

BAIL SLIP

Ashok Kumar @ Anthony samy, Male, aged 25/2009 years S/o.Mickel @ Mikel, Appellant/sole Accused was released on bail vide order of this Court in dated 01.03.2019 in Cr1.MP(MD)No.1780 of 2019 in Cr1.A (MD)No.340 of 2009.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 19.11.2019

CORAM

THE HONOURABLE MR. JUSTICE B.PUGALENDHI

Cr1.A(MD)No.340 of 2009

Ashok Kumar @ Anthony Samy

.. Appellant/Sole Accused

Vs.

State through
The Inspector of Police,
Sivalaperi Police Station,
Tirunelveli,
Tirunelveli District.
Crime No.89/2007

.. Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 of the Criminal Procedure Code to call for the records relating to the judgment in Session Case No.181 of 2008, dated 26.10.2009, on the file of the learned Sessions Judge (Mahalir Court), Tirunelveli and set aside the same.

For Appellant : Mr.T.Lajapathi Roy

For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

JUDGMENT

This Criminal Appeal is preferred by the appellant / sole accused as against the conviction and sentence imposed by the learned Sessions Judge (Mahalir Court), Tirunelveli, in S.C.No.181 of 2008, dated 26.10.2009.

2. The appellant / accused was charged for the offence under Section 306 IPC and the trial Court, in conclusion of the trial, found this appellant guilty for the offence under Section 306 IPC, convicted and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.2500/-, i/d to undergo simple imprisonment for three months. As against the conviction and



sentence imposed by the trial Court, the appellant has preferred the instant appeal.

3. The facts of the case, as projected by the prosecution, are as follows:

3.1. The victim, Tamilselvi and the appellant / accused loved each other and by promising to marry her, the accused had physical relationship with the victim. But, he refused to marry her and therefore, a complaint was lodged by the victim girl. In that complaint, the appellant was acquitted from the charges framed against him. The victim girl was on distress out of the verdict of her earlier complaint.

3.2. While so, on 05.10.2007, when the victim girl went to the public water tap to take water, the appellant / accused abused her that what she succeeded by lodging the case against him and also invited her to be a concubine to him. This was also witnessed by the Aunt [PW3] of the victim. Frustrated over the same, the victim girl, when she was alone, consumed poison and when she along with her father [PW1] were on the way to the police station, the victim girl got fainted. Immediately, she was admitted in the Government Hospital, Palayamkottai.

3.3. Dr.Krishnamurthy [PW12], who attended the victim girl at the Government Hospital, Palayamkottai, admitted her in the Hospital and also gave the first aid treatment. He also sent a medical intimation to the Sivalaperi Police Station. The Sub-Inspector of Police [PW8], on receipt of the medical intimation, deputed the Constable [PW9] for recording the statement of the victim and accordingly, PW9 went to the Government Hospital, Palayamkottai. But, in the meantime, the deceased died in the Hospital on 07.10.2007 at about 05.25 am. Thereafter, PW9 reached the Hospital and recorded the statement from the father of the victim [PW1] on 07.10.2007 at about 10.00 am in Ex.P1 and returned to the Police Station and registered the case in Crime No.89 of 2007 under Section 174 Cr.P.C on 07.10.2007 at about 11.00 am.

3.4. The Inspector of Police [PW13], on receipt of the intimation, went to the Hospital around 12.30 noon and conducted inquest in the presence of the panchayatars. The inquest report is marked as Ex.P10. Thereafter, he sent the body of the deceased for postmortem.

3.5. Dr.Shyamsundar Singh [PW11] conducted the postmortem on 07.10.2007 at about 02.40 pm and noted down the presence of 100 ml brown colour fluid with pungent odour and preserved the viscera and sent for chemical analysis. The Inspector of Police [PW13] went to the place of occurrence around 05.00 pm on the same day and prepared the observation mahazar [Ex.P2] and rough sketch [Ex.P11] in the presence of witnesses PW4 and another. He arrested the accused on 08.10.2007 at about 09.30 pm near Sivalaperi to Kaliyavur Road Paper



Mill and remanded him to judicial custody. He also examined the other witnesses and completed the investigation and filed the final report on 01.01.2008.

3.6. During the trial, thirteen witnesses were examined on the side of the prosecution and eleven documents were marked.

4. The available evidence from the prosecution witnesses is as follows:

i) PW1 is the father of the victim girl, who lodged the complaint [Ex.P1]. He speaks about the earlier complaint and the steps taken for filing an appeal as against the order of acquittal passed in the earlier case.

ii) PW2 is the mother of the victim girl and she also speaks about the earlier complaint. She is a hearsay witness to the occurrence said to have taken place on 05.10.2007.

iii) PW3 is the sister of PW2 and the maternal aunt of the deceased. She has stated that on the date of occurrence, ie., on 05.10.2007, she was also present at the place of occurrence and in her presence, the accused has abused the victim girl that what she achieved by lodging the complaint against him and also invited her to be a concubine for him.

iv) PW4 is the witness for observation mahazar and the sketch prepared in the place of occurrence.

v) PW5 is examined as a witness to the previous incident, but, he turned hostile.

vi) PW6 is the Doctor, who treated the deceased and also intimated the death to the police station.

vii) PW7 is the Constable, who identified the body of the deceased to the Doctor for postmortem.

viii) PW8 is the Sub-Inspector of Police, Paalam Police Station, Tirunelveli City, who received the information from the Government Hospital, Tirunelveli and passed on the information to the Sivelaperi Police Station on 07.10.2007 at about 10.00 am.

ix) PW9 is the Special Sub-Inspector of Police, who registered the case in Crime No.89 of 2007.

x) PW10 is the Scientific expert of the Forensic Lab and according to her, she has not found any poisonous substance or any toxins in the viscera sent for examination.

xi) PW11 is the Doctor, who conducted the postmortem on the body of the deceased.

xii) PW12 is the Doctor, who admitted the deceased in the Hospital and provided the initial treatment.

xiii) PW13 is the Inspector of Police, who conducted the investigation and filed the final report.

5. After the prosecution evidences were closed, the incriminating materials were put to the appellant / accused under Section 313 Cr.P.C and he denied the same. Though the appellant / accused stated that there are witnesses to support his case, neither a witness nor a document was marked on the side of the defence. In conclusion of the trial, the learned trial Judge has found the



appellant / accused guilty and has convicted him as stated supra. As against the conviction and sentence, the appellant / accused has preferred the instant appeal.

6. Heard Mr.T.Lajapathi Roy, learned Counsel appearing for the appellant / accused and Mr.K.K.Ramakrishnan, learned Additional Public Prosecutor appearing for the respondent / State.

7. Mr.T.Lajapathi Roy, learned Counsel for the appellant / accused has raised the following points for the consideration of this Court:

7.1. In the very first document, namely, the complaint [Ex.P1], there is no averment that any incident was taken place as projected by the prosecution that the victim girl was abused by the accused at the public water tap on 05.10.2007.

7.2. Even according to the father of the victim girl [PW1], she was on frustration out of the acquittal and on account of the same, she committed suicide.

7.3. The prosecution has failed to prove that the death was due to poison. The Doctor [PW11], who conducted postmortem, has preserved the organs and sent the viscera to the Scientific Expert [PW10]. The chemical analysis report was also marked as Ex.P6, through PW10 and as per the same, as well as the evidence of the scientific expert [PW10], on examination of the Stomach, Intestine, Liver, Kidney and other preservatives, neither the presence of Rodenticide nor other poisonous substance were detected.

7.4. He has also referred to the postmortem certificate [Ex.P8], wherein, the Doctor [PW11] who conducted postmortem has reserved his opinion as to the cause of death pending the chemical analysis report of viscera. Therefore, the entire case of the prosecution is failed.

7.5. The only evidence available as against the accused is the evidence of PW3, who is the maternal aunt of the deceased. She is residing in a nearby village. She is happened to be a chance witness in this case. According to her statement, she went along with the deceased to the water tap, where the accused met the deceased and has abused her on 05.10.2007, on account of which, the deceased is said to have consumed poison and died. But, the presence of PW3 at the place of occurrence on 05.10.2007 itself is very doubtful, for the reason that PW3 belongs to another village.

7.6. Moreover, according to the statement of PW3 before the Inspector of Police [PW13], she was standing near that place and at that time, the victim girl came there for taking water and that the occurrence was taken place. But, she has deposed in her evidence as if she also accompanied the deceased to the water tap on the date of occurrence. Therefore, the evidence of PW3 is not trustworthy to believe the case of the prosecution.

7.7. Apart from the evidence of PW3, there is no other evidence to corroborate the case of the prosecution that there was an



incident took place on 05.10.2007 and it is not proper to convict the accused based on the available evidence of PW3 alone.

Therefore, the learned Counsel prays for interference.

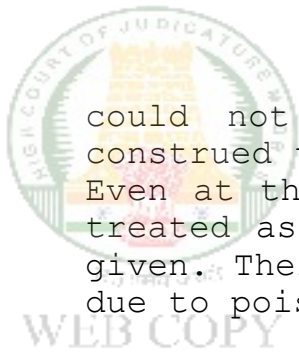
8. Per contra, Mr.K.K.Ramakrishnan, learned Additional Public Prosecutor would contend that though the Doctor [PW11], who conducted postmortem, has not assigned any reason for the cause of the death in the postmortem certificate [Ex.P8], after the receipt of the scientific evidence from the expert, gave the final opinion in Ex.P6 that the the deceased would appear to have died of poisoning, as the postmortem appearances are consistent with that of death due to poisoning. Though the scientific expert could not identify the nature of poison, which the accused took, the Doctor who conducted the postmortem has given the final opinion that it is a case of death due to poisoning. Moreover, the evidence of PW3 is very cogent that the accused has abused the victim girl and driven her to commit suicide by consuming poison. Her evidence is cogent and trustworthy and it need not be disbelieved for the sole reason that she was residing in the neighbouring village. Therefore, the learned Additional Public Prosecutor prays for dismissal.

9. This Court has paid it's anxious consideration to the rival submissions as well as to the materials placed on record.

10. The victim girl died in the Hospital on 07.10.2007. When she and her father [PW1] were on the way to the police station, she got fainted and therefore, her father took her to the Government Medical College Hospital, Tirunelveli and admitted her on 06.10.2007 at about 11.00 am. When she was undertaking treatment at the Government Medical College Hospital, Tirunelveli, she died on 07.10.2007 at about 05.25 am and based on the medical intimation, the respondent Police went to the Hospital and recorded the statement of PW1 and registered the case in Crime No.89 of 2007.

11. The Doctor [PW11], who conducted the postmortem on 07.10.2007 at about 02.40 pm, has issued the postmortem certificate [Ex.P8], wherein, he has not assigned any reason for the cause of death, however, reserved the final opinion pending the chemical analysis report. The viscera in this case was preserved and sent for chemical analysis. The Scientific Expert [PW10], Forensic Lab, on her analysis of the Stomach, Intestine, Liver, Kidney and other preservatives, has given a opinion [Ex.P6] that they have not detected any Rodenticide or any other poisonous substance on the organs which were forwarded for chemical analysis. Based on the report of the Scientific Expert, the Doctor [PW11] gave his final opinion in Ex.P6 that the deceased appears to have died of poison, however, the nature of poison could not be identified in the chemical analysis.

12. When the Doctor's [PW11] evidence is very much available that the deceased died due to poison and that the nature of poison



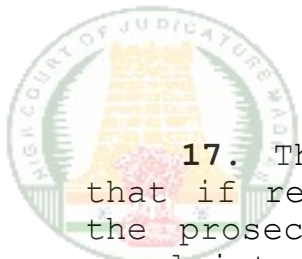
could not be deducted in the chemical analysis, it cannot be construed that the deceased died on account of some other materials. Even at the time of admitting the deceased in the Hospital, it was treated as a case of poisoning and for that, initial treatment was given. Therefore, the prosecution has proved that the deceased died due to poisoning.

13. The relevant facts to be considered in this case is the date of acquittal on the earlier complaint instituted by the victim girl. The victim girl, according to the prosecution, was 19 years old at the time of incident. She prosecuted the accused for the offence under Section 376 IPC that the accused, by promising her to marry, had physical relationship with her. The prosecution instituted by the deceased ended in acquittal on 29.08.2007.

14. According to the prosecution, the victim girl was challenged by the accused on 05.10.2007 that what she achieved by lodging the complaint against him and the accused has also went to the extent of abusing her by inviting her to be a concubine and has also asked her to go and die. On frustration, the victim girl has consumed poison. This incident took place on 05.10.2007 is supported by the evidence of PW3. But, it is the contention of the learned Counsel for the appellant that PW3 could not be a natural witness, as she is living in a nearby village and her presence in the place of occurrence at the relevant point of time could not be believed, as there are certain contradictions in her statement and her evidence is an exaggerated one.

15. No doubt, PW3 is a close relative of the victim girl. She is the sister of the victim girl's mother [PW2]. She is also a resident of an adjacent village. According to her evidence, since the victim girl was on frustration, she also accompanied her on the date of occurrence and in her presence, the accused abused the victim.

16. In short, it is the contention of the defense that PW3 is a cooked up witness to create a story by the prosecution. According to both the parties, due to the order of acquittal in the earlier complaint, the victim girl was in distress. The order of acquittal was on 29.08.2007 and the alleged occurrence took place on 05.10.2007. If really the victim was affected only because of the verdict of acquittal, she would have committed suicide soon thereafter. But, between 29.08.2007 and 05.10.2007, there was no issue. According to the prosecution, there was an incident on 05.10.2007 near the public water tap and only thereafter, the victim has taken the extreme step. It is also represented that the prosecution is taking steps to prefer an appeal as against the order of acquittal in the earlier complaint. Moreover, the statement of PW3 was also recorded by the Inspector of Police on 08.10.2007, ie., immediately after the complaint. In the given circumstances of the case, the theory of the defense that PW3 is a cooked up witness to suit the prosecution is not acceptable.



17. The learned Counsel for the appellant has also contended that if really an incident took place on 05.10.2007 as alleged by the prosecution, then the same would have been reflected in the complaint [Ex.P1]. But, it is a settled position of law that a complaint is not an encyclopedia, where each and every minute details have to be stated. The version of prosecution that the deceased consumed poison due to the incident took place on 05.10.2007 is supported by the evidence of PWs 1 to 3 as well as the inquest report [Ex.P10].

18. The learned Counsel for the appellant further contended that the deceased lost the earlier case and on frustration, committed suicide and when she has committed suicide out of frustration, it cannot be termed that the accused attributed the commission of offence to attract the offence under Section 306 IPC. To attract the offence under Section 306 IPC, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary and in this case, there is no evidence that the accused has abetted the deceased to commit suicide.

19. The accused was convicted for the offence under Section 306 IPC. For better appreciation, Section 306 IPC is extracted thus:

"306 - If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

20. As per the above, whoever abets a person to commit suicide is liable to be prosecuted. The word 'abetment' is defined under Section 107 IPC and for better understanding, the same is extracted thus:

"107 - Abetment of a thing:- A person abets the doing of a thing, who-

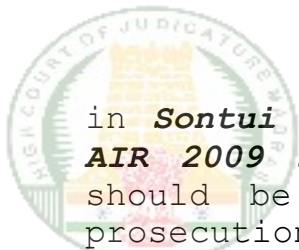
First:- Instigates any person to do that thing; or

Secondly:- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly:- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1:- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."

21. Mere uttering of words 'go and die' itself will not constitute such abetment. The prosecution has to prove beyond reasonable doubt that the accused has instigated the deceased to commit suicide. In similar circumstances, the Hon'ble Supreme Court



in **Sontui Rama Krishna v. Sonti Shanti Sree & another**, reported in **AIR 2009 SC 923**, has held that to constitute the abatement, it should be established by means of acceptable evidence by the prosecution that the accused had the animus to drive the woman to commit suicide.

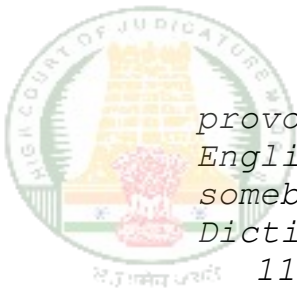
22. The Hon'ble Supreme Court, in its latest decision, in **Rajesh v. State of Haryana**, reported in **2019 SCC OnLine SC 44** has held as follows:

"9. Conviction under Section 306 IPC is not sustainable on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused, which led or compelled the person to commit suicide. In order to bring a case within the purview of Section 306 IPC, there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC. (See *Amalendu Pal alias Jhantu v. State of West Bengal*, reported in (2010) 1 SCC 707).

10. The term instigation under Section 107 IPC has been explained in *Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi)*, reported in (2009) 16 SCC 605 : (2010) 3 SCC (Cri) 367, as follows:

"16. Speaking for the three-Judge Bench in *Ramesh Kumar case* [(2001) 9 SCC 618 : 2002 SCC (Cri) 1088], R.C.Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.

17. Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by "goad" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action;



provoke to action or reaction" (see Concise Oxford English Dictionary); "to keep irritating or annoying somebody until he reacts" (See Oxford Advanced Learner's Dictionary, 7th Edn.)."

11. Words uttered in a fit of anger or omission without any intention cannot be termed as instigation. [See Praveen Pradhan v. State of Uttaranchal, reported in (2012) 9 SCC 734]"

23. In the case on hand, the prosecution has proved that there was an incident took place on 05.10.2007 and the accused has challenged the deceased what she achieved by lodging the complaint against him and has also went to the extent of abusing her by inviting her to be a concubine and asked her to go and die. As discussed supra, the victim has not taken any extreme step immediately after the pronouncement of the verdict of acquittal in her earlier complaint, but, only after the alleged incident took place on 05.10.2007. Therefore, this Court is of the view that the prosecution has established its case that the accused has instigated the victim to commit suicide.

24. At this juncture, the learned Counsel for the appellant contended that the appellant has already undergone more than 100 days in prison during the trial as well as appeal. Therefore, as an alternate remedy, prays for modification of sentence. He also referred to the judgment of the Hon'ble Supreme Court reported in **AIR 2002 SC 3270**, in **Mohd. Hoshan and another vs. State of A.P.**, wherein, the punishment for the offence under Sections 306 & 498A IPC was converted to the period of two months imprisonment already undergone. The relevant portion in the said decision is extracted as under:

"8. Having regard to the evidence brought on record and looking to the reasons recorded by the High Court as indicated in the foregoing paragraphs, we are of the view that the trial court committed manifest error in disbelieving the dying declaration (Exbt P/2) and the evidence of PWs 3 to 7. We have no hesitation in holding that the view taken by the trial court in acquitting the appellants was not a reasonable and justifiable view which could have been taken looking to the evidence keeping in view the well-settled principles. The High Court, in our opinion, was right and justified in reversing the order of acquittal and convicting and sentencing the appellants for the offences under Section 306 and 498-A IPC. We find no good reason to interfere with the same. However, we think it just and appropriate to modify the sentence of imprisonment for the period already undergone and order accordingly having regard to the fact that both the appellants were in imprisonment for about two months; the incident took place



appellant No. 1 and she is aged 60 years; both the appellants are on bail and it may not be appropriate to send them to jail again. The appeal stands disposed of in the above terms. The bail bonds stand cancelled."

25. He has also relied upon the judgment of the Hon'ble Supreme Court reported in **2012 (3) SCC 221**, in the case of **Roy Fernandes vs. State of Goa and others**, wherein, the sentence of imprisonment was modified with a compensation of Rs.3,00,000/- for the offence under Sections 323 & 325 IPC. The relevant portion is extracted thus:

"46. In the result, we allow this appeal in part, set aside the conviction and sentence awarded to the appellant under Section 302 read with Section 149 IPC and acquit the appellant of that charge. The conviction of the appellant for the offences punishable under Section 323 and 325 IPC is affirmed and the appellant is sentenced to the period of imprisonment already undergone by him. We further direct that the appellant shall deposit a sum of Rs.3,00,000/- towards compensation to be paid to the widow of the deceased Shri Felix Felicio Monteiro, failing her to his surviving legal heirs. A sum of Rs.1,00,000/- shall be similarly deposited towards compensation payable to Monteiro failing to their legal representatives. The deposit shall be made within two months from today failing which the sentence of one year awarded to the appellant shall stand revived and the appellant taken in custody to serve the remainder of the period. The appeal is disposed of with the above modification and directions."

26. Considering the nature of offence, the available evidence and the overall circumstances, this Court is inclined to interfere with the quantum of sentence. Accordingly, the sentence of imprisonment alone is modified as that of the period of imprisonment already undergone and to pay a compensation of Rs.2,00,000/- [Rupees Two Lakh only], which shall be deposited to the credit of S.C.No.181 of 2008, on the file of the learned Sessions Judge (Mahalir Court), Tirunelveli, within a period of three months, failing which, the sentence of imprisonment imposed by the trial Court shall be revived and the appellant shall be taken in custody to serve the remaining period of imprisonment. The trial Court shall take necessary steps to communicate this judgment to the family of the victim and to hand over the compensation amount to them.

27. In fine,

- This Criminal Appeal is partly allowed.

- The order of conviction passed by the learned Sessions Judge (Mahalir Court), Tirunelveli in Session Case No.181 of 2008, dated

<https://hcc.mca.gov.in/cases/>



26.10.2009, stands confirmed, however, the sentence of imprisonment is modified to the extent indicated supra.

- Bail bonds, if any executed, shall stand terminated.

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Sd/-

Assistant Registrar ()

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

gk

To

1.The Sessions Judge,
Mahalir Court,
Tirunelveli.

2.The Judicial Magistrate, No.III, Tirunelveli.

3. The Inspector of Police,
Sivalaperi Police Station,
Tirunelveli.

4.The Superintendent of Central Prison,
Palayamkottai.

5.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

6. The Superintendent of Police, Tirunelveli District.

Copy to

The Section Officer, Criminal Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1 CC to Mr.T. LAJAPATHI ROY, Advocate (SR-99661[F] dated
20/11/2019)

Cr1.A(MD)No.340 of 2009
19.11.2019

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