

that the appellant left the spot after a while. He realized that his mobile phone was missing and he suspected that Sasikumar would have stolen his mobile phone. He came back to the spot where they consumed liquor. Sasikumar and Kanagarathinam were still there and the appellant assaulted both of them with his hands and legs. In the process, the ribs of Sasikumar got broken and he died as a result. In this regard, PW.1 Sukumar who is a close relative of Sasikumar lodged Ex.P1 complaint before the Boothapandy Police Station. Based on the same, Ex.P18 FIR in Crime No.518 of 2011 was registered under Section 174 of Cr.PC. Investigation was taken up and after the completion of all the formalities, final report was laid against the appellant before the Judicial Magistrate, Boothapandi for the offences under Sections 302 and 307 IPC. The case was committed to the Sessions Court in PRC No.3 of 2012 and taken up for trial in S.C No.57 of 2012. Charges were framed against the appellant under Section 302 IPC for causing the murder of Sasikumar and under Section 307 IPC for causing grievous injuries to Kanagarathinam/PW.3. The appellant pleaded not guilty to the charges and claimed to be tried. The prosecution examined as many as 14 witnesses and marked Exs.P1 to P20 and MO.1 to MO.4 were also marked. On the side of the accused, no evidence was adduced. The learned Trial Judge after a detailed consideration of the evidence on record, acquitted the accused in respect of the offence under Section 307 IPC and also under Section 302 IPC. But then, found him guilty of the offence under Section 304(ii) IPC and sentenced him as mentioned above. Challenging the same, this appeal has been filed.

3. Heard the learned counsel on either side.

4. The learned counsel appearing for the appellant submitted that even the very registration of the FIR cannot be believed. Sasikumar was leading a wayward life. Even his wife was not living with him. Therefore, it is unbelievable that PW.1, the co-brother of the deceased and who was not on talking terms with the deceased would have taken the trouble to go to the spot and lodged Ex.P1 complaint. He also pointed out that the FIR reached the court only on 08.12.2011. There is no explanation for this delay. He also drew my attention to the testimony of P.W.2 which is to the effect that the accused was heavily under the influence of alcohol and that he was not even able to stand. Such a person could not be attributed with the acts with which he was charged. Though P.W.8 the auto driver deposed that the deceased and others consumed Parotta and Chicken, the postmortem doctor did not find any foodstuff in the stomach of the deceased. The prosecution would claim that on 11.12.2011 at about 07.00 P.M, the appellant surrendered before PW.10 VAO and made an extra judicial confession. But, interestingly only the report of the VAO was marked. The so called extra judicial confession was not marked.



5.The learned counsel for the appellant further contend that there was no prior acquaintance between PW.10 and the accused. Therefore, it is simply impossible that the accused would have made an extra judicial confession before him. More than anything else, PW.3 is an injured eyewitness. That is why the charge under Section 307 IPC was framed. But, he had not at all implicated the appellant. There is nothing on record to show that PW.3 was taken to hospital. Neither the accident register nor the wound certificate in respect of PW.3 was marked. Thus, there is complete absence of material to sustain the prosecution case that during the occurrence PW.3 was injured. He initially contended that PW.2 who is projected as an eyewitness did not reveal the same to anybody. The police examined him only two days after the occurrence. Therefore, it is most unsafe to sustain the appellant's conviction on the strength of the testimony of PW.2.

6.Per contra, the learned Government Counsel appearing for the prosecution submitted that the impugned judgment does not warrant any interference and wanted this Court to sustain the same.

7.I carefully considered the rival contentions and perused the evidence on record. PW.1 is a close relative of the deceased. He received an information on 04.12.2011 that Sasikumar was found lying dead near Pallikondan dam. Thereupon, he went to the spot. He found injuries on his body. He lodged Ex.P1 complaint before Boothapandi Police Station. PW.2 Mahesh is a resident of the same village. He stated that on 03.12.2011 at about 08.15 P.M, the accused came to his house and told him that he consumed liquor along with four others and that his mobile phone was missing and that he suspected Sasikumar of having stolen his mobile phone. He wanted PW.2 Mahesh to accompany him to the dam. PW.2 searched in the vicinity and found out the mobile phone. In the meanwhile, the appellant is said to have assaulted both Sasikumar as well as Kanagarathinam. PW.2 is an eyewitness and his statement was recorded under Section 164 of Cr.PC before the Judicial Magistrate No.I, Nagercoil. Ex.P10 is the statement of PW.2 recorded under Section 164 of Cr.PC. PW.3 Kanagarathinam turned hostile. PW.4 Mohan deposed that after consuming liquor, they went to Pallikondan Dam and that he and one Murugan left after a while. He stated that he did not know as to what happened thereafter. PW.5 signed in the Observation Mahazar. PW.6 is the postmortem doctor. He issued Ex.P5 postmortem report and Ex.P6 final opinion. After narrating the injuries found on the body of the deceased Sasikumar, he opined that the injuries may be caused by hick. PW.7 Sundharayya who was the Judicial Magistrate No.I, Nagercoil and it was he who recorded the statement of PW.2 under Section 164 of Cr.PC. PW.8 is the auto driver who dropped the five persons including the appellant in Gnam Village. PW.9 took photographs of the body of the deceased lying near the dam. PW.10 is the village administrative officer

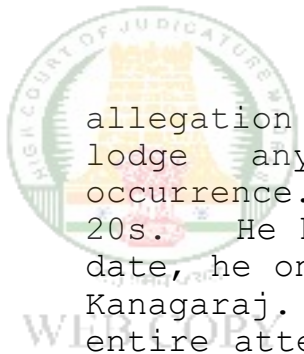


before whom the accused is said to have made an extra judicial confession. Ex.P11 is the report submitted by the Village Administrative Officer to the police. PW.11 is the Inspector of Police who conducted the initial part of the investigation. PW.12 registered the FIR/Ex.P18. PW.13 produced the body of the Sasikumar for postmortem and also submitted the express FIR to the court. PW.14 is the Inspector of Police who completed the investigation and filed final report.

8.It is not in dispute that the appellant was one of the five member group comprising himself, Sasikumar, Mohan, Murugan and Kanagarathinam and that consumed liquor near the shutter of Pallikondan dam in Gnalam village. PW.3 Kanagarathinam deposed that on 03.12.2011 they had gone to Thittuvilai to consume liquor and that thereafter they purchased few more bottles and went to the occurrence spot in an auto for their drink session. He claimed that since he had consumed liquor in excessive quantity, he fell down and became unconscious and that he did not know as to how Sasikumar died. PW.4 is a Havildhar working in CISF. He also confirmed that the five member group which included himself and the accused consumed liquor at the occurrence spot. PW.4 would however claim that he and Murugan left earlier than others. PW.8 is an auto driver. He stated that on 03.12.2011, he took the said five member group to the Parotta shop and thereafter dropped them at Gnalam village. He admitted that there was a liquor shop near the auto stand.

9.Thus, from a careful reading of the testimony of these witnesses namely PW.3, PW.4 and PW.8, one can come to the conclusion that the appellant was very much a part of the five member group that consumed liquor at the occurrence spot. The appellant in the statement filed by him under Section 313 of Cr.PC did not deny his presence at the occurrence spot. He characterised the incriminating circumstances put to him as false. From a reading of the testimony of PW.4 one can come to the conclusion that Mohan and Murugan left the field early.

10.I would also concur with the submission of the learned counsel appearing for the appellant that the appellant would not have made any extra judicial confession before the Village Administrative Officer/PW.10. This is for more reasons than one. The so called extra judicial confession was not marked before the court. Only the report of the VAO/PW.10 was marked as Ex.P11. There was no prior acquaintance between the VAO and the appellant. Therefore, the appellant would not have reposed faith and confidence in a person with whom he was not acquainted earlier. But then, the case of the prosecution rests essentially on the testimony of PW.2. PW.2 is a resident of Gnalam Village. There is no animosity between PW.2 and the appellant. The appellant in his statement under Section 313 of Cr.PC has not levelled any



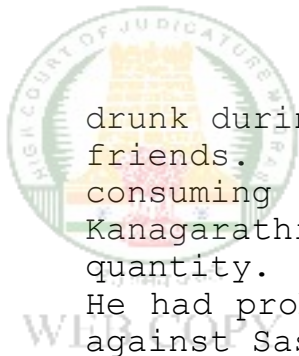
allegation against PW.2 Mahesh. It is true that PW.2 Mahesh did not lodge any complaint against the appellant immediately after the occurrence. It is quite probable. He was a young man in his early 20s. He had just then passed out of ITI. Even on the occurrence date, he only saw the appellant hitting and kicking the deceased and Kanagaraj. It was quite dark when the occurrence took place. His entire attention was more focussed on finding out the mobile phone. After tracing it, he handed it over to the appellant and safely brought him back to his house. PW.2 did not know then Sasikumar died. Only when the death of Sasikumar came to light and police took up investigation, PW.2 stated before the police as to what happened.

11.It is relevant to note here that the occurrence had taken place on 03.12.2011 and that PW.2 was examined on 04.12.2011 itself by the investigation officer/PW.11. He was taken to Judicial Magistrate No.1, Nagercoil on 20.12.2011 and his statement was recorded under Section 164 of Cr.PC. PW.2 did not resile from the statement and supported the prosecution case while deposing before the court. He had clearly stated that when he was at his house on 03.02.2011 at about 08.30 PM., the appellant called him out and asked to accompany him to the occurrence spot for the purpose of finding out his mobile phone. PW.2 clearly stated that the appellant hacked and hit the deceased as well as Kanagarathinam. Even as this was going on, PW.2 located the cell phone under a bush and he returned along with the appellant.

12.The testimony of PW.2 could not be shaken in the cross examination. As already pointed out, there was no reason as to why PW.2 should falsely implicate the appellant. Even the appellant has not attributed any motive to PW.2. The appellant was arrested on 11.12.2011 and he gave a confession and pursuant to the same handed over MO.1 mobile phone. PW.6 is the doctor who conducted autopsy on the body of the deceased. He had clearly opined that the injuries found on the body of Sasikumar could have been caused by kicking. In other words, the ocular evidence and the injuries found on the body of Sasikumar are in consonance with the medical opinion.

13.Taking note of all these circumstances, the learned Trial Judge rightly came to the conclusion that the prosecution has proved beyond reasonable doubt the involvement of the appellant in the crime. It rightly found the appellant guilty of the offence under Section 304(ii) IPC. The conviction imposed on the appellant is confirmed.

14.Now comes the question of sentence. The court below has sentenced the appellant ten years rigorous imprisonment. Even the court below rightly acquitted the appellant of the charge under Section 302 IPC. It clearly observed that the appellant had no *mens rea* whatsoever. Even according to PW.2, the appellant was heavily



drunk during the relevant time. The appellant and the deceased were friends. That is why they want to spend the evening together by consuming liquor. It is seen from the evidence of PW.3 Kanagarathinam that all of them had consumed liquor in excess quantity. Therefore, the appellant was not really out of control. He had probably dropped his mobile phone. He entertained suspicion against Sasikumar and venting his anger had hit him rather savagely.

15.Section 84 of the Indian Penal Code reads as under :

"84. Act of a person of unsound mind : Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

But then, the appellant cannot claim the benefit of Section 84 of IPC. This is because, there was no administration of intoxicating drink against his will. The appellant having voluntarily consumed liquor cannot claim the benefit of Section 84 of IPC. But then, a person under the influence of liquor whether voluntarily consumed or involuntarily administered, will not know as to what he is doing. He will have neither intention nor knowledge. In this case, it is not the case of the prosecution that the appellant had consumed liquor in moderate quantity. From the testimony of PW.2, one can visualize the situation in which the appellant was placed. The appellant was in his early 50s while the deceased was in his late 50s. The appellant has a family to support and sustain. Even PW.2 stated that after he located the mobile phone, there was a call from a family member of the appellant.

16.Taking note of these mitigating factors, I am of the view that interest of justice will be served by reducing the sentence of imprisonment imposed on the appellant from ten years rigorous imprisonment to two years rigorous imprisonment. The Trial Judge is directed to enforce this judgment and commit the appellant in prison to serve the remaining period of sentence.

17.With this modification in the matter of sentence, this appeal is partly allowed.

Sd/-

Assistant Registrar(Crl. Side)

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/ /2020

Sub Assistant Registrar(CS)

Skm



To

1. The Sessions Judge, Kanyakumari Division at Nagercoil.

2. The Judicial Magistrate, Boothapandi.

3. Do through, the Chief Judicial Magistrate,
Kanyakumari at Nagercoil.

4. The Inspector of Police, Boothapandy Police Station,
Kanyakumari District.

5. The Superintendent, Central Prison, Palayamkottai.

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

COPY TO.

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

Crl A (MD) No. 119 of 2013

27.08.2019

AL (CO)

TR (09.06.2020) 7P 9C