

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25-11-2016

Pronounced on : 23 .02.2018

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.266 of 2013
and MP.No.1 of 2013

Backiyaraj

.. Appellant/A-1

Vs.

The State represented by
Inspector of Police,
Thirupur Rural Police Station,
Thirupur District
(Crime No.1093 of 2009)

.. Respondent/Complainant

Prayer:- Criminal Appeal is filed under Section 374 of Criminal Procedure Code against the judgment dated 31.8.2012 made in S.C.No.36 of 2011 on the file of the learned I Additional and Sessions Judge, Thiruppur.

For Appellant : Mr.A.K.Gopal for Mr.O.Selvam.
For Respondent : Mr.P.Govindarajan,
Additional Public Prosecutor.

J U D G M E N T

The appellant in this criminal appeal is ranked as per the rank before the trial Court.

2. The accused Backiyaraj/A-1 and Guru/A-2 were tried before the learned I Additional and Sessions Judge Court, Thiruppur, on the allegation that on 18.6.2009, at about 3.30 a.m., when the deceased Mariyappan blew air using the Air Gun on the first accused Backiyaraj, inspite of the first accused and the second accused Guru, asking the deceased to refrain from doing so, the deceased continued with the said act and enraged by the same, while the second accused caught hold of the head of the deceased, the first accused caught hold of the legs of the deceased and the first accused inserted the rod of the air gun into the anus of the deceased blew air into the deceased using the compressor and in the course of the same transaction, the first accused inserted the rod into the nose of the deceased and blew air using the air gun due to which the deceased died of suffocation. The accused were charged and tried for the offence

under Section 302 r/w Section 34 IPC. However, on being found guilty, while A-1 was sentenced to undergo rigorous imprisonment for a period of 7 years u/s 304 (2) IPC, A-2 was sentenced to rigorous imprisonment for a period of 7 years u/s 304 (2) r/w Section 34 IPC. Aggrieved against the said judgment, the first accused has preferred the present appeal.

3. The facts necessary to dispose of the appeals are as follows :-

P.Ws.1 to 8 are the employees working in various capacities in Mercury Process Company situated at Kuppandampalayam, Vettukaattu Thottam, Thiruppur District. PW-9 is the Constable, PW-10 is the Headconstable, PW-11 is also the Constable, PW-12 is the Doctor, PW-13 is the Assistant Doctor, PW-14 is the Deputy Superintendent of Police, PW-15 is the Medical Officer/Postmortem Doctor and PW-16 is the Inspector of Police, who investigated the case.

4. The case of the prosecution is that A-1 Backiyaraj, A-2 Guru and the deceased Mariyappan all were working in Mercury Process Company situated at Kuppandampalayam, Vettukaattu Thottam, Thiruppur District. On 19.6.2009, during night shift, when A-1 was working in Dryer Section, at about 3.15 hours, the deceased Mariyappan took the Air Gun and blew air on the face of A-1 and inspite of A-1 and A-2 asking the deceased to refrain from doing so, the deceased continued with the said act and enraged by the same, while the second accused caught hold of the head of the deceased, the first accused caught hold of the legs of the deceased and the first accused inserted the rod of the air gun into the anus of the deceased blew air into the deceased using the compressor and in the course of the same transaction, the first accused inserted the rod into the nose of the deceased and blew air using the air gun due to which the deceased died of suffocation.

5. PW-1 Kumaresan, who was working as a Supervisor in the Production Section on seeing the incident, shouted at A-1 put the Air Gun on the floor and when PW-1 enquired about the incident, A-1 narrated the same. When PW-1 saw the deceased Mariyappan, the entire body of the deceased was in swelling condition and the deceased was in unconscious stage. Immediately, he called the van driver (PW-5) through the co-workers and sent the deceased along with them to the hospital. Thereafter, PW-1 informed the incident to the owner of the Mercury Process Company and also made a complaint (Ex.P-1) before PW-14, Deputy Superintendent of Police, based on which a case in Crime No.1093 of 2009 was registered u/s 302 IPC on the file of Nallur Police Station. The complaint as well as the registered FIR were sent to the Court of Judicial Magistrate No.II, Tiruppur.

6. PW-14, on taking up investigation, proceeded to the scene of occurrence, where he drew a rough sketch, Ex.P-8 and prepared observation mahazar, Ex.P-2. PW-14 summoned the services of the photographer and caused photographs of the scene of occurrence. PW-14 recovered plastic hose and other material objects from the scene of occurrence. PW-14, thereafter, examined witnesses and recorded their statements. Thereafter, PW-14 went to the Government Hospital, Tiruppur, where he examined witnesses and recorded their statements. PW-14 conducted inquest over the body of the deceased and prepared inquest report, Ex.P-14. PW-14, on completing the inquest, sent the body of the deceased along with a requisition to the doctor for conducting post-mortem.

7. PW-13, the doctor attached to the Government Hospital, Tiruppur, on receiving the body through the Police Constable along with the requisition for conducting post-mortem, performed post-mortem on the body of the deceased during which time, the doctor found the following injuries on the body of the deceased :-

"External injuries: (i) Anus dilated, odeneath anal ring (2) On pressing crepitus present all over the head, face and body expel lower limbs, Internal appearance:- Ribs intact, Heart congested Lt 310 gm Chamber empty. Lungs congested Rt 450 Lt 400 gms. Branch and cut sectioning tracker contain fecal matter, Hyoid Intact, stomach contain fecal matter. Liver congested Lt 160 gms, spleen congested Lt 180 gms, Kidneys congested each Lt 160 gms, Intestines. Laya intestine contains air, small intestine and appendix contain air and fecal matter. Bladder empty, reenum gas. Skull: No fracture of skull bones / membrane intact. Brain congested Lt 1410 gms. The following articles are preserved for chemical analysis (1) stomach incontem (2) Intestine and incontem (3) Sample of Liver (4) Kidney ore (5) Lungs (6) skin (7) preservative."

8. The doctor sent the viscera for chemical examination and after receipt of the chemical examination report, the doctor issued Ex.P-6, post-mortem certificate opined that the deceased appears to have died on account of aspiration of fecal matter 28 to 32 hours prior to autopsy.

9. PW-14, continuing with his investigation examined further witnesses and recorded their statement. PW-14 searched for the accused and arrested them on 20.6.2009 near the junction of Kangeyam Road-Kombaithottam and questioned them. At that time,

the A-1 and A-2 confessed to the crime and each of them voluntarily gave a confession statement, the admissible portion of which is marked as Exs.P-9 and Ex.P-10. Thereafter, the accused were sent to judicial custody. PW-14 continued with his investigation and examined further witnesses and recorded their statements. The material objects were forwarded to the Court under Form-95 (Ex.P-11). PW-14 examined the doctor, PW-13, who conducted post-mortem on the body of the deceased and recorded his statement. PW-14 gave a requisition, Ex.P-12, to the Court to send the articles preserved for chemical examination. On transfer, PW-14 handed over the investigation to his successor PW-16.

10. PW-16, continuing with the investigation, examined further witnesses and recorded their statement. PW-16 further enquired Dr.Sureshkumar, who made endorsement in the Accident Register. After completion of investigation, PW-16 filed the final report against the accused under Section 302 IPC.

11. The accused were questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against them. They denied all the incriminating circumstances. They did not examine any witness on their side.

12. To bring home the charge against the accused, the prosecution examined PW.s 1 to 16 and marked Exs.P-1 to P-15 and M.O.s 1 and 2. The accused neither examined any witness nor marked any documents. Though the charge was laid against the accused under Section 302 IPC, the Trial Court, on the basis of oral and documentary evidence, however, convicted the accused and sentenced them to rigorous imprisonment for a period of seven years under Section 304 (2) IPC, together with fine. Aggrieved by the said order, the present appeal has been filed by A-1 alone.

13. PW-13, the doctor, was examined by the prosecution to establish the cause of death of the deceased Mariyappan, and who issued Ex.P-6, post-mortem certificate. The evidence of PW-13 and the post-mortem certificate clearly establish that the deceased died on account aspiration of fecal matter and that they are homicidal in nature. Trial Court, therefore, holds that the deceased Mariyappan died on account of homicidal violence.

14. Heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the respondent and also perused the materials available on record.

15. The learned counsel for the appellant would contend that the appellant is a physically challenged person, due to polio attack from his childhood. It is unbelievable that this accused caught hold the deceased and put Air Gun into the anus of the

deceased and passed the air forcefully into the body of the deceased, there is no eyewitness. PW1 would not have been eyewitnessed the incident, PW1 was working as a Supervisor in Production Section and not in the dryer section. Even the Doctor who conducted autopsy has not clearly stated that as to whether any injury in the anus which create doubt. The prosecution has not proved the case beyond reasonable doubt. The trial Court has convicted the appellant without sufficient materials, the conviction and sentence passed by the trial Court is liable to be set aside.

16. The learned Additional Public Prosecutor would submit that PW1 has clearly stated the incident. PW2 also corroborated the evidence of PW1. PW13/Doctor has clearly stated that the death caused due to suffocation. The evidence of PWs1, 2 and 13 would clearly shows that the accused has committed the offence. The trial Court has clearly gone into the matter and there is no motive to murder the deceased, due to sudden provocation the accused have done it, knowing fully aware that the action would cause death on the person. Hence, the trial Court rightly not considered under Section 302 IPC and considered only under Section 304 part II IPC and there is no merit in the appeal filed by accused/A1.

17. PW-1 Kumaresan, who was working as a Supervisor in Production Section of the above said Mercury Process Company, deposed that the incident took place on 18.6.2009 Thursday during night shift which starts from 8.30 p.m. on 18.6.2009 and ends at 8.30 a.m. on 19.6.2009. When he was working in that Section, in the night shift, during tea time, early morning at about 3.30 a.m., A-1 Backiyaraj went to the Dryer Section. After five minutes, the deceased Mariyappan went to the said Section and after five minutes A-2 Guru also went there. The deceased Mariyappan was working in the Soft Flow Machine Section. Since even after tea time, these three persons did not return to their respective Sections, for doing their regular work, PW-1 Kumaresan went to the Dryer Room. When he saw A-2 holding the head portion of the deceased and A-1 was standing in the leg portion of the deceased and put the Air Gun into the anus of the deceased and passed the air forcefully into the body of the deceased. When PW-1 shouted, on seeing that incident, A-1 put the Air Gun on the floor and when PW-1 enquired about the incident, A-1 narrated the whole incident. PW-1 found that the body of the deceased Mariyappan was in swollen condition and the deceased was in an unconscious stage. Immediately, he called the van driver through PW2-contractor and sent the deceased to the hospital. Thereafter, he informed the incident to the owner of the Mercury Process Company and also made a complaint (Ex.P-1) before Nallur Police Station.

18. PW-2, Singaravelan, who was working as a Contractor in

the said Company A-2 was working under him and while he was working in the night shift, on 18.6.2009, during tea time, after taking tea, when A-1 was in the Dryer Section, deceased went to Dryer Section, after five minutes, A-2 also went into that Section. During that time, he had gone to nearby Section. When PW-2 did not find them in their respective places, he went to Dryer Section where PW-1 shouted at them when PW-2 asked PW-1 he narrated the incident. Then PW-2 only called the van driver along with another co-worker to take the deceased Mariyappan to the hospital which the deceased body was found in swelling condition.

19. PW-3, Rajan, who was working as a Labour Master in the said Company and deposed that while he was working, on 18.6.2009, night shift (i.e., from 8.30 p.m. on 18.6.2009 to 8.30 a.m., on 19.6.2009), A-1 Kumaresan was the Incharge of Software Section and he also narrated the same as that of PW-1. PWs-4 to 8 reiterated the narration as were spoken to by PW-1.

20. The main case of the prosecution is that all of them were working in the said company in the particular day i.e., on 18.6.2009. During night shift, when they were at different Sections. During the tea time, after taking tea, the accused and the deceased went into the Dryer Section. Where the deceased Mariyappan took the Air Gun and blew the air at the face of A-1 Backiyaraj and played, the said act of the deceased Mariyappan was warned by A-1 Backiyaraj and A-2 Guru. Even then in spite of their warnings, the deceased Mariyappan did not listen to their words and continued to do the same. Immediately, A-2 Guru caught hold the head of the deceased Mariyappan and A-1 Backiyaraj hold the legs of the deceased and thereby put the Air Gun into the anus of the deceased and also blew air into the body of the deceased. When they had not turned to duty to their respective Sections, after tea time, PW-1 went there and saw the occurrence. Though, the workers belong to different Sections in different capacity and their evidences were hear say evidence. PW-1 clearly spoken about the incident and the Doctor, who has done autopsy has opined that cause of death is due to suffocation only. Therefore, all the witnesses i.e., PWs.1 to 8 have spoken that on particular day, during night shift, the accused and the deceased were working there and the said incident had taken place in the early morning hours. After complaint, investigation took place and after completing the investigation prosecution filed charge sheet against the accused. Then after committal, before the Trial Court the prosecution examined PWs 1 to 8 as occurrence witnesses. There is no reason to disbelieve the evidence of PW-1 and coupled with the medical evidence also shows that the cause of death is due to suffocation. Conviction can be based on testimony of sole witness, if same inspires confidence. At this juncture, it is pertinent to refer to the latest decision of the Hon'ble Apex

Court in the case of Juman and another v. State of Bihar reported in (2017) 11 SCC 85, the relevant paragraph 21 of the judgment is extracted hereunder :-

"21. We have seen in the instant case that the witnesses have vividly deposed about the genesis of the occurrence, the participation and involvement of the accused persons in the crime. The non-examination of the witnesses, who might have been there on the way to hospital or the hospital itself when deceased narrated the incident, would not make the prosecution case unacceptable. Similarly, evidence of any witness cannot be rejected merely on the ground that interested witnesses admittedly had enmity with the persons implicated in the case. The purpose of recording of the evidence, in any case, shall always be to unearth the truth of the case. Conviction can even be based on the testimony of a sole eyewitness, if the same inspires confidence. Moreover, prosecution case has been proved by the testimony of the eyewitness, since corroborated by the other witnesses of the occurrence. We are constrained to reject the submissions made on behalf of the appellants."

Therefore, from the evidences of PW-1 eyewitness and PW-13 medical witness, it is found that the accused had only caused the death of the deceased. PW-2 also corroborated the same that the accused and the deceased were working in different Sections and when they were seen by PW-1 on the spot, the said incident took place. Initially, when the deceased was taken to Banu Hospital at Palladam Road, there was no doctors and then the deceased was taken to Revathy Hospital. Doctors at the Revathy Hospital, on seeing the deceased, refused to give treatment to the deceased and asked them to take the deceased to the Government General Hospital and where the death of the deceased was confirmed by the Doctors.

21. It is worthwhile to refer yet another latest decision of the Hon'ble Apex Court in the case of Yogesh Singh v. Mahabeer Singh and others reported in (2017) 11 SCC 195, the relevant paragraph 15 of the judgment is reproduced hereunder :-

"15. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubts. However, the burden on the prosecution is only to establish its case beyond all reasonable doubt and not alldoubts. Here, it is worthwhile to reproduce the observations made by Venkatachaliah, J. in State of U.P. v. Krishna Gopal [State of U.P. v. Krishna Gopal.

"25. ... Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

26. The concept of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice."

22. Thus, the prosecution has proved its case beyond reasonable doubt and the trial Court also held accused found guilty. The act of the accused, from the evidence of PW-1, clearly shows that the deceased first blew air at the accused 1 and 2 forcefully. When they warned the deceased, he did not listen to their words and continued to do the same thing. Therefore, due to sudden provocation the incident took place. But there is no material to show that the accused had any prior motive against the deceased to murder him and the accused did that without any intention. But however, accused definitely would have had knowledge that their act would cause death to the deceased. But with no initial intention only due to sudden provocation, the incident had taken place.

23. The Trial Court has convicted the first accused under Section 304 part II IPC. There is no mens rea and also there is no previous motive/ intention to cause death. Since the deceased himself first blew air at the accused, even though they had

warned the deceased, since the deceased did not heed to their warnings, the accused had acted due to sudden provocation due to which the incident took place. However, the act of the accused definitely falls under Exception to Section 300 IPC. The accused having full knowledge that their act would cause death, is liable to be convicted under Section 304 part II IPC.

24. The Trial Court convicted the first accused under Section 304 Part II IPC and the materials available on record justify the conviction and the sentence passed against the first accused by the Trial Court, which does not warrant any interference.

25. In the result, the appeal fails and the same is dismissed confirming the order passed by the Trial court in S.C.No.36 of 2011 dated 31.8.2012. consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar (CS-IV)

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Sub-Assistant Registrar

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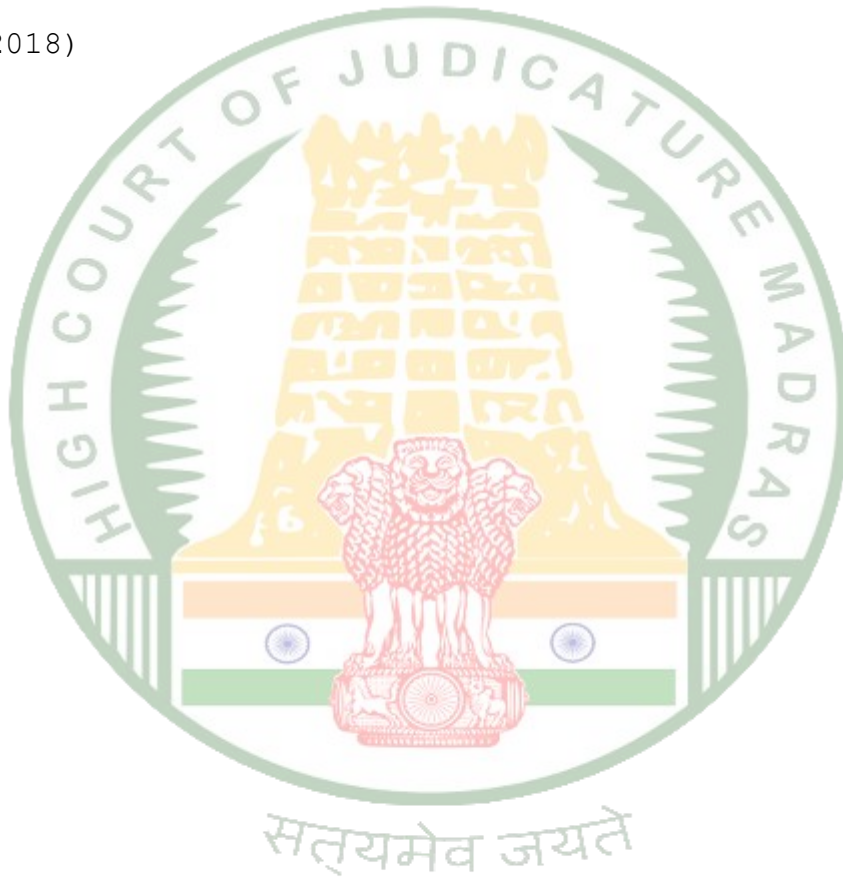
- 1.The Inspector of Police,
Thiruppur Rural Police Station,
Thiruppur District.
- 2.The I Additional Sessions Judge,
Thiruppur.
- 3.The Public Prosecutor,
High court,
Madras-104.
4. The Superintendent, Central Prison, Coimbatore.

copy to
The Section officer
Criminal Section, High Court, Madras.

+2 Ccs to Mr.D. Selvam, Advocate sr 13997.

Crl.A.No.266 of 2013

KJ(CO)
SP(12/03/2018)



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