

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.06.2019
Pronounced on : 08.07.2019

CORAM:

THE HONOURABLE Mr.JUSTICE M.M.SUNDRESH
and
THE HONOURABLE Mr.JUSTICE M.NIRMAL KUMAR

Criminal Appeal No.417 of 2017

Karunamoorthy ... Appellant / Accused

-Vs-

State Rep. by,
The Inspector of Police,
Tittakudi Circle,
Tittakudi,
Cuddalore District. ... Respondent / Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to set aside the Judgment of conviction and sentence passed by the learned District Mahila Sessions Judge, Cuddalore in S.C.No.16 of 2016 dated 17.05.2017 and acquit the appellant from all the charges.

For Appellant : Mr.K.Gandhi Kumar

For Respondent : Mr.R.Prathap Kumar
Additional Public Prosecutor

JUDGMENT

[Order of the Court was made by M.NIRMAL KUMAR, J.]

The appellant, who stood charged and convicted for the offence under Sections 449, 302 and 506(i) of IPC in S.C.No.417 of 2017 dated 17.05.2017 on the file of the Mahila Sessions Court, Cuddalore, having been arrayed as an accused has filed the above Criminal Appeal.

2.Brief Facts:

2.1.The appellant is the cousin brother of one Prakash, whose wife Selvarani is the deceased in this case. The appellant used to call upon the deceased Selvarani and chat with her. The husband of the deceased stayed at Chennai and worked

as Supplier in Vijay Hotel. During holidays and other festivals, he used to visit his family. Taking advantage of his absence, the appellant had developed illegal intimacy with the deceased Selvarani, which was objected by the villagers and her husband Prakash. On 18.04.2005 at about 11.00 p.m when the deceased Selvarani and her two daughters were sleeping, the appellant came through the back side of the house of the deceased and called her to have physical relationship. The deceased Selvarani refused and asked the appellant to leave the place. Thereafter with an intention to murder, the appellant had forcibly trespassed into the house of the deceased and slapped her and pushed her by the neck, thereby she fainted and fell down. Sensing that she was breathing, appellant took the pillow and smothered her to death. This was witnessed by Priyadharshini, daughter of the deceased Selvarani. She questioned the appellant about the act, the appellant had threatened the said Priyadharshini [PW2] to keep quiet otherwise she would also meet the same fate. On confirmation that the deceased had died, the appellant took the pillow and her mobile phone and ran away through the back door of the deceased house.

2.2. On 19.04.2015 at 06.00 a.m, when Priyadharshini [PW2] woke up her mother, she saw the blood oozing from the deceased mouth and she called her relatives. They came and sprinkled water on the face of the deceased, unable to see any movement, they informed the deceased brother [PW3] and his son [PW1], who are residing at Eraiyur Village a far off place. Thereafter, PW1 & PW3 came to the house of the deceased at about 09.00 a.m. On confirming the death of Selvarani, PW1 went to respondent police and lodged a complaint [Ex.P1] at about 12.00 noon on 19.04.2015. On receipt of the same, PW9 registered a case in Crime No.31 of 2015 [Ex.16].

2.3. The appellant and the deceased Selvarani are relatives. Taking advantage of the absence of the deceased husband Prakash, both of them had developed illegal intimacy and had physical relationship for quite some time, which was objected by the relatives of the deceased and the villagers.

3. In support of the prosecution, PW.1 to PW.10 were examined and Ex.P1 to Ex.P23 were marked and 6 materials objects were marked. On the side of the defence one witness/DW1 has been examined and marked Ex.D1 to Ex.D7.

3.1. PW1 is the author of the complaint [Ex.P1] dated 19.04.2015. The occurrence is said to have taken place on 18.04.2015 at about 11.00 p.m. PW2 is the daughter of the deceased and she is the only eye witness in this case. PW3 is the brother of the deceased, who had accompanied PW1.

3.2.PW4, the Aunt of the deceased reached the scene of occurrence by hearing the cry sound in the deceased house on 19.04.2015.

3.3.PW5, the learned Judicial Magistrate No.II, Virudhachalam recorded statement under Section 164 Cr.P.C of PW1 to PW4 and three others and the same were marked under Ex.P2 to Ex.P8.

3.4.PW6, the Doctor conducted postmortem on the body of the deceased and issued the postmortem report as Ex.P12.

3.5.PW7, the Village Administrative Officer, Thittakudi, the witness for the observation mahazar [Ex.P13] drawn by PW10 in the scene of occurrence.

3.6.PW8, the Village Administrative Officer, Avinangudi is the witness for the arrest and confession of the appellant on 21.04.2015 at about 07.00 a.m. The admitted portion of the confession is Ex.P14 and mahazar for the recovery of M.Os.1 and 2 is Ex.P15.

3.7.PW9, the Sub Inspector of Police received the complaint [Ex.P1] from PW1 and registered F.I.R in Crime No.31 of 2015 [Ex.P16].

3.8.PW10, the Inspector of Police had taken up the investigation, visited the scene of occurrence on 19.04.2015 at about 01.30 p.m, prepared observation mahazar [Ex.P17]. Thereafter, examined the witnesses who were present at the scene of occurrence viz., PW1, PW2, PW4 and others. On 20.04.2019 after inquest sent the body for post mortem. In continuation of the investigation, he has examined other witnesses and recovered the materials MO3 to MO6 under form 91. Thereafter on 21.04.2015 at about 07.00 a.m he arrested the appellant in presence of PW8. Based on his confession, Pillow [M.O.1] and Cell phone of the deceased [M.O.2] were recovered. On the very same day, he examined other witnesses and made a request to the learned Judicial Magistrate No.II, Virudhachalam for recording the statements under Section 164 of Cr.P.C of PW1 to PW4 and others.

4.The appellant/accused was questioned under Section 313 of the Criminal Procedure Code. He denied the charges and gave an explanation that the appellant on seeing the crowd in the house of the deceased had gone there, from there he was taken by the respondent Police on 19.04.2015 and kept in illegal custody for three days and a false case has been foisted against him.

5.The Court below placing reliance upon the evidence of PW2 and other witnesses coupled with the medical evidence, convicted the appellant for the offence under Section 449 of IPC to undergo five years rigorous imprisonment and to pay a fine of Rs.1000/-, in default six months rigorous imprisonment and for Section 302 of IPC to undergo life imprisonment and to pay a fine of Rs.1,000/- in default six months rigorous imprisonment and Section 506(i) of IPC to undergo two years rigorous imprisonment and ordered the sentences to run concurrently.

6.The learned counsel for the appellant would submit that the prosecution has not proved its case beyond reasonable doubt. The Court below has wrongly relied upon the evidence adduced on behalf of the prosecution notwithstanding the serious discrepancies involved. The evidence of PW2 has not been taken into consideration properly and the recoveries have not been proved by the prosecution. PWs.1, 3 & 4 have categorically stated that they came to know about the incident through PW2 and the entire prosecution case rested upon the evidence of PW2, which is highly susceptible to sustain conviction without corroboration.

7.He would further submit that after the occurrence, PW2 was staying with her relatives, she have been tutored to depose against the appellant and therefore her evidence was unreliable in the facts of the case and hence, the very case of the prosecution cannot be sustained. Further more a witness have stated about the presence of police at the place of occurrence at 09.00 a.m on 19.04.2015 even before the complaint was lodged and registered. Thus, the appeal has to be allowed.

8.Per contra, the learned Additional Public Prosecutor appearing for the state would submit that PW2 is the child witness who had spoken about the occurrence and her evidence does not create any doubt. The trial Court had taken into consideration the evidence of PW2 and the evidence adduced by PW1, PW3 and PW4 which corroborated with that of each other and the exhibits marked and recoveries have been proved. Hence, there is nothing to discrete the evidence of PW2. Further PW1 to PW4 have given statement under Section 164 of Cr.P.C. The trial Court on considering the relevant materials had convicted the appellant. The prosecution has also established the motive. Thus, the appeal has to be dismissed.

9.The point for consideration is as to whether the prosecution has proved its case beyond reasonable doubt or not?

10.PW1 has stated about that he received information on 19.04.2015 at about 07.30 a.m from his Aunt Kannagi that the deceased was found dead with blood oozing from her mouth.

Immediately, he along with his father PW3 rushed to the house of the deceased at about 08.30 a.m and saw the body of the deceased. PW1 enquired PW2, who had stated to him that on 18.04.2015 at about 11.00 p.m the appellant came to the house of the deceased for physical relationship with the deceased. On refusal, the appellant had slapped and pushed her down by her neck and took the pillow [M.O.1] and smothered her to death. When the same was questioned by PW2, the appellant threatened and warned PW2 that she would also meet the same fate. On confirming the death of the deceased, the appellant had left the house through backyard and took the pillow [M.O.1] and mobile phone [M.O.2] of the deceased. On 19.04.2015 at about 06.00 a.m, when PW2 woke up the deceased, she was immobile. PW2 rushed to her Aunt and called her. On confirming the death of the deceased, PW1 at about 12.00 noon went to the respondent Police and lodged a complaint [Ex.P1].

11.PW1 further stated that the complaint [Ex.P1] was written by PW9 the Sub Inspector of Police. On perusal of the same, it is seen that nowhere it is mentioned that the complaint has been written by PW9. Further PW9 states he received the written complaint from PW1. There are corrections with regard to the time mentioned in the complaint for which there is no explanation given by PW1. Thus serious doubts is cast in the manner Ex.P1 complaint came into existence.

12.PW1 has further stated that the deceased father-in-law Krishnan was sleeping in the same house of the deceased and the said Krishnan has not stated about the appellant entering into the house or hearing any commotion. The said Krishnan could not be examined as he had passed away. In any way, the statement of Krishnan is not of any use. PW1 admits that the appellant was present when he reached the house of the deceased. The appellant was taken in police custody on the same day on 19.04.2015.

13.PW2 admits that she has not spoken about any light available during the occurrence and she saw the occurrence in aid of it. It is to be noted that none of the witnesses have spoken about the availability of light. She further stated that at about 11.00 p.m on 18.04.2015 she saw the appellant fighting with her mother and slapped and smothered her to death. She further admits that only on the next day i.e., on 19.04.2015 at about 06.00 a.m she informs about the occurrence to her Aunt, who was residing away from her house about the incident. No neighbors have been examined this case. When the occurrence took place, PW2's grand father Krishnan was available in the house. There is no reason for not informing her grand father or taking any assistance from him immediately.

14.PW6 the Doctor states that the death would have happened somewhere between 01.00 a.m and 01.00 p.m on 19.04.2015, but PW2 categorically stated that the occurrence had taken place at 11.00 p.m on 18.04.2015, which causes serious doubt about the presence of PW2.

15.Further the presence of the Police at 09.00 a.m at the scene of occurrence on 19.04.2015 is in contradiction with the evidence viz., PW1 to PW4 and there are improvements and embellishment. Further PW1, PW3 and PW4, who are none other than the uncle, grand father and aunt of PW2 who are all close relatives have deposed that they came to know about the incident through PW2. It is to be noted that the statement of witnesses viz., PW1 to PW4, Suguna, Shobana and Kanchana though were recorded on 19.04.2015, their statement reached the Court only on 19.05.2015. There is considerable delay in sending the statement to the Court, for which no explanation has been given which causes great doubt.

16.The contention of the appellant is that the witnesses were compelled to toe the line of the prosecution and the witnesses have admitted only on the request of the police and they had given 164 Cr.P.C statement. It is seen that the inquest was held on 20.04.2015 between 09.00 a.m and 11.00 a.m and the same has been sent to the Court on 21.04.2015 after the arrest of the appellant. Thus after fixing the appellant as accused, the statements were recorded. That was the reason that all the statements reached the Court with considerable delay.

17.The Call Detail Records (CDR) [Ex.P23] was produced to show that the appellant and the deceased were in constant touch. The said document was not certified by the Nodal Officer and the Nodal Officer was not examined by the prosecution. In the absence of certificate under 65(b) no relevance could be placed as Ex.P23. The seizure of M.O.2 the mobile phone of the deceased is of no sequence.

18.DW1 is the father of the appellant through him Ex.D1 to Ex.D7 had been marked. DW1 has categorically stated that the appellant was arrested on 19.04.2015 by the respondent Police and kept in illegal custody. PW6 the Doctor, who conducted post mortem and issued Ex.P12 has deposed that the probable time of the death is not in conformity with the evidence of PW2.

19.PW8 the Village Administrative Officer in his presence Ex.P14, the confession of the accused, Ex.P15 mahazar for recovery of pillow [M.O.1] and cell phone of the deceased [M.O.2] from the appellant were marked. PW8 admits that he hails from different village and he is nothing but an obliging witness and corrections are found in Ex.P15.

20. From the evidence of PW10 the investigating officer, it is seen that during the occurrence there was no light and PW2 did not see the occurrence in the aid of light. From the observation mahazar [Ex.P13] there is nothing to note with regard to forcibly opening the door. Further, the Investigating Officer admits the contradictions made by PW2 and other witnesses. In the scene of occurrence though many persons were present, PW10 did not examine any independent witnesses in this case. The statement of PW1 reached the Court only on 21.04.2005 and the statements of PW2 to PW4 and PW6 to PW9 have reached the Court on 19.05.2015 and other witnesses all reached the Court with considerable delay.

21. The entire prosecution case rests on the evidence of PW2 the child witness. It is to be seen whether PW2 evidence is reliable one. There is no likelihood of being tutored. This precaution is necessary because the child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is truth in it, there is no obstacle in the way of accepting the evidence of a child witness [PW2].

22. In this case PW2 is naturally having animosity against the appellant, since the appellant and the deceased were having illegal relationship for quite sometime. PW2 has seen the appellant and the deceased talking with each other often, which was objected by the relatives of the deceased. Further there was animosity with regard to the appellant's sister getting in marriage with the deceased husband Prakash family. The illegal relationship has been known to most of the villagers, who are all repressive.

23. This would have waivered very much in the mind of PW2. Further PW2 is a school going student, who has got good retention power and she is capable of reciting the same. There are possibilities of PW2 being tutored. Thus PW2 is amenable to torturing.

***24. In the case of child witness the Courts have laid down the evidence must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law in these cases "(Prakash Versus State of Madhya Pradesh [(1992) 4 Supreme Court Cases 225]; Baby Kandayanathi Versus State of Kerala [(1993) Supp. (3) Supreme Court Cases 667]; Raja Ram Yadav Versus State of Bihar [(1996) 9 Supreme Court Cases 287];**

and Dattu Ramrao Sakhare and others Vs. State of Maharashtra [(1997) 5 Supreme Court Cases 341]". Thus, it cannot be safe to rely on the evidence of PW2 alone without corroboration to sustain the conviction."

25.From the evidence of PW2 which is in contradiction and motivated one and serious doubt arises in the manner PW2 witnessed the occurrence in darkness and PW2 did not inform her grand father Krishnan who was very much available in the house and also not informed any of the neighbor. Admittedly the houses are a row houses, there is inordinate delay in informing about the occurrence after seven hours, which is not a normal conduct. Further the appellant's relationship with PW2's mother had caused animus against the appellant fueled by her paternal relatives and hence there is every possibility of PW2 being tutored.

26.Hence, the case as projected by the prosecution is not safe to sustain conviction without corroboration. In such view of the matter in our considered view, the conviction and sentence imposed by the trial Court against the appellant cannot be sustained in the eye of law. Accordingly, we hold that the prosecution has failed to prove the case beyond reasonable doubt. As such, the conviction and sentence imposed on the appellant in S.C.No.16 of 2016 on the file of the District Mahila Sessions Court, Cuddalore is set aside and this Criminal Appeal is allowed. The appellant is acquitted of all the charges levelled against him and the fine amount, if any paid, shall be refunded to him. The appellant is directed to be released forthwith, unless his custody is required in connection with any other case.

Sd/-

Assistant Registrar (CS-V)

Dated:16/08/2019

*Amended as per order
dated 13/11/2019

Sd/-

Assistant Registrar(CS-VI)

Dated:28/11/2019

//True Copy//

Sub Assistant Registrar

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To

1. The District Mahila Sessions Court,
Cuddalore.
 2. The Inspector of Police,
Tittakudi Circle,
Tittakudi,
Cuddalore District.
 3. The Public Prosecutor,
High Court, Madras.
 4. The Director General of Police,
Mylapore, Chennai.
 5. The District Collector,
Cuddalore.
 6. The Principal Sessions Judge,
Cuddalore.
 7. The Chief Judicial Magistrate,
Cuddalore.
 8. The District Munsif cum Judicial Magistrate,
Thittakudi.
 9. The Superintendent of Police,
Central Prison, Cuddalore.
 10. The Section Officer,
Criminal Section,
High Court, Madras.
- To be substituted to
The order already
despatched on
04/10/2019

+1 cc to Mr.K.Gandhikumar, Advocate, S.R.No.56669

PM(CO)
SSM(27/08/2019)

srg 28/11/2019

Criminal Appeal No.417 of 2017