

Bail Slip

Bala @ Dhanapal S/o. Veersamy accused in S.C.18/2016 on the file of the I Additional District and Sessions Judge, Erode was enlarged on bail by this Court vide order dated 30.10.2018 in CrI.M.P. 13790/2018 in CrI.A. 344/2017.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[JUDGMENT RESERVED ON : 26.09.2019]

[JUDGMENT DELIVERED ON : 01.11.2019]

CORAM

THE HON'BLE Mr. JUSTICE M.M.SUNDRESH
and
THE HON'BLE Mr. JUSTICE RMT.TEEKAA RAMAN

CrI.A.No.344 of 2017

Bala @ Dhanapal ... Appellant

Vs.

State Rep. By,
The Inspector of Police,
Perundurai Police Station,
Erode.

... Respondent

Prayer:- Criminal Appeal filed under Section 374 (2) of Cr.P.C., against the judgment passed by the learned I Additional District and Sessions Judge, Erode, in S.C.No.18 of 2016, dated 29.09.2016, convicting the appellant under Section 302 of IPC to undergo imprisonment for life and to pay a fine of Rs.1,000/- in default to undergo simple imprisonment for a period of 6 months.

For Appellant : Mr.R.C.Paul Kanagaraj

For Respondent : Mr.K.Prabakar

Additional Public Prosecutor

JUDGMENT

[Judgment of the Court was
delivered by RMT.TEEKAA RAMAN, J.)

Challenge is made to the judgment passed by the learned I Additional District and Sessions Judge, Erode, in S.C.No.18 of 2016, dated 29.09.2016, whereby, the sole accused/appellant stood charged and tried under Section 302 IPC and on trial, he was found guilty under Section 302 IPC and awarded imprisonment for life along with fine and default sentence.

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

[i] The respondent police filed charge sheet against the accused for the offence under Section 302 IPC alleging that the deceased Viswanathan, aged about 63 years, was served as a Commander in the Indian Navy for 17 years and retired. His wife Sundarambal and Son Sweendar are residing in America. The deceased Viswanathan alone was residing at Sengodampalayam, Erode. Four years back, the deceased Viswanathan was residing at Pandian Nagar near Kampuliyampatti at Door No.4/281. The deceased Viswanathan was very much interested in homosexual sex and he called young boys to his house under the guise of getting job for them, gave them liquor and meat and have homosexual sex with them.

[ii] The accused Bala alias Dhanapal was residing at Kollankadu Taluk, Pappampalayam, Tiruchengode. He completed 12th standard and obtained Auto Mechanic Course Certificate from KSR Polytechnic College at Tiruchengode. He wanted to join in the Army. The deceased Viswanathan used to go to the house of his brother Subramani at Pappampalayam. The accused contacted with the deceased Viswanathan and told him about his desire to join in the Army. The deceased Viswanathan asked the accused to come to his house at Sengodampalayam.

[iii] After that, the deceased Viswanathan shifted his residence to Kampuliyampatti, Pandiyan Nagar. The deceased told the accused that he will get a job for him in the Army and also gave him liquor and chicken and had homosexual sex with him. The accused was also having homosexual sex with him under the impression that the deceased will get him a job in the Army. But the deceased Viswanathan not got him a job in the Army and hence, the accused was in angry against the deceased Viswanathan.

[iv] On 26.08.2014, the deceased Viswanathan contacted over the cell phone of the accused bearing No.8012145021 at about 12.30 hours, and told him to come to his house at about 8.30 p.m. The accused also came to the Vijayamangalam toll-gate and was waiting for the deceased Viswanathan. The deceased Viswanathan took the accused in his motorcycle. At that time, the deceased Viswanathan also brought the son of witness Alwin James Muthu and he gave tiffin to the accused in the Sakthi Bhavan Hotel near toll-gate and after that, the deceased Viswanathan took the accused to his house and after leaving the accused at his house, the deceased Viswanathan dropped the child at the house of the witness Alwin James Muthu. The accused planned to kill the deceased Viswanathan, since he was not getting him job in the Army and only using him for the homosexual sex. After dropping the child at the house of Alwin

James Muthu, the deceased Viswanathan returned to his house on 26.08.2014 at about 10.00 p.m. On the same day, at about 11.30 p.m., the deceased Viswanathan tried to have homosexual sex with the accused in his bed room. At that time, the accused asked the deceased Viswanathan why he is not taking any steps to get him job in the Army, enraged and attacked him with iron rod behind the left head and when the deceased Viswanathan tried to catch the accused, he also attacked the deceased Viswanathan at his neck. As a result of which, the deceased Viswanathan fallen down and died due to head injuries. Hence, the accused committed an offence punishable under Section 302 IPC.

[v] The case was taken on file by the learned District Munsif-cum-Judicial Magistrate, Perundurai, and numbered as P.R.C.No.15 of 2015 and after observing the formalities, the case was committed to the Court of Sessions and re-numbered as S.C.No.18 of 2016 and made over to the learned I Additional District and Sessions Judge, Erode.

[vi] After the case was committed to the Court of Sessions, necessary charges were framed. In order to substantiate the charges levelled against the accused, the prosecution examined 15 witnesses as P.Ws.1 to 15 and marked 29 exhibits as Exs.P.1 to P.29 and also produced 10 Material Objects. On completion of the evidence on the side of the prosecution, the accused was questioned under Section 313 Cr.P.C. procedurally as to the incriminating circumstances found in the prosecution witnesses and he denied them as false. No defence witnesses were examined. On hearing the arguments advanced on either side, the trial Court found the accused guilty under Section 302 IPC and awarded life imprisonment along with fine and default sentence. Hence, this appeal at the instance of the appellant.

3. Summary of the prosecution witnesses, in nutshell, is as under:-

[i] P.W.1-Mr.Alwin James Muthu, the informant, in his evidence, had deposed that he is residing at Pandiyan Nagar, Kampuliyampatti, Perundurai Taluk, Erode and he is Teacher and the deceased Viswanathan is his neighbour and he was a retired Commander of the Indian Navy and he was living alone and his son and wife are residing at America. On 26.08.2014, in the evening, his four years old son was taken by the deceased Viswanathan to his house, but his son was not returned to his house after 9 o' clock. P.W.1 called the deceased Viswanathan over cell phone and the deceased Viswanathan told P.W.1 that he will bring his son within 10 minutes and came to his house with his son. P.W.1 asked the deceased Viswanathan to have food at his house but the deceased Viswanathan replied that a guest was at home. P.W.1 had further deposed that on 27.08.2014 at about 9 o' clock, when he was going to School, the persons, who came

for building work, standing outside the house of the deceased and reported that the deceased Viswanathan not came out of the house even after a long time of their calling. The building workers jumped over the compound and went inside the house of the deceased Viswanathan and found that the main door was not locked and also found Viswanathan dead in his bed room and the bed room of the deceased Viswanathan was opened and the building workers came to P.W.1 and told him that Viswanathan was lying in the bed room. Thereafter, P.W.1 and one Singaram went inside the house of the said Viswanathan and found Viswanathan dead in the pool of blood with head injuries on the left head and hence, P.W.1 went and lodged the complaint-Ex.P.1.

[ii] P.W.2-Mr.Subramanian, who is the brother of the deceased, in his evidence, had deposed that on 27.08.2014 at about 11.00 to 11.15 p.m., he received an information stating that his brother Viswanathan was found dead in his house and on receiving the same, he went to the house of the deceased where he saw the body of his brother in the pool of blood.

[iii] P.W.3-Mr.Murugesan, in his evidence, had deposed that he is the Panchayat President of Mettupudur and he also served as Naik in Army Communication Department. He further deposed that he is running a hotel in the name of Sakthi Bhavan near toll-gate at Vijayamangalam. He used to open his hotel in the morning 4.00 to 4.30 everyday and close it around night 11.00 p.m. He knew the deceased Viswanathan. P.W.3 further deposed that on 26.08.2014 at about 8.30 p.m., the deceased Viswanathan came to his hotel with a 4 years old boy and also with the accused Bala @ Dhanapal, had coffee and the deceased Viswanathan introduced the accused to him and brought him for the purpose of getting him job and left. In the early morning 4.30 a.m., he saw the accused Bala @ Dhanapal and when he enquired about Viswanathan, the accused replied that Viswanathan is sleeping in his house and he alone returning to his home. P.W.3 had further deposed that on the same day morning 8 o' clock, he went to Coimbatore and on the next day, he came to know from the Newspaper that Viswanathan was murdered. Immediately, he went to the Perundurai Police station and told that he saw the accused Bala @ Dhanapal with the deceased Viswanathan on the night of 26.08.2014.

[iv] P.W.4-Mr.Govindasamy, could depose that he is working as a Driver in hire Van and the house of the deceased Viswanathan is situated West of his house. He had further deposed that on 27.08.2014 in the early morning at about 3.15 to 3.30 a.m., he was going from the Tea Shop at Toll-gate to his house and at that time, he saw the accused Bala @ Dhanapal, who was coming in the opposite direction and on enquiry, the accused told him that he came to the house of Viswanathan and

thereafter, P.W.4 returned to his house. After returning to home, on the same day in the night through his wife, P.W.4 came to know about the murder of Viswanathan. The police enquired him and he went to police station on 29.08.2014 at about 2.00 p.m., and identified the accused in the police station.

[v] P.W.5-Mrs.Bhuvaneswari, Village Administrative Officer of Pudupalayam Village could depose that on 29.08.2014, she received a call over cell phone from the Inspector of Police, Perundurai, and was informed that they arrested the accused in Crime No.416 of 2014 and asked her to come to police station and she went there and in her presence, the accused gave a statement to the Inspector of Police. The accused told the Inspector of Police that he will show the place where he hidden the iron rod and the bloodstained baniyan, which he wearing at the time of occurrence. P.W.5 and one Vijayakumar attested the confession statement. The admissible portion of the confession statement of the accused is marked as Ex.P.2 and the signature of P.W.5 in the confession statement is marked as Ex.P.3. The Inspector of Police took the accused to his house situated at Pappampalayam, Kollankodu and at that time, P.W.5 and the said Vijayakumar accompanied them. The accused produced the bloodstained baniyan-M.O.1 from the plantain garden situated behind his house and the Inspector of Police seized it under the seizure mahazar and the said Vijayakumar attested the seizure mahazar. After that, the Inspector of Police, took the accused to Kompuliyampatti, Pandiyan Nagar water tank and the accused produced the iron rod-M.O.2 which was hidden behind the water tank and the same was seized under seizure mahazar and P.W.5 attested the said mahazar.

[vi] P.W.6-Mr.Dhineshkumar could depose that he and the accused were friends and they were worked together in Krishi Company and his brother one Thirunavukkarasu completed marine studies and he knew the deceased Viswanathan through the accused Bala @ Dhanapal. He had further deposed that he asked Viswanathan to get a job for his brother Thirunavukkarasu but the Viswanathan asked them to come to his house and hence, he and the accused Bala @ Dhanapal went to the house of Viswanathan. At that time, Viswanathan gave him beer to drink. In the night, he and the accused Bala @ Dhanapal slept there in the house of the Viswanathan and at that time, Viswanathan came to him and lied by his side and was doing vulgar activities with him and he told Viswanathan that he would not like all these activities and they came to their house on the next day morning and the accused Bala @ Dhanapal told about the behaviour of Viswanathan. On 27.08.2014, in the morning, the accused Bala @ Dhanapal called him over phone. On the same day, at about 8.00 p.m., the accused Bala @ Dhanapal also called him over phone and told him that military man was dead and when he enquired the

accused as to what happened, the accused replied that when he went to the house of Viswanathan, he tried to misbehave with him and hence, he attacked him with iron rod and the accused told him that not to talk to him any more. P.W.7, the learned Magistrate deposed about the statement of P.W.6-Dinesh Kumar, recorded under Section 164 of Cr.P.C.

[vii] P.W.8-Dr.Ravichandran deposed regarding receiving of requisition and the post-mortem conducted on the body of the deceased. He found lacerated scalp wound measuring 8x2x3 c.m. over back of the left ear running transversely till mid line at the level occipital suture line. Exposing skull. The margins are irregular with slight unvation over left occipital from left ear adjacent and abrasion over left shoulder area over cervical measuring 1/2 x 1/2 c.m. and base of skull fracture and opined that the deceased would have died around 22 to 28 hours prior to autopsy and died due to multiple injuries causing shock and haemorrhage and issued Ex.P.8-Post mortem Certificate.

[viii] P.W.10-Mr.Gobinath, Village Administrative Officer of the Kampulliyampatti Village, had deposed in his evidence that on the date of occurrence, he went to the scene and the police have prepared Observation Mahazar and attested the said Observation Mahazar. P.W.10 had further deposed that the Inspector of Police seized the blood of the deceased in one piece of cotton cloth and the bloodstained white and blue colour bed sheet were recovered in the seizure mahazar and he attested the seizure mahazar. The bloodstained cotton cloth and the cloth without blood and the bloodstained bed sheet are marked as M.Os.5, 6 and 7. (P.W.13 is the Head Constable, who submitted the FIR and complaint to the Judicial Magistrate Court, Perundurai).

[ix] P.W.11, who is the Head Clerk of the Judicial Magistrate Court, deposed regarding the receipt of the material objects and forwarding the same to the Chemical Examination. P.W.12 is the Head Constable, who has accompanied the dead body for post-mortem while P.W.13 is the Head Constable, who received the complaint and prepared the First Information Report and forwarded the FIR along with a copy of the complaint to the Judicial Magistrate, Perundurai. P.W.15 deposed regarding the registration of FIR in Crime No.416 of 2014 and handing over the FIR to the Inspector of Police. P.W.15 further deposed that he went to the scene of occurrence at Perundurai Kompuliyampatti, Pandiyan Nagar and prepared the Observation Mahazar and Rough Sketch in the presence of the witnesses Gobinath and Velusamy and informed for the sniffer dog and photographed the scene of occurrence through police photographers and seized the blood in a cotton cloth and white and blue colour bed sheet and prepared the inquest report and sent the dead body for post-mortem

through the Head Constable Venkatachalam and recorded the statements of witnesses under Section 161 of Cr.P.C. and seized the material objects in Form 95 and on 28.08.2014 he recorded the statements of P.W.3 and P.W.4 and filed charge sheet after investigation.

4. When incriminating evidence against the accused were put to him under Section 313 Cr.P.C., the accused, in his statement, has stated that the Inspector of Police, in order to escape from the Departmental action, since he is unable to trace out the culprit in this case, foisted this case on him with the help of witnesses P.W.1, P.W.3, P.W.4, P.W.5 and P.W.6 and P.W.6-Dhineshkumar also deposed against him on the threat given by the Inspector of Police and he is nowhere connected with the case and the material objects were not recovered from him and he never seen the witnesses Dineshkumar, Murugesan and Govindaswamy and he does not know the location of Pandiyan Nagar and the case was foisted against him.

5. On consideration of both oral and documentary evidence adduced before the Sessions Court, the learned Sessions Judge held that the prosecution has let in complete chain of evidence to establish the charge under Section 302 IPC against the accused and accordingly, convicted the accused for the offence under Section 302 IPC and sentenced him to undergo life imprisonment and to pay a fine of Rs.1000/- in default to undergo imprisonment for a period of six months. Hence, the present appeal is preferred by the appellant/accused.

6. Mr.R.C.Paul Kanagaraj, learned counsel appearing for the appellant/accused would contend that the learned trial Judge had failed to see that P.W.3-Murugan is not a reliable witness and that his evidence cannot be taken into consideration as a witness to speak about the last seen theory. It is further contended that the learned trial Judge had failed to see that P.W.1, in his evidence, had categorically stated that on the fateful day, the deceased had informed him that there was a guest waiting at his home and the name of the appellant was not registered by P.W.1. Further, the learned trial Judge had failed to see that P.W.4-Govindasamy, is a tutored witness and his evidence in chief and cross do not inspire the confidence to relay the same to fix the appellant was seen in old loons and spoken with the witness.

7. Per contra, Mr.K.Prabakar, learned Additional Public Prosecutor made submissions in support of the judgment of the trial Court.

8. Points for consideration:

(i) Whether the prosecution has proved the charge under Section 302 IPC beyond reasonable doubt.?

(ii) Whether the order of conviction passed by the Sessions Court is sustainable in law? and

(iii) Whether the quantum of sentence awarded therein is proper?

9. After hearing the rival submissions and after perusing the documents and records carefully, it is seen that the case of the prosecution rests on (i) circumstantial evidence, since there was no direct evidence to the alleged occurrence and (ii) recovery of material objects.

10. The Apex Court, in a series of decisions, has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:-

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be completed and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

11. In the decision reported in (1984) 4 SCC 116 [Sharad Birdhichand Sarda Vs.State of Maharashtra], it has been held as follows:-

"Before a false explanation or false plea taken by the accused can be used as an additional link to the chain of circumstantial evidence, the following essential conditions must be satisfied:-

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation."

12. Keeping the above ratio laid down by the Hon'ble Apex Court on proving the guilt of the accused, the prosecution entirely rests upon circumstantial evidence. We find that the criminal law was set into motion by P.W.1-Alwin James Muthu, who lodged the complaint with the respondent police alleging that on 27.08.2014 at about 9 hours, when he was going to his work, the construction labourers outside the house of the deceased banking the gate for a long time and one Singaram, who came by the side, insisted the construction labourer to jump over the compound wall and to knock the inside door and as per instruction, one of the labour went inside the house of the deceased and found that the door was opened and thereafter, when he entered into the house, he found the deceased lying down in his bedroom with injury on his left side. Narrating the above fact, a complaint was lodged before the respondent police and based on which, a case in Crime No.416 of 2016 was registered for the offence under Section 302 IPC.

13. After receipt of the complaint and the investigation, P.W.15, Inspector of Police has laid the charge sheet against the accused for the offence under Section 302 IPC.

14. The prosecution theory, in brief, is that the deceased is a retired Navy Commander from Indian Navy and he was living alone in Door No.4/281 at Pandian Nagar near Kampuliyampatti, Perundurai, Erode District and the accused Bala @ Dhanapaul is residing at Tiruchengode. He completed 12th standard and obtained Auto Mechanic Course Certificate from KSR Polytechnic College at Tiruchengode. He wanted to join in the Army. The accused came in contact with the deceased Viswanathan when he used to visit the house of his brother Subramani at Pappampalayam and as the accused desired to join in the Army, the deceased Viswanathan invited the accused to his home under the promise to get a job in Navy and the deceased had homosexual sex with the accused many times. However, the accused had several times submitted himself for the said activity under the impression that the deceased will get him a job in the Army, but the deceased Viswanathan did not get any job in the Army, due to the said act, the accused was totally in a frustrated mood.

Homocide:-

15. As per the medical evidence of P.W.8-Dr.Ravichandran, the deceased would have died around 22 to 28 hours prior to autopsy due to multiple injuries causing shock and haemorrhage and accordingly, the deceased Viswanathan died due to homicidal violence at his residence.

Crime:-

16. To prove the charges, the prosecution, in the absence of direct evidence, has relied upon circumstantial evidence based upon (i) last seen theory and (ii) recovery of material objects to connect the accused with the crime.

17. To buttress the charges, the prosecution heavily relied upon the evidence of P.W.1, the informant, who set the criminal law into motion. P.W.3, P.W.4 and P.W.6 are the independent witnesses while P.W.5 is the revenue witness and attester of the seizure mahazar and confession statement and P.W.10-Revenue Witness, who is the attester of the observation mahazar and the seizure mahazure at the scene of the crime while P.W.7 is the Judicial Officer, who had recorded the statement of independent witness P.W.6 under Section 164 of Cr.P.C. while the police witnesses have deposed regarding the receipt of the complaint and registration of the FIR and filing of the charge sheet after investigation.

18. P.W.1 is the person, who set the criminal law into motion and he is the last person to see the deceased as alive, around 9 o' clock on 26.08.2014 when the deceased came to his house along with his son and also the deceased conveyed him that a guest was waiting at home. While P.W.3-Murugesan, Panchayat President and Ex-Service man worked in the Army Communication Department had deposed about the seeing of the accused in the company of the deceased along with the child of P.W.1 on the previous night and thereafter also seen the accused at early morning at 4.30 a.m. on the following day and his version in the chief examination assumes significance as the same is not impeached in the cross-examination except formal denial. His evidence is to the effect that on the previous night at about 8.30 p.m., the deceased and the accused and the child of P.W.1 came and had coffee and also bought the food parcel and returned and subsequently on early morning, he has also seen the accused and made enquiries about the deceased also assumes significance. In the absence of anything in the cross-examination to discredit his evidence, we find that the version of both P.W.1 and P.W.3 are clear and cogent and mutually corroborates with each other and lends support the prosecution theory.

19. It is seen from the evidence of P.W.4, who is the independent witness, who could clearly depose that on 27.08.2014 at about 3.15 to 3.30 a.m (in the early morning) he saw the accused near the tea shop at toll-gate and on suspicion when he enquired, the accused said to have replied that he came to the house of the deceased. In the absence of anything in the cross examination to discredit the evidence of P.W.3 and P.W.4, on an cumulative examination of the private prosecution witnesses viz., P.Ws.1, 3 and 4, who are independent witnesses, we find that on the fateful day on 26.08.2014 at about 8.30 p.m., the deceased was seen in the company of the accused along with the child of P.W.1 in his hotel. Thereafter, around 9.00 p.m., when the deceased dropped the son of P.W.1 in his house, P.W.1 is the last person to see the deceased as alive and in the following morning, he was found to be in the pool of blood by P.W.1. Moreover, the accused was first seen in the close neighbourhood of the residence of the deceased, viz., scene of the crime by P.W.4 around 3.30 a.m. followed by P.W.3 around 4.30 a.m. also assumes significance and lend a chain in the link of event. Thus, this Court finds that P.W.3 and P.W.4 are independent witnesses and their version as to seeing the accused leaving the area around 3.30 a.m. and from the conversation they had enquired about the deceased with whose company the accused was seen in the previous night in the said locality, clearly lends support the prosecution theory.

20. As per the evidence of P.W.6 (whose brother Thirunavukarasar completed Diploma in Marine studies), it is seen that P.W.6 was introduced to the deceased through the accused Bala @ Dhanapaul to seek a job for his brother in Navy. From his version, it could be seen that the deceased Viswanathan, who was a retired officer, under the guise of getting employment for his brother in the Marine services, has misbehaved with him resultantly, he left the house and told the accused not to have any associationship with the deceased and the version of the private prosecution witness P.W.6 is clear and cogent and the same remains unimpeached in the cross-examination.

21. It remains to be stated that on 27.08.2014, the accused Bala @ Dhanapaul has called P.W.6 through cell phone and on the same day at about 8.00 p.m., the accused has called P.W.6 and conveyed that the deceased Viswanathan died and on enquiry, it was replied by the accused that on the previous night, since the deceased Viswanathan tried to misbehave with him, he attacked the deceased Viswanathan with iron road. P.W.6-Dinesh Kumar, an independent witness, had deposed regarding the nature of attitude and behaviour of the deceased with the accused on the premise to secure him a job in Marine/Navy and he had invited P.W.6 to get a job in Marine. Nothing in the cross examination

to discredit the version of the independent witness P.W.6 and it clearly lends support the case of the prosecution. It is pertinent to note that the statement of P.W.6 recorded by P.W.7-Judicial Magistrate under Section 164 of Cr.P.C. was marked as Ex.P.6 and the same found to be in full consonance with the version of P.W.6 in the witness box and which also provides vital link between the accused and the occurrence.

22. It remains to be stated that P.W.5-Village Administrative Officer is the attester of the confession statement-Ex.P.2 and also the seizure mahazars-Exs.P.4 and P.5. Based upon the admissible portion of the confession statement of the accused, bloodstained baniyan-M.O.1 was recovered from the garden behind the house of the accused and M.O.2-Iron rod was also recovered near the water tank at Pandiyan Nagar through the seizure mahazars, which were attested by P.W.5. Furthermore, on a combined reading of Chemical Examination Reports-Exs.P.26 and 27 and Ex.P.28-Serological Report, blood was deducted on each item of 1 and 3 to 8 (both inclusive) but not on item No.2. Item No.4 is the banian seized under M.O.1.

23. It is pertinent to note that the statement of witness P.W.6 recorded under Section 164 of Cr.P.C. by P.W.7-Judicial Magistrate and marked as Ex.P.6 found to be in full consonance with the version of P.W.6 in the witness box and thus, this Court finds that the prosecution has successfully demonstrated the "last scene theory" based upon the chain of circumstantial evidence as narrated above. Hence, the finding rendered by the trial Court that the guilt of the accused is proved in the manner known to law does not suffer from any infirmity warranting interference by this Court at this appellate stage and hence, the said finding is hereby confirmed. Accordingly, this Court holds that the accused has committed the crime. The prosecution has let in many legal acceptable evidence providing chain of links to point the guilt of the accused and nexus of the accused with the crime.

24. Mr.R.C.Paul Kanagaraj, learned counsel appearing for the appellant would submit that the deceased Viswanathan exploited the socio-Economic condition of the accused as he was looking for a job in Indian Navy and the deceased Viswanathan was the retired Commander of the Indian Navy. The learned counsel also drawn our attention to the document Ex.P.2-confession statement said to have been given by the accused to the police stating that there was no pre-meditation for committing the alleged crime. As per the admissible portion of confession statement of accused-Ex.P.2, the accused was not willing to have homosexual sex with the deceased Viswanathan and when the deceased Viswanathan made such an activity, the accused had attacked the deceased Viswanathan with iron rod which was lying inside the

house and hence, the charge under Section 302 IPC is not made out.

25. We have heard the submissions made by the learned counsel appearing for the appellant.

Legal position on Homosexuality:-

26. In the decision reported in (2018) 10 Supreme Court Cases 1 [Navtej Singh Johar and others Vs. Union of India, Through Secretary, Ministry of Law and Justice, the Hon'ble Supreme Court has held as follows:-

"A cursory reading of Section 375 IPC divulges that it is a gender specific provision for the protection of women as only a man can commit the offence of rape. The Section has been divided into two parts. The former part, comprising of Clauses (a) to (d), simply describes what acts committed by a man with a woman would amount to rape provided that the said acts are committed in the circumstances falling under any of the seven descriptions as stipulated by the latter part of the Section.

Section 377 IPC, unlike Section 375, is a gender-neutral provision as it uses the word 'whoever'. (emphasis supplied by us)

Section 377 criminalises even voluntary carnal intercourse not only between homosexuals but also between heterosexuals. The major difference between the language of Section 377 and Section 375 is that of the element of absence of consent which has been elaborately incorporated in the seven descriptions contained in the latter part of Section 375 IPC. It is the absence of willful and informed consent embodied in the seven descriptions to Section 375 which makes the offence of rape criminal.

If consensual carnal intercourse between a heterosexual couple does not amount to rape, it definitely should not be labelled and designated as unnatural offence under Section 377 IPC.

In view of the law laid down in Shayara Bano (supra) and given the fact that Section 377 criminalises even consensual sexual acts between adults, it fails to make a distinction between consensual and non-consensual sexual acts between competent adults. Needless to say, the Section also interferes with consensual acts of competent

adults in private space. Sexual acts cannot be viewed from the lens of social morality or that of traditional precepts wherein sexual acts were considered only for the purpose of procreation.

Thus analysed, Section 377 IPC, so far as it penalizes any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 IPC is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered 156 under Section 377 IPC done between the individuals without the consent of any one of them would invite penal liability under Section 377 IPC.

A cursory reading of both Sections 375 IPC and 377 IPC reveals that although the former Section gives due recognition to the absence of wilful and informed consent' for an act to be termed as rape, per contra, Section 377 does not contain any such qualification embodying in itself the absence of 'wilful and informed consent' to criminalize carnal intercourse which consequently results in criminalizing even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgenders. Section 375 IPC, after the coming into force of the Criminal Law (Amendment) Act, 2013, has not used the words subject to any other provision of the IPC'. This indicates that Section 375 IPC is not subject to Section 377 IPC.

Ergo, Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC." (emphasis supplied by us)

27. (a) Thus, after the judgment of the Hon'ble Apex Court in the case of Navtej Singh Johar and others Vs. Union of India, (cited supra) in the matter of homosexuality, "consent to" and "refusal for" stands at miles apart in the diametrically opposite direction. The accused had refused to submit himself to the advance made by the deceased, de hors his earlier consensual, for the said act. In the matters of sexual offence against the woman, certain legal protection was given for woman, on such circumstances, so as to protect her body, from, committing the offence against her body on the ground of grave and sudden provocation. When, the law gives legal protection for woman in safeguarding her body against commission of an sexual offence, on an akin analysis, so too for man.

27.(b) The Army Act is a separate Act altogether and homosexuality is an offence under Section 46 of the Army Act, which deals with unbecoming conduct. It has already been held by the Hon'ble Supreme Court that homosexuality is not unnatural. The Supreme Court has not struck down Section 377 IPC but has merely read it down and interpreted it. Bestiality will continue to be "unnatural" under Section 377 IPC as per the judgment and hence, it would remain an offence under Section 46 (a) of the Army Act as well.

27.(c) The position of partner in homosexuality is as that of woman, in case of offence under Section 375 IPC. On legal pronouncement, certain inference of such conduct, in the nature of legal protection are provided to woman in the case of commission of offence of her body, and akin to and applying the same analogy are applicable. In other words, so too for man.

27.(d) In other words, a erstwhile partner in homosexuality cannot be denied of his self dignity due to submission on an earlier occasion, as consensual party, still and de hors, earlier consensual Submission, either voluntarily or on false promise, (as in the instance case of getting job in Marine Force Service) is entitled to refuse and on such refusal, as held in the case cited supra, the offence is made out and when such being the case, the ex-partner (as in the instant case accused) is entitled to protect his body from commission of offence by the other partner (as in this case deceased).

27.(e) Thus, on consensual, homosexuality was decriminalized and however, in case of refusal, it still hold the ground of offence.

28. On a close scanning and careful scrutiny of above evidence in the proper perspective, We find that:

The prosecution has successfully demonstrated the following circumstances in the manner known to law:-

a) On 26.08.2014 around 12.30 noon, the deceased from his cellphone (8012145021) had called the accused cell phone (8760513822) and invited him to his house [as per Ex.P.29 (statement of Nodal Officer) and call sheet history and Tower post details]

b) On 26.08.2014 around 8.30 p.m Independent witness P.W.3 had seen the accused in the company of deceased along with the child of P.W.1 at his hotel.

c) On 26.08.2014 around 9.00 p.m., P.W.1 seen the deceased while he dropped P.W.1's son at his residence.

d) Deceased declined the offer of P.W.1 to have food at his residence on the premise that he had a guest at home and bought parcelled food.

e) On the next day early morning, viz., 27.08.2014 around 3.30 a.m, the accused was seen by P.W.4, who is the close neighbourhood of the house of the deceased (viz) place of crime and the accused told P.W.4 that he is returning to home after visiting military man (deceased).

f) On 27.08.2014 in the early morning around 4.30 a.m, P.W.3 had seen the accused around the area of the house of the deceased and the accused answered regarding his presence with deceased on the previous night.

g) On 27.08.2014 around 9.10 a.m P.W.1 found the deceased Viswanathan in the pool of blood in his house which was unlocked.

h) On 27.08.2014 around 11.00 a.m, P.W.1 lodged Ex.P1-complaint.

i) On 27.08.2014 in the night around 8.00 p.m, the accused spoken to P.W.6 and stated about the murder of military man.

j) On 28.08.2014 P.W.6 was examined by the Investigation Officer.

k) On 29.08.2014, police arrested the accused, and based upon the admissible portion of the confession statement of the accused, M.O.1-Paniyan and M.O.2-Iron rod were recovered and his confession statement leads to discover the fact of M.O.1-Blood stain cloth and M.O.2 weapon of crime at two different places.

1) Scientific Reports are to the effect that Bloodstained Paniyan-M.O.1 (accused Panian) and M.O.2 (iron rod) weapon of crime and on the dress of deceased are mutually tallied.

29. From the above circumstances, this Court finds that the prosecution has let in the circumstances to prove the guilt of the accused and to prove the nexus between the crime and the accused.

30. (i) Now what remains only what is the offence proved. It was argued that an offence punishable under the second part of Section 304 of the Indian Penal Code alone is made out, since Exceptions 1 and 4 to Section 300 IPC are attracted.

(ii) All murders are culpable homicides, but all culpable homicides are not murders. An act resulting in death done intending to cause death is culpable homicide under the first part of Section 299 IPC amounting to murder under the first part of Section 300 IPC. It will get reduced to culpable homicide not amounting to murder only if any one of the exceptions is attracted.

(iii) Even then only the first part of Section 304 IPC which requires intention to cause death or intention to cause such bodily injury, as is likely to cause death will apply. The second part of Section 304 IPC is applicable only when there is no intention and there is only the knowledge that the act is likely to cause death.

(iv) An offence coming under the second part of Section 299 IPC involves only intention to cause bodily injury which is likely to cause death and death resulted. That will become murder only if the second part of Section 300 IPC is attracted and injury is inflicted on a person whose special physical condition was known to him. The only other likelihood in Section 300 IPC is in part 4. सत्यमेव जयते

(v) Parts 1 and 3 of Section 300 IPC require intention, for the former to cause death and for the latter to cause that particular injury which is found to be sufficient in the ordinary course of nature to cause death.

(vi) Sufficiency in the ordinary course of nature is of a higher degree than likelihood.

31. In order to attract the first exception, there must have been such a high degree of grave and sudden provocation from the deceased, which was capable of depriving the appellant of his power of self-control to cause death under his influence.

Deprivation of self control is the mitigating factor there. It is co-related with the gravity and suddenness of the provocation.

32. The provocations are the first and last requests for homosexuality. The repetition of such a request could have given any graver provocation.

33. From the records available, the prosecution has not let in any evidence for pre-meditation of committing the crime by the accused and in the case on hand, the pre-meditation for commission of the crime by the accused is totally missing and on evidence, the act was committed by the accused in a sudden and grave provocation and the accused has given a blow on the neck of the deceased and when the blow was given by the appellant, he was completely enraged losing his medical balance and further, since the offence was committed by the accused suddenly, we find that the accused has lost his control while committing the offence due to grave and sudden provocation.

34. In the case of Indra Deva Vs. State reported in 1991 Cr.L.J.2598 : 1991 All cri. R.350, it is observed that Part - I applies only in two circumstances, if the act by which the death is caused or done (i) with the intention of causing death or (ii) of causing such bodily injury as is likely to cause death. In the case of Sital Singh Vs. State of Punjab reported in 1983 Cr.L.J. 1042 : 1983 AIR (SC) 65, it is observed that where pre-meditation for commission of crime is not established, accused can be convicted only under Section 304 Part I IPC. Hence, following the ratio laid down by the Hon'ble Apex Court in the decision reported in AIR 1990 SC 713 [Madhani Vs. State of Rajasthan], the conviction is altered to one under Section 304 (i) IPC.

35. Thus, on a cumulative reading of circumstances placed on record, we are of considered view that the action of the accused on the body of the deceased falls under Section 304 (i) I.P.C and hence, the conviction imposed by the trial Court under Section 302 I.P.C is modified to that of Section 304 (i) I.P.C and sentence is accordingly reduced to 8 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default, to undergo Simple Imprisonment for three months. In this regard, the Trial Court is directed to issue Non-Bailable Warrant to secure the accused to undergo the remaining period of sentence, if any.

This Criminal Appeal is partly allowed to the extent indicated above.

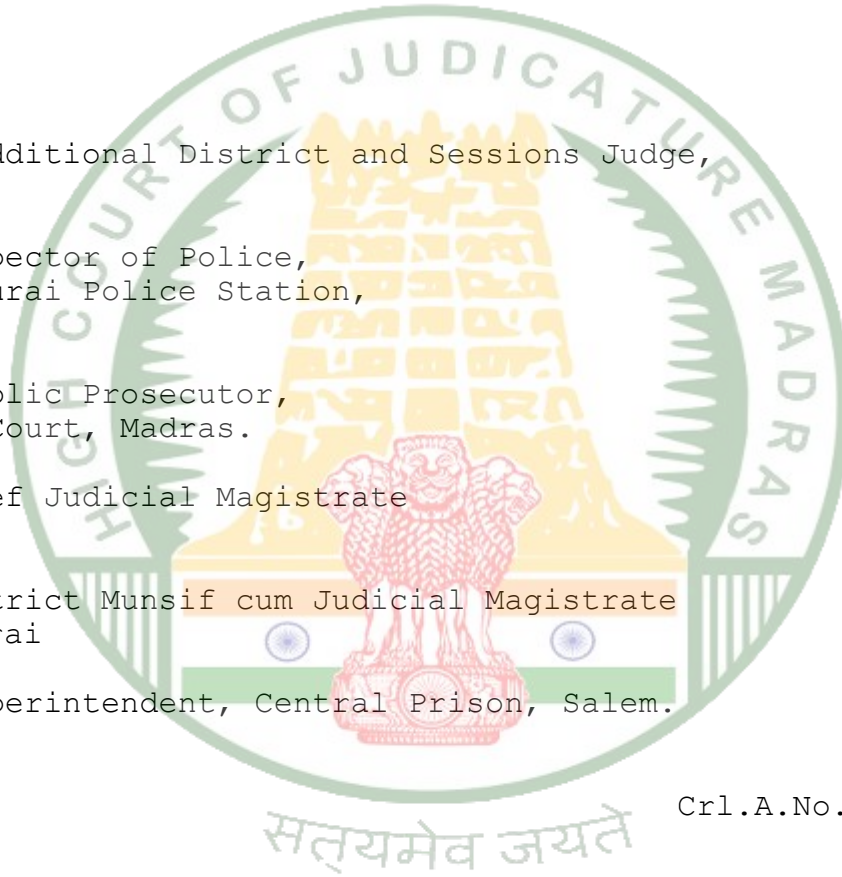
-s/d-
Assistant Registrar(CS-IX)

True Copy

Sub-Assistant Registrar

Jr1
To

- 1.The I Additional District and Sessions Judge,
Erode.
- 2.The Inspector of Police,
Perundurai Police Station,
Erode.
3. The Public Prosecutor,
High Court, Madras.
- 4.The Chief Judicial Magistrate
Erode.
- 5.The District Munsif cum Judicial Magistrate
Perundurai
6. The Superintendent, Central Prison, Salem.



Cr1.A.No.344 of 2017

SS (CO)
SP(14/11/2019)

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