns over PW.1 was 40% and the accident register issued by PW.13 was marked as Ex.P7. At this juncture, the contention of the learned counsel for the revision petitioner that PW1 has committed self-immolation and he relied upon Ex.P7 Accident Register.

14. The learned counsel appearing for the petitioner/accused would refer and rely upon Ex.P7, which is an accident register, wherein Doctor has mentioned as "alleged to have sustained burns-self immolation?". Therefore, the learned counsel appearing for the petitioner would argue that PW.1-the victim herself had set fire on herself. That's why immediate to the occurrence, she deposed before the doctor-PW.13 that the incident was self-immolation. Only thereafter, the relative of PW.1 have been falsely foisted the case against the accused and registered a false case.

15. In this regard, it is to be stated that PW.13-doctor himself has clarified that since he was repeatedly asking as to how the accident has taken place, with a hesitation, PW1 has replied that she made self immolation attempt and that is why he put the question now. At this juncture, it is relevant to state that in the case of Pattipati Venkaiah vs. State of Andhra Pradesh reported in 1985 Cri LJ 2012 wherein it was observed that,

"A doctor is not at all concerned as to who committed the offence or whether the person brought to him is a criminal or an ordinary person. His primary effort is to save the life of the person brought to him and inform the police in medico-legal cases. It is well settled that doctors before whom dead bodies are produced or injured persons are brought, both themselves take the dying declaration or hold the post-mortem immediately and if they start examining the informants they are likely to become witnesses of the occurrence which is not permissible".

In yet another decision reported in 1993 Cri LJ 2173, in the case of Basheer vs. State by Sub Inspector of Police, Madurai, it has been held as follows:

"It is advisable that in all cases, it is better for the medical officers, while mentioning about the assailant, note whether he is a known person or unknown person, but they are not expected to note the name of the person."

In the case of P.Babu and Ors. vs. State of Andhra Pradesh reported in AIR 1994 SCC 424, it has been held as follows:

"It is a matter of common knowledge that such entry in the injury certificate does not necessarily amount to a statement. At that stage, the doctor was required to fill up that column in a normal manner and it was not the duty of the doctor to enquire from the injured patient about the actual assailants and that the inquiry would be confined as to how he received the injuries namely the weapons used etc.,"

16. Thus based upon the above decisions and also coupled with the practise of Standard Operative Procedure (SOP) prescribed into the Tamil Nadu Medical Code, the note of the

Doctor in the wound certificate or Accident Register cannot be taken as a substantive evidence to fix the culpability or non-culpability of the accused or otherwise, the certificate has to be relied on only for the limited purpose of ascertaining the nature of the injuries and the weapon stated to have been used and the relevancy of time and hence merely because, certain note has been made by the Doctor that will not probablize the case of the defence. On perusal of the noting made by the Doctor in the Accident Register, it is not at all possible to doubt relating to the genesis of this case, which is clearly described in Ex.P.1-complaint. Based upon which the criminal law was set into motion and accordingly, the arguments advanced by the revision petitioner/accused that some question mark has been made by the Doctor and therefore, he has probalized the suggestive case that it was a self-immolation.

17. As stated supra, at the risk of repetition, PW.13-Doctor Premkumar, in the chief-examination himself has clarified as to why, he has put the question mark that since PW.1 has answered with some hesitation and thereafter, she replied that she made self immolation and thus, in view of the above explanations offered by the medical witness, such an entry in the Accident Register does not necessarily amount to statement, since at the relevant stage, doctor is required to fill up in the normal manner and it is not the duty of the Doctor to question into the injured patient about the actual assailants or the accused and that his enquiry would be confined as to how she received injury and the weapons used and hence the plea raised by the revision petitioner does not holds good in view of the decisions stated above and the same is hereby stands rejected.

18. The learned counsel for the revision petitioner raised the plea that PW.11-Porkodi is a child witness and it cannot relied solely to form basis for conviction and therefore, he contended that the prosecution has failed to prove the guilt of the accused beyond all reasonable doubts. In support of his argument, he relied upon the cases in State of Karnataka vs. Shantappa Madivalappa Galapuji and others reported in 2010(1)MLJ (Cr1)1248(SC), Nivrutti Pandurang Kokate and Ors. vs. State of Maharashtra reported in 2008(12)SCC 565, Golla Yelugu Govindu vs. State of Andhra Pradesh, reported in (2008) 4 Scale 569 and Dattu Ramrao Sakhare vs. State of Maharashtra reported in (1997) 5 SCC (Cr) 413.

19. The summary of the decisions of the above mentioned cases regarding the duty of the trial Courts as to recording their subjective satisfactions before recording the evidence of the child witness. The prepositions of law, as contemplated by the Hon'ble Apex Court regarding the examination and evaluation of child version, either as witness of crime or victim of crime,

following guidelines have exempted from the above cited decisions. That are as under:

"(i) a child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto;

(ii) all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease-whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto;

(iii) a child witness, if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath, the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof;

(iv) the only precaution, which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored;

(v) the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge, who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous in a world of make-believe.

(vi) though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in

it, there is no obstacle in the way of accepting the evidence of a child witnesses".

20. The deposition of a child witness may require corroboration, but in case, her deposition inspires the confidence of the Court and in the absence of any iota of evidence leading to facts, when there is no embellishment or improvement therein, the Court may rely upon her evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because she is susceptible to tutoring. Only in case, there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully.

21. On close scanning and scrutiny of the evidence of the victim-PW.1 and her daughter PW.11 who was in 8th standard at the time of examination before the Court, initially, the trial Court has put several questions to check whether the intellectual capacity to understand the question and to give rational answers thereto and thereafter, it appears that the learned Additional Assistant Sessions Judge, Villupuram has taken a view to make the decision on the question, whether the child witness-PW.11 has sufficient intelligence and capacity to disclose what she wanted to convey and has found to have necessary intelligence of understanding of the application of oath have clearly recorded her subjective satisfaction to the decision to the examination of PW.13 is found to be clear on the lines of the decisions of the Hon'ble Apex Court as relied on before this Court. Further more, the Sessions Court has recorded the statement of the child witness and also apprise of the fact that on hearing the huge cry of the mother, PW.11 awoke in the middle of the night and saw the incident wherein the accused quarrelled with her mother (PW.1) and poured kerosene on PW.1 and set her ablaze and her mother went out of the house and subsequently, the mother of the victim-PW.3 came to the scene of occurrence and thus, this Court finds that though the evidence of PW.11-the child witness appears to be competent, except minor contradictions, there is no major contradiction in respect of the alleged act of the accused on the body of PW.1 in pouring kerosene and setting her ablaze and also a subsequent coordination with the family members in asking them to rescue of the mother from the fire have inspired the confidence of the Court.

22. By relying upon the findings of the trial Court, that on a combined reading of version of PW.1 and PW.11, the prosecution has proved the prosecution theory beyond reasonable doubt. PW.1 being the injured witness, the testimony of the injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. Admittedly, the accused is found tress-

passed into the house of PW.1 at the mid-night and the facts as spoken by the private prosecution witnesses, namely, P.Ws.1, 3, 5 and 11, the conviction under Section 451 IPC is sustainable and hence, this Court confirmed the conviction and sentence imposed under Section 451 IPC.

23. It remains to be stated that after initial treatment by PW.13-Doctor Premkumar, who had issued Ex.P.7-Accident Register and assessed the burn injury at 40%, for further treatment, she has taken to JIPMER hospital and given treatment in the JIPMER hospital by Doctor Acuthan and subsequently she has been discharged. For the reasons best known, the prosecution has not examined Doctor Elanchezian and Acuthan of JIPMER Hospital, who have given further treatment and the victim has been retrieved from the burn injury and discharged from the hospital and however, no medical certificate or discharge summary or wound summary has issued by JIPMER Hospital was marked by the prosecution to enlighten the case to prove the charge under Section 307 IPC. Such oral and documentary evidence as that of Doctor Elanchezian, who was not at all examined before the trial Court, nor any medical document filed before the trial Court, namely, discharge summary or wound summary, the trial Court appears to have been carried away by initial remarks made by PW-13-Doctor Premkumar in fixing the quantum of injury at 40% and accordingly, awarded 5 years sentence. Taking into lapse on the part of the prosecution regarding the non-examination of Doctor Elanchezian, JIPMER Hospital regarding the nature and injury that has resulted on the body of PW.1 by the act of the accused and in the absence of any documentary medical evidence as to give a fair assessment of the injury sustained, this Court is inclined to modify the conviction and sentence and accordingly, conviction under Section 307 IPC is modified and converted into one under Section 326 IPC and sentence has been reduced to two years rigorous imprisonment, with fine of Rs.2000/-, in default, to undergo two weeks simple imprisonment. The period already underwent shall be given set off under Section 428 Cr.P.C.

24. In the result, this criminal appeal is partly allowed to the extent as indicated above. Bail bond, if any, executed by the accused/appellant shall stand cancelled.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

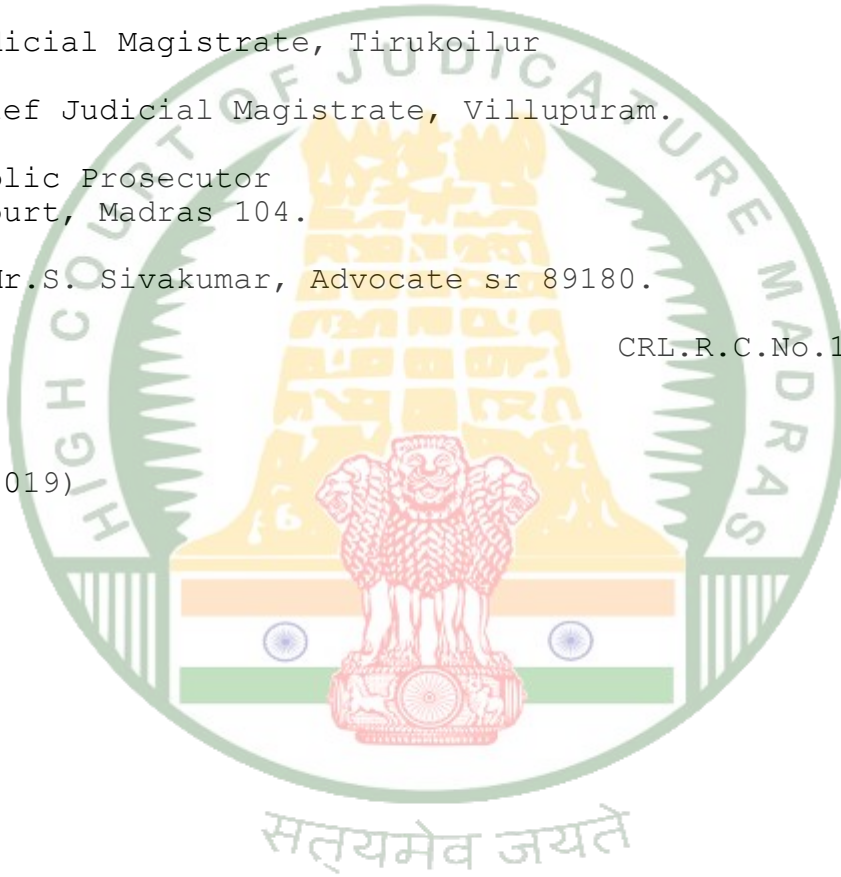
PJL

To

1. The Principal Sessions Judge,
Villupuram.
 2. The II-Additional Assistant Sessions Judge,
Villupuram.
 3. The Inspector of Police,
Mannaloorpettai Police Station,
Vilupuram District.
 4. The Judicial Magistrate, Tirukoilur
 5. The Chief Judicial Magistrate, Villupuram.
 6. The Public Prosecutor
High Court, Madras 104.
- +1 CC to Mr.S. Sivakumar, Advocate sr 89180.

CRL.R.C.No.1537 of 2011

KS (CO)
SP (24/01/2019)



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