

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.02.2019

CORAM

THE HON'BLE MR.JUSTICE M.SATHYANARAYANAN

AND

THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

CRIMINAL APPEAL No.128 OF 2018

Thalapathi

.. Appellant/Accused

vs

State Rep. by
The Inspector of Police,
F4, Kaverapattai Police Station,
Crime No.575 of 2011. ... Respondent/Complainant

Prayer : Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code against the Judgment and Order dated 05.01.2018 made in S.C.No.39 of 2014, on the file of the Court of IV Additional District and Sessions Judge, Ponneri.

For Appellant : Mr.R.Sankarasubbu
for M/s.P.K.Ilavarasan
For Respondent : Mr.R.Prathapkumar,
Additional Public Prosecutor.

J U D G M E N T

(Judgment of the Court was delivered by M.Sathyannarayanan, J.)

The appellant is arrayed as Accused No.1 in S.C.No.39 of 2014 on the file of the IV Additional District and Sessions Judge, Ponneri. The appellant/A-1 along with one Tamilarasan/A-2, who died during the course of trial, stood charged and tried for the commission of offence under Section 302 r/w. 34 IPC. The Trial Court, after conclusion of trial, has found A-1 guilty for the offence under Section 302 r/w. 34 IPC and imposed sentence of Life Imprisonment with a Fine of Rs.2,000/- in default to undergo 3 months Simple Imprisonment and on account of the fact that A-2 died during the course of trial, the trial Court held that the charge framed against him got abated.

2. The case of the prosecution, briefly narrated for the purpose of disposal of this Criminal Appeal are as follows:

2.1. There was an enmity between the deceased, namely Chinnaiyan, and A-1 and A-2 with regard to collection of Kadal Paalai plant from the lake of Chinnambedu and both A-1 and A-2 with an intention to murder the deceased Chinnaiyan, on 14.11.2011 at 2.30 p.m. when Chinnaiyan was standing near Chinnambedupettai Lakshmi Amman Temple, A-1

and A-2 came in a pulsar motorycle bearing Reg.No.TN05-AC-9169 / M.O.7 and they intentionally and voluntarily dashed against Chinnaiyan and had wordy altercation with him. The deceased/Chinnaiyan, apprehending danger, started running towards Kuppuswamy's Land and he was chased and caught by the accused. A-1 and A-2 attacked Chinnaiyan with wooden log and as a result of sustainment of fatal injuries, he died on the spot.

2.2. PW1 was the Secretary of Amirthanallur Village and according to him, the deceased Chinnaiyan was his junior paternal uncle and there was previous enmity between the accused and the deceased on account of collection of Kadal Paalai Plant. On 14.11.2012 at about 2.30 p.m. PW1 was proceeding to Chinnampedupettai and while he was nearing Lakshmi Amman Temple, both the accused came in a Pulsar motor cycle / M.O.7 and intentionally dashed against the deceased, who, apprehending danger to his life, ran to Kuppuswamy's land and he was chased by the accused. Both the accused caught the deceased and assaulted him with wooden log and the incident was witnessed by PW1, who, immediately shouted for help. A-1 and A-2, after attacking Chinnaiyan, fled away from the scene of occurrence. When PW1 went near, Chinnaiyan was found dead with blood stains on his head.

2.3. PW1 proceeded to Kavaraipettai Police Station and lodged a complaint under Ex.P1 to PW10 - Sub Inspector of Police of the said police station, who, upon receipt of the same, registered a case in Crime No.575 of 2011 for the offence under Section 302 I.P.C. at about 14.00 hours on 14.11.2011. Printed F.I.R. was marked as Ex.P10.

2.4. PW11 - Inspector of Police took up the investigation and visited the scene of occurrence on the same day at about 4.30 p.m. and in the presence of PWs.4 and 5, prepared Ex.P2-Observation Mahazar and Ex.P11-Rough Sketch and also recovered M.O.6- Sample Mud from the scene of occurrence under the cover of Mahazar - Ex.P3. PW11 conducted inquest on the dead body of the deceased in the presence of Panchayatdars and other witnesses and also prepared Ex.P12-Inquest Report. PW11 sent the body of the deceased for postmortem through a Head Constable Thiru Dayalan to the Government Hospital, Ponneri.

2.5. PW7 was the Assistant Surgeon attached to the Government Hospital, Ponneri, Thiruvallur District, who, on receipt of the body of the deceased, commenced the postmortem at about 1.50 p.m. on 15.11.2011 and noted the following features:

"External Examination: Both eyes closed. Mouth open. Mud present over the feet and leg. Head : Deep cut injury about 3 x 3 cm over the left parietal region present. Neck: Hyoid bone intact.

Internal Examination: Head : Deep penetrated

injury cut left parietal region. Brain matter injury present and subdural hematoma present.

Chest : Ribs intact.

Lungs : Intact congested. Heart : Intact, empty.
Abdomen: Liver, Spleen intact.

Stomach : Contains fluid about 150 ml.
Intestine : Intact filled with gas and fluid.
External genitalia norma.

Viscera sent for chemical analysis. Viscera chemical analysis were examined alcohol or other poison was not detected in any of them."

PW7, after concluding the postmortem, opined that the deceased would have appeared to have died due to shock and intra cranial hemorrhage due to head injury. The Postmortem Certificate was marked as Ex.P7.

2.6. PW11 continued with the investigation and effected the arrest of both the accused at about 7.15 a.m. on 15.11.2011 in the presence of PW6 and one Thiru.Krishnan and recorded voluntary confession statements of the accused and in pursuant to the admissible portion of the confession statements of the accused marked as Exs.P13 and P14 respectively, M.O.7-Motor Cycle and M.O.8-Knife were recovered under Mahazar, Exs.P4 and P5. PW11 also recovered M.Os.9 to 13 from the body of the deceased under the cover of Mahazar- Ex.P6 and also sent M.Os.1 to 8 for Forensic Examination.

2.7. PW8, was the Junior Scientific Officer of the Forensic Science Laboratory and she examined M.Os.1 to 8 and arrayed as Item Nos.1, 3 to 8 and detected blood on each of the items and issued a report Ex.P8. PW8, after examination sent the objects to PW9 - Scientific Officer, who examined the objects and detected blood stain in all the items except Item No.2 and certified that item Nos.4, 5, 7 and 8 belonged to human blood group 'O'. PW9 issued the Serological Report marked as Ex.P9. PW11 examined PWs.7 to 9 and recorded their statements and after completing the investigation, filed a Final Report charging both the accused for the commission of offence under Section 302 r/w.34 IPC on the file of the Court of Judicial Magistrate No.1, Ponneri, which was taken on file in P.R.C.No.17 of 2012.

2.8. The Committal Court had issued summons to both the accused and on their appearance, furnished them with copies of documents under Section 207 CrPC. The Committal Court, having found that the case is exclusively triable by the Court of Sessions, committed the same to the Principal District and Sessions Court, Thiruvallur, which in-turn made over the same to the IV Additional District and

Sessions Judge, Ponneri, which took up the same in S.C.No.39 of 2014 and summoned both the accused and also framed charge under Section 302 r/w. 34 I.P.C.

2.9. The prosecution, in order to sustain it's case examined PWs.1 to 11, marked Exs.P1 to P14 and also marked M.Os.1 to 9. On behalf of the appellant/A-1, no witness was examined and however, marked Ex.D1- copy of the arrest memo. The appellant/A-1 was questioned under Section 313 CrPC with regard to incriminating circumstances made out against him in the evidence rendered by the prosecution and he denied it as false.

2.10. The Trial Court, on consideration of oral and documentary evidence and other materials, has found the appellant/A-1 guilty for the offence under Section 302 r/w. 34 IPC and convicted and sentenced him as as stated above, vide impugned judgment dated 05.01.2018. Challenging the legality of the same, the appellant/A-1 has filed this Criminal Appeal.

3. Mr.R.Sankarasubbu, learned counsel appearing for the appellant made the following submissions:

(i) The prosecution has projected PWs.1 and 2 as eyewitnesses to the occurrence and also examined PW3, who gave an entirely different version and in the light of material contradictions between the testimonies of PWs.1 and 2 on the one side and PW3 on the other side, the origin and genesis of the prosecution case became highly doubtful.

(ii) It is the version of PWs.1 and 2 that the deceased was attacked by using M.O.1- wooden log and whereas the Postmortem Report / Ex.P7 and the testimony of the Doctor / PW7, who conducted the Autopsy, would disclose that the deceased died on account of cut injury on the left parietal region and the medical evidence is not in conformity with the ocular testimonies and it also creates doubt as to the attack said to have been made by the accused and the cause of death.

(iii) As per Ex.D1 - Arrest memo, the appellant/A1 had sustained injury on his left side of his hip, but the prosecution failed to offer any plausible explanation and further, while noting the time of the offence, some alterations have been made in Column-5 of Exs.D1 and D2, for which no plausible explanation has been offered by

the prosecution.

- (iv) Attention of this Court was also drawn to the testimony of PW11/Investigating Officer and a submission was made that the statements of the material witnesses, namely PWs.1 and 2 were recorded on 14.11.2011, but the said statements have not been despatched to the Court at the earliest point of time and the same has been filed along with the Final Report only on 16.08.2012 and the case properties were also sent only after 4 days and despite a specific question put, the Investigating Officer/PW11 failed to offer any explanation and when PW11 was asked as to the treatment given to A-1 on the injury sustained on the left side of his hip, he failed to offer any plausible explanation.
- (v) As per the testimonies of PWs.4 and 5, as per the orders of police, they signed it on blank sheets and admittedly, they have not been treated as hostile.
- (vi) In the light of very many infirmities pointed out, the Trial Court ought to have awarded benefit of doubt in favour of the appellant/A1 and therefore, prays for setting aside the impugned judgment of conviction and sentence passed by the Trial Court by allowing this Criminal Appeal.

4. Per contra, Mr.R.Prathap Kumar, learned Additional Public Prosecutor appearing for the respondent/State would submit that PWs.1 and 2 were the eyewitnesses to the occurrence and their testimonies also corroborate with each other on material particulars except the snap answer given by PW3, which in no way affects the credibility of the prosecution case. Insofar as the discrepancy as to M.O.8/knife is concerned, it is the submission of the learned Additional Public Prosecutor that the Postmortem Certificate/Ex.P7 and the testimony of PW7/Doctor would disclose that the deceased died on account of homicidal violence and as to the belated despatch of the statements recorded from PWs.1 and 2 as well M.Os.1 and 8 to Court is concerned, PW11/Investigating Officer has given proper explanation. In sum and substance, it is the submission of the learned Additional Public Prosecutor that the Trial Court, on a thorough consideration of materials and on proper appreciation of oral and documentary evidence, has rightly reached the conclusion to convict and sentence the appellant/A-1 and the well considered judgment passed by the Trial Court may not warrant interference at the hands of this Court in exercise of its appellate jurisdiction.

5. This Court has considered the rival submissions and also perused the entire materials placed before it.

6. A perusal of the cross examination of PW1 would disclose that he was not at all aware of the identify of A-1 and A-2 and somebody from the scene of occurrence informed the name of A-1 viz., Thalapathi. PW1 further admitted that either in the complaint or during the course of investigation, he did not specifically state about the type of weapon used for the commission of offence and he witnessed the occurrence about 50 feet away and he further admitted that he gave the complaint only after sending his junior paternal uncle in the ambulance.

7. PW2, who corroborated the testimony of PW1, would depose that both the accused chased the deceased and he has seen the occurrence at a distance of about 1 Acre and he was not aware of both the accused until he was enquired into by the police. It is pertinent to point out at this juncture that both the eyewitnesses, namely PWs.1 and 2 were not aware of the identity of A-1 and A-2, who said to have committed the murder by inflicting fatal injuries by using M.O.1 and despite the said fact, no Test Identification Parade was conducted. PW2 said to have witnessed the chasing of the deceased by A-1 and A-2 about 1 Acre distance.

8. PW3, who has spoken that the deceased came to his house and told him that he was chased by two persons and he came out and saw that one person was standing outside and when he asked him, he told that since he was attacked by Chinnaiyan, he stabbed him and when he asked about the whereabouts of the said person, he replied that he has fallen near the lake. In the cross examination, PW3 would state that he told the police about the stabbing of the deceased by the accused and he did not state about the motive aspect to the police. It is to be noted at this juncture that it is the clear case of the prosecution that the deceased was attacked by A-1 by using M.O.1-wooden log and whereas according to PW3, the injured was attacked otherwise.

9. Ex.P7-Postmortem Report coupled with the testimony of PW7/Doctor would indicate that the deceased died on account of knife injury. PW7 in the cross examination would state that the injury found on the head of the deceased would have have been caused by knife and "Koduvaal". It is very pertinent to point out at this juncture that the statements of the material witnesses viz., PWs.1 to 3 have not been despatched to the Court at the earliest point of time and it was filed along with the Final Report only on 16.08.2012 and M.Os.1 and 8 were also despatched to the Court only after 4 days.

10. PW11/Investigating Officer would admit in the cross examination that at the time of conducting inquest, he has also recorded the statements of PWs.1 and 2, but the

said statements did not see the light of day. Insofar as the injury sustained by A-1, Exs.D1 and D2/Arrest Memo would disclose that he suffered injury on the left side of his hip. PW11 further admitted in the cross examination that in Column No.11 of the Arrest Memo viz., Whether A-1 was referred to the hospital ? - he did not specify anything and it was also indicated in the Final Report and denied the suggestion that Exs.D1 and D2 has been deliberately burked by him.

11. A careful scrutiny, perusal and consideration of the testimonies of PWs.1 to 3 had created grave doubt in the case projection by the prosecution for the following reasons:

(i) PWs.1 and 2, who are said to be the eyewitnesses, did not know the identity of A-1 and A-2 and the statements recorded from them under Section 161(3) CrPC have not been despatched to the Court at the earliest point of time and it was sent along with the Final Report only on 16.08.2012.

(ii) The case of the prosecution was that the deceased died on account of attack by A-1 by using M.O.1 -wooden log and whereas the Postmortem Certificate/Ex.P7 coupled with the testimony of PW7/Doctor would disclose that the deceased died on account of cut injury and the injury sustained by A1, as evidenced from Exs.D1 and D2 have not been explained by the prosecution, despite a specific question has been put to PW11- Investigating Officer.

(iii) As per Ex.D2- Arrest Memo, M.O.8-knife was recovered in pursuant to the admissible portion of the confession statement of A-2, marked as Ex.P14, under cover of Mahazar - Ex.P5 and Ex.P9-Serology Report would also indicate that M.O.8-knife was not subjected to serological examination.

12. It is to be noted at this juncture and as already pointed out pendency of the trial, A-2 died and the Trial Court held that the charge framed against him got abated.

13. In the considered opinion of the Court, the above said infirmities are vital and grave in nature and it has shaken the very foundation of the prosecution case and the prosecution also failed to come out with any plausible or tenable explanation during the course of trial and therefore, the appellant/A-1 is entitled to the benefit of doubt.

<https://hcservices.ecourts.gov.in/hcservices/>

14. In the result, this Criminal Appeal is allowed and the conviction and sentence imposed on the appellant, vide

judgment dated 05.01.2018 made in S.C.No.39 of 2014 on the file of the IV Additional District and Sessions Judge, Ponneri, are set aside and the appellant is acquitted of all the charges framed against him. It is reported that the accused/appellant is in jail and therefore, he is directed to be set at liberty forthwith, unless his presence/custody is required in connection with any other case/proceedings.

Sd/-

Assistant Registrar(Co)

//True Copy//

Sub Assistant Registrar

Jvm

To

- 1.The Inspector of Police,
F4, Kaverapattai Police Station,
(Crime No.575 of 2011).
 - 2.The Superintendent of Prison,
Central Prison-I, Puzhal, Chennai
 - 3.The Public Prosecutor,
Madras High Court, Chennai.
 - 4.The IV Additional District and Sessions Judge, Ponneri.
 - 5.The Principal Sessions Judge, Thiruvallur.
 6. The section officer,
Criminal Section, High court, Madras
 - 7.The Judicial Magistrate I, Ponneri.
 - 8.The Chief Judicial Magistrate, Thiruvallur
 - 9.The District collector, Thiruvallur
 - 10.The Director General of Police,
Mylapore, Chennai.
- +1cc to M/s.P.K.Ilavarasan , Advocate SR.No. 17967
Criminal Appeal No.128 of 2018
A.SK(03/04/2019)