

BAIL SLIP

That the Appellant /1st Accused namely Muthaiyayan in CRL A.548/11 (1st accused in SC.No.03/08/2009 on the file of the principal Sessions Judge, Salem) was released on bail vide order of this court dated 12/01/2012 and made in CRL.M.P.NO.1 of 2012 in CRL.A NO.548/2011.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.07.2018

PRONOUNCED ON : 02.08.2018

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRL.A.No.548 of 2011

Muthaiyayan
S/o. Chinnu

...Appellant/1st Accused

Vs

The State rep by
The Station House Officer,
Thambampatti Police Station,
Salem District.

...Respondent/ Complainant

Prayer: Criminal Appeal filed under Section 374 of Cr.P.C., against the judgment made in Sessions Case No.318 of 2009, dated 01.08.2011 on the file of the learned Principal Sessions Judge, Salem convicting and sentencing the appellant to undergo imprisonment for ten years and to pay a fine of Rs.1000/- under Section 304(i) IPC, in default to undergo rigorous imprisonment for three months and also convicted and sentenced to undergo rigorous imprisonment for three months each for the offence under Section 323 read with Section 34 IPC (3 counts) and directing the sentence of imprisonment to run concurrently.

For Appellant : Mr.C.D.Johnson

For Respondent : Ms.Padmavathi Ramesh
Additional Public Prosecutor

J U D G M E N T

This appeal is directed as against the judgment dated 01.08.2011 made in S.C.No.318 of 2009 on the file of the learned Principal Sessions Judge, Salem, thereby

convicted and sentenced the appellant to undergo imprisonment for ten years and to pay a fine of Rs.1000/- in default of payment of fine to undergo rigorous imprisonment for three months for the offence under Section 304 Part(i) IPC, and also convicted and sentenced the appellant to undergo rigorous imprisonment for three months each for the offence under Section 323 r/w Section 34 IPC (3 counts). Before the trial Court, there are two accused in this case. The appellant is the first accused and the second accused viz., Chinnu, S/o. Iruson died during the trial.

2. The brief fact which leads to file this appeal is as under :- On 25.05.2009, at about 7.30 p.m., the appellant along with another accused, who is his father, due to previous enmity with the deceased and her family, picked up quarrel with regard to permitting one Sadaiyan P.W.10, to lay the bricks on the common pathway used by the accused as well as the deceased family. Due to the said quarrel, the accused scolded P.W.1 and the deceased with filthy language and also the first accused assaulted the deceased with neem wooden log on her head and the second accused assaulted the deceased with neem stick and caused grievous injury on her. When P.Ws.3 and 4 intercepted the quarrel, the accused 1 & 2 assaulted P.W.3 with hands and the first accused assaulted P.W.4 with neem wooden log on his left forearm and the second accused also assaulted P.W.4 on his head. The deceased was taken to the Government Hospital, Attur and she was given first aid and referred to Government Hospital, Salem. But she died on the way to the Government Hospital, Salem.

3. The injured witnesses P.W.1, 3 and 4 went to the Hospital for treatment. P.W.7 and P.W.8, the Doctors treated them and recorded the Accident Registers and issued wound certificates under Exs.P.11 and 13 to 16. P.W.15, the Sub Inspector of Police after receipt of the intimation, went to the Hospital and recorded the statement of P.W.1 under Ex.P.1, in which P.W.2 signed as witness, and registered a case in Crime No.255 of 2009 for the offences under Sections 323 and 302 of IPC. The First Information Report is marked as Ex.P.28. P.W.16, the Investigating Officer took up the investigation and enquired the witnesses and laid charge sheet against the accused under Sections 323 and 302 of IPC. The trial Court framed charges for the above said offences and the accused pleaded not guilty and claimed trial.

4. During the course of trial, the prosecution examined P.W.1 to P.W.16 and marked Ex.P.1 to Ex.P.30 and also produced M.O.1 to M.O.9. When the accused was

questioned under Section 313 of Cr.P.C. about the incriminating evidence against him, he denied the same. The accused did not let any evidence but marked Ex.D.1 and Ex.D.2. On considering the above oral and documentary evidence, the trial Court acquitted the accused for the offence under Section 302 of IPC. However convicted the accused for the offence under Sections 304 Part(i) and 323 r/w 34 (3 counts) of IPC and sentenced him as stated above. As against the said conviction and sentence, the appellant preferred this appeal.

5. The learned counsel for appearing for the appellant would submit that there was no motive to commit the alleged offence by the accused and the prosecution failed to examine any independent witness to prove the charge as against the accused. There are contradiction between the statements recorded under Section 164 of Cr.P.C. of P.Ws.1,2 and 4 on their deposition. P.W.1 stated in the earliest document Ex.P.11, the Accident Register, that she was attacked by three known persons, whereas P.Ws.3 and 4 stated in their Accident Register that they were attacked by known two persons. This contradiction vitiates the entire case of the prosecution as such the accused is liable to be acquitted.

6. The learned counsel appearing for the appellant would further contend that a case in counter also registered in Crime No.256 of 2009 for the offences under Sections 294B, 324 and 323 IPC, on the complaint given by the deceased second accused and the same was closed under R.C.S.No.5 of 2009, as such the respondent did not follow the procedure laid down under Rule 588-A of Madras Police Standing Order. With regard to the same the accused marked Ex.D.1 and Ex.D.2, the case sheet and wound certificate of the deceased second accused issued by P.W.7 the Doctor, who treated P.W.1. Therefore, he prayed for acquittal of the appellant.

7. Per contra, the learned Additional Public Prosecutor appearing for the State vehemently opposed the submissions made by the learned counsel for the appellant and submitted that the prosecution proved the case beyond all reasonable doubts. Further she referred several portions of oral and documentary evidence adduced by the prosecution and contended that the conviction imposed upon the appellant as referred above perfectly legal and prayed for confirming the same.

8. Heard the argument of Mr.C.D.Johnson, learned counsel appearing for the appellant and Ms.Prabavathi Ganeshram, learned Additional Public Prosecutor appearing

for the State and perused the records placed before this Court.

9. It is seen from the records, P.W.1 stated that on 25.05.2009, at about 7.30 p.m., the appellant/first accused along with the second accused, due to common pathway dispute on the western side of their house, the appellant assaulted the deceased with neem wooden log on her head and the deceased second accused also assaulted the deceased and caused grievous injury. When P.W.1 daughter-in-law of the deceased, P.Ws.3 and 4, neighbours of the deceased intercepted, they were also attacked by the accused 1 and 2 with neem wooden log and neem stick. The neem wooden log marked as M.O.1 and the neem stick marked as M.O.2.

10. P.W.1 went to the hospital on 25.05.2009, at about 9.45 p.m. for treatment and informed that she was assaulted by three known persons with stick. P.W.7, Dr. Ulaganathan treated her and found the following injuries on her.

- "1. Red laceration 3X $\frac{1}{2}$ X $\frac{1}{2}$ cm over parietal area
2. Contusion 2X2 cm size over right wrist."

P.W.7 registered the Accident Register and it was marked as Ex.P.7. On the same day, the deceased brought to the Hospital as dead and the intimation report marked as Ex.P.12.

11. On 26.05.2009 at about 11.20 a.m., P.W.4 went to the hospital for treatment and P.W.8, Dr.Sampath Kumar registered the Accident Register Ex.P.15 and found the following injuries.

- "1. A red abrasion contusion (Lt) fore arm 3X2 cm size
2. A red abrasion (Lt) occipital region 2 X1 cm size"

On the same day at about 11.30 a.m., P.W.3 went to the hospital and P.W.8 registered the Accident Registered marked as Ex.P.13 and found the following injuries on his body.

- "1. A red abrasion on (Rt) shoulder 1X1cm size
2. C/o. pain all over body"

The wound certificate of P.W.3 was marked as Ex.P.14 and the wound certificate of P.W.4 was marked as Ex.P.16. On the complaint Ex.P.1, P.W.15 registered the First Information Report for the above said offences and the said FIR was marked as Ex.P.28. P.W.16, the Investigating Officer took up the investigation and visited the place of occurrence and in the presence of the Village Administrative Officer P.W.11, he prepared observation mahazar and rough sketch under Exs.P.19 and 29, in the

presence of P.W.11. The Investigating Officer recovered blood stained concrete cement produced as M.O.3 under seizure mahazar Ex.P.20. P.W.12 conducted inquest on the dead body of the deceased and prepared inquest report Ex.P.30. P.W.9 Dr.K.Srinivasan conducted autopsy on the dead body of the deceased and found the following injuries.

"External Appearance :-

A moderately built body of a female with arms by the side of the body with eyes closed, mouth opened with passed motion from oval orifice
Teeth 8/8/8/8

External examination :-

1. Red sutured wound @ 6cm long present over mid frontal scalp.

Internal examination :-

Bony cage - Intact, Lungs - Intact, Heart - filled with blood. Stomach - 200 ml digested food present, Intestine - distended with gas, Liver, Spleen & Kidneys - Intact, Bladder - Empty, Uterus - Small and Empty, Hyoid bone - intact, Spine & Pelvis - Intact.

Skull :-

- Ecchymosis 8 X 6 cm under mid-frontal scalp.
- Vertical frontal bone fracture present.
- Sagittal Mid line sutural separation between the parietal bones present.
- Membranes - Intact
- Brain - 200 gms of Sub Dural Haematoma present over frontal and mid parietal lobe.
- Base of the skull - intact."

The Postmortem certificate marked as Ex.P.18 and P.W.9, the Doctor opined that the deceased Chinnammal died due to shock and haemorrhage due to fracture on her skull and due to the injuries sustained on vital organ viz., brain.

12. This Court paid its anxious consideration to the rival submissions on either side and also perused the oral and documentary evidences and other material placed on record. The following question arises for consideration :-

Whether the reasons assigned by the trial Court for convicting the appellant under Section 304 Part(i), 323 r/w Section 34(3counts) of IPC and imposition of sentence of ten years of rigorous imprisonment with fine are sustainable?

13. P.Ws.1,3 and 4 are injured witnesses. Admittedly, there is an enmity between the deceased family and the accused family for the past two years with regard to using common pathway. On construction of house of one Sadayan P.W.10, the deceased permitted him to lay the bricks adjacent to the house of P.W.1. The appellant as well as the deceased second accused quarrelled, as to why permitting P.W.10 to lay the bricks in common pathway, and when the deceased came there to enquire the same, the first accused picked a neem wooden log in the fire wood shop and assaulted the deceased. The prosecution has proved the said fact by examining P.W.10 Sadayan, who deposed that he laid the bricks on the permission granted by the deceased in the common pathway.

14. P.W.5, who is the eye witness to the occurrence, deposed that the accused were abusing the deceased and others and assaulted them. When P.Ws.1, 3 and 4 intervened they were also attacked by the accused. It is also proved from the statements recorded under Section 164 of Cr.P.C. by the learned Judicial Magistrate No.6, Salem from P.Ws.1, 3 to 5 and one Angammal, Neela, Pachamuthu @ Nagesh. These statements also corroborated with the depositions of P.Ws.1, 3 to 5. P.W.7, the Doctor who treated P.W.1 and registered Accident Register Ex.P.11 and opined that the injuries sustained by the P.W.1 are simple in nature. P.W.8, the Doctor, who treated P.Ws.3 and 5 registered the Accident Register marked as Exs.P.13 and 15, deposed that they sustained simple injuries and issued wound certificates marked as Exs.P.14 and 16. Therefore, the evidence of P.Ws.1 and 3 supported by the medical evidence as mentioned above. P.W.9, the Doctor, who conducted the post-mortem of the deceased, stated that the deceased died due to shock and haemorrhage due to fracture in skull and due to the injuries in the vital organ brain. Further he stated that the above mentioned injuries would have been caused by M.O.1. As such the evidence of P.W.9 supported the case of the prosecution. Ex.P.4 to Ex.P.10 the statements recorded under Section 164 of Cr.P.C., by P.W.6, the learned Judicial Magistrate No.6, Salem, also corroborated the evidence of P.Ws.1, 3 and 4 and proved the case of the prosecution.

15. The next contention of the learned counsel appearing for the appellant is that the case in counter was not tried together by the same Court and as such the entire case of the prosecution hit by the Section 210 Cr.P.C. and relied the judgement reported in "(2003) 9 SCC 426 - State of M.P. Vs. Mishrilal (dead) & ors" held as follows :-

"8. In the instant case, it is

undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the accused Mishrilal in respect of the same incident. It would have been just fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathilal's case (supra). The cross-cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments. In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavour to find out the truth and to cull out the truth from the falsehood. Unfortunately, the investigating officer has failed to discharge the obligation, resulting in grave miscarriage of justice. "

16. The learned counsel appearing for the appellant also relied the judgment reported in "(1976) 4 SCC 394 - Lakshmi Singh and ors Vs. State of Bihar" which held as follows:-

"12. The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the Court to rely on the evidence of PWs. 1 to 4 and 6 more particularly, when some of these witnesses have lied by stating that they did not see any

injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima Criminal Appeal No. 67 of 1971 decided on March 19, 1975 : Reported in there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises."

17. Admittedly, P.W.16 the Inspector of Police registered a case in Crime No.256 of 2009 under Section 294B, 324, 323 of IPC for the injuries sustained by the deceased second accused and the same was closed under R.C.S.No.5 of 2009, after getting wound certificate of the deceased second accused Chinnu, who sustained injury on his hand. Therefore, the respondent police duly followed the procedure laid down under Rule 588-A of Madras Police Standing Order. Further, after closing of the said First Information Report, the accused did not proceed further against the closure of charge sheet by way of any protest petition or any private complaint. Therefore, the above decisions are not applicable to the present case on hand.

18. Further it is also noted that Ex.D.2 the wound certificate of the deceased accused shows that he was assaulted at about 8.30 p.m., on 25.05.2009, whereas Ex.P.11, the Accident Register of P.W.1, shows that she was assaulted at about 7.30 p.m., on 25.05.2009. In this regard, P.W.1 stated in her cross examination that they were assaulted at the same time and denied the suggestion that the occurrence took place at 8.30 p.m. It is also corroborated by the evidence of P.W.7, the Doctor, who

registered the Accident Register about the time of the occurrence. Further, in the alleged occurrence in Crime No. 256 of 2009, the first accused had no injury. Therefore, the contention of the learned counsel for the appellant cannot be accepted. There is no material to accept the defence version that the complainant party was aggressor and the accused retaliated in the self-defence.

19. In such circumstances, it is clear that the prosecution has clearly established the fact that the accused committed the offences as charged by the prosecution. However, the learned trial Court convicted the accused only under Section 304 Part(i) of IPC, since the accused had no intention to cause death of the deceased Chinnammal and the act of the accused amounts to committing culpable homicide not amounting to murder. The only point has to be considered is that whether the accused entitled for any reduction of sentence. The question of sentence is always difficult task requiring the balance of various circumstances. The question of awarding sentence is the matter of discretionary power, exercised on considering all the circumstances evidence on mitigating circumstances of the individual cases.

20. In the present case, the occurrence took place due to the pathway dispute and the accused had no intention to cause death of the deceased Chinnammal. The occurrence was happened in a sudden altercation, when the deceased Chinnammal came to the place of occurrence and questioned as to why the accused scolded her and the accused took the neem wooden log in the nearby fire wood shop and assaulted her, without any prior motive, which was due to sudden anger caused by the deceased. Therefore, the judgment of the learned Principal Session Judge, Salem in S.C.No.318 of 2009 dated 01.08.2011 convicting the accused for the offences under Sections 304(i) and 323 r/w 34 (3 counts) is confirmed. However, the sentence imposed by the trial Court will stand reduce to seven years of rigorous imprisonment. The trial Court is directed to secure the appellant for the purpose of sentencing him to undergo the reduced/modified period of sentence. It is also directed that the period of sentence already undergone by the appellant, if any, shall be given set off, as required under Section 428 Cr.P.C.

21. With the above directions, the criminal appeal is partly allowed.

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//True Copy//

Sd/-

Assistant Registrar(Co)

Sub Assistant Registrar

To

1.The Judicial Magistrate no.2
Attur

2.do- the Chief Judicial Magistrate,
Salem.

3.The Presiding Officer
The Principal Sessions Court,
Salem.

4. The Station House Officer,
Thambampatti Police Station,
Salem District.

5.The Superintendent,
Central Prison,coimbatore.

6.The District Collector,Coimbatore.

7.The Director General of Police Mylapore,
Chennai. 4

8. The Public Prosecutor,
High Court, Madras.

Cc to :
The Section Officer,
Criminal Section,
High Court, Madras.

ASK(20/08/2018)

JUDGMENT IN
CRL.A.548 OF 2011

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