

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
17.09.2019	24.09.2019

CORAM:

**THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
AND
THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH**

**Crl.A. (MD)No.353 of 2017
and
Crl. MP(MD)No.8170 of 2017**

Vellapandi : Appellant/Sole Accused
Vs.

State through
The Inspector of Police,
Srivaikundam Police Station,
Tuticorin District
(Crime No.286 of 2013)

: Respondent /Complainant

COMMON : Criminal Appeal is filed under Section 374 of the Code of Criminal Procedure, praying to admit this appeal in file and call for records from the Lower Court namely II nd Additional District and Sessions Judge, Tuticorin in S.C.No.54 of 2015 and to set aside the Judgement dated 20.10.2016 passed by the Lower Court and thereby acquit the above accused from the charges.

For Appellant : Mr.KA.Ramakrishnan

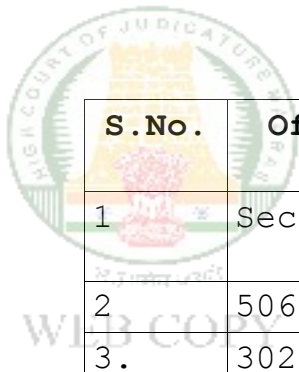
For Respondent : Mr.M.Chandrasekaran
Additional Public Prosecutor

JUDGMENT

S.VAIDYANATHAN, J.
AND
N.ANAND VENKATESH, J.

The sole accused, aggrieved by the Judgment passed by the II Additional Sessions Judge, Thoothukudi, in S.C.No.54 of 2015, dated 20.10.2016, has filed the present appeal before this Court.

2. By virtue of the said Judgment, the appellant has been convicted and sentenced as follows:-



S.No.	Offence for which convicted	Sentence of Imprisonment	Fine Amount
1	Section 341 IPC	Two Weeks Simple Imprisonment	-
2	506(ii) IPC	3 Months S.I.	-
3.	302 IPC	Life Imprisonment	Rs.1000/-, and in default. to undergo 3 months S.I.

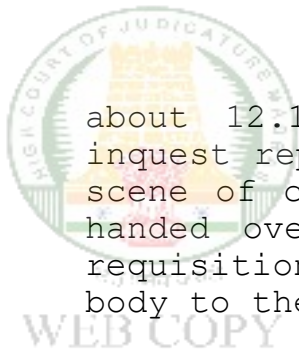
The case of the prosecution:

3. On 29.09.2013, when P.W.1, her daughter Petchi and P.W.2 were standing and talking in front of the house of P.W.1 at about 2.00 p.m., the accused told P.W.1 that whenever he asked his father to get him married, the husband of P.W.1 is unnecessarily interfering with the same and therefore only if he is done away with, he can get married. Subsequently, on 01.10.2013, at about 7.30 p.m., when P.W.1, one Samudram, P.W.2 and one Kalimuthu were talking near the house of Luca (P.W.3). They saw the deceased Arumugam alias Ganapathi coming in a cycle from west to east at Srivaikundam - Eral Road, the accused was coming in the opposite direction with an iron pipe (M.O.1) and he restrained the deceased Arumugam alias Ganapathi and abused him in filthy language and attacked him with iron pipe on his head repeatedly. When the witnesses attempted to stop him, he threatened them saying that they will also be attacked and killed, if they interfered. They found the deceased lying in a pool of blood and he had died.

4. The compliant and the materials collected in the Course of Investigation:-

4.1 P.W.9, who is the Special Sub Inspector of Srivaikundam Police Station, was on bandobust duty and he received an information regarding the incident and went to the scene of occurrence and collected the information from P.W.1 between 08.15 to 8.30 p.m., and reduced it to writing and got her thumb imprison (Ex.P1). The complaint was attested by P.W.2. He brought the complaint to the Police Station and at about 10.00 p.m., he registered an FIR (Ex.P.12) in Crime No.286 of 2013, for an offence under Sections 341, 294(b), 302 and 506(ii) of IPC. The express FIR was handed over to the Head Constable (P.W.7). He handed over the FIR to the Judicial Magistrate, Tiruchendur, on 02.10.2013, at about 3.30 a.m.

4.2 The Inspector of Police (P.W.13) took over investigation and went to the scene of crime at about 11.15 p.m., on 01.10.2013 and in the presence of witnesses, (P.W.4) he inspected the place and prepared the observation mahazar (Ex.P2) and the rough sketch (Ex.P15). He conducted the inquest over the body of the deceased at



about 12.15 a.m., in the presence of witness and prepared the inquest report (Ex.P16). He collected the material objects in the scene of crime (M.Os.2, 3 and 4) and seized it under (Ex.P3). He handed over the dead body to the Head Constable (P.W.8) with a requisition to conduct postmortem and to thereafter handover the body to the relatives.

4.3 The Investigating Officer proceeded to record the statements of the witnesses under Section 161(3) of Cr.P.C. He got the information regarding the accused person and he proceeded to arrest the accused on 02.10.2013, at about 7.00 a.m., in the presence of witnesses (P.W.5). Based on the confession, he recovered the material objects (M.O.1, M.O.5 and M.O.6). The material objects were sent to the Court under Form 95. He also submitted the requisition to the Court (Ex.P6) to send the seized objects for chemical analysis. Thereafter, he handed over the investigation to P.W.14.

4.4. The Investigation was taken over by P.W.14 and he received the postmortem report (Ex.P14) and recorded the statement of the Doctor (P.W.11). On completion of the investigation, the final report was laid on 17.12.2013 before the Judicial Magistrate, Srivaikundam.

5. The case was committed to the II Additional District and Sessions Judge, Thoothukudi. The learned Judge framed charges against the appellant for an offence under Sections 341, 294(b), 506 (ii) and 302 of IPC. The prosecution examined P.W.1 to P.W.14 and marked Ex.P1 to P16 and M.O.1 to M.O.9. The accused examined defence witnesses (D.W.1 to D.W.3).

6. The trial Court brought to the notice of the appellant all the incriminating circumstances that were collected against him during the course of trial and questioned him under Section 313 (1) (b) of Cr.P.C., and the appellant denied the same as false.

Submission :-

7. The learned counsel for the appellant made the following submissions:-

- * P.W.1, P.W.2 and P.W.12, who were shown to be eyewitnesses, could not have been present in the scene of occurrence. P.W.1 says that he came to the place of occurrence from the house only after hearing the noise.

- * The witnesses state that the blood from the body of the deceased was present in the dress of all the witnesses and the dress was not sent for chemical analysis. If it had been sent to the chemical analysis and it was found to be with the blood of the deceased, it would have clinched the case of the prosecution

<https://hcservices.ecourts.gov.in/hcservices/> regarding the presence of P.W.1 and P.W.2.



* The accused was a person with unsound mind and even at the time when the final report was filed, it was returned by the learned Judicial Magistrate with an endorsement that the appellant complained that he is a person with unsound mind and therefore, a report was sought for from the Institute of Mental Health, Kilpauk. The Director of Institute of Mental Health, Kilpauk, by his letter dated 22.08.2014, had reported that the appellant is diagnosed with major mental illness Paranoid Schizophrenia.

* The appellant is entitled to the exception under Section 84 of IPC., since he is a person with unsound mind. In order to substantiate the said submission, the learned counsel relied upon the Judgments of Hon'ble Supreme Court in **Devidas Loka Rathod Vs. State of Maharashtra** reported in (CDJ 2018 SC 678) and in '**X**' Vs. State of Maharashtra reported in (CDJ 2019 SC 601).

8. Submissions made by the learned Additional Public Prosecutor appearing on behalf of the respondent Police:-

* The appellant has taken two mutually exclusive stand. Either the appellant must challenge the case on merits or he must take the plea of unsound mind and claim exception, under Section 84 of IPC. He cannot be permitted to argue on both the counts.

* The evidence of P.W.1, P.W.2 and P.W.12 clearly establishes that it was only the appellant, who had attacked the deceased indiscriminately with an iron pipe in his head and caused the death. The Discrepancy pointed out by the learned counsel for the appellant does not in any way affect the credibility of the eyewitnesses.

* If the appellant takes the ground of unsound mind, burden of proof is upon him to prove that he suffered from unsoundness of mind at the time of incident and that he was incapable of knowing the nature of act, which he committed. This burden has not been discharged by the appellant.

* The evidence of D.W.1 does not show that the the appellant was suffering from unsoundness of mind and this witness does not even state what treatment was given to the appellant and what tablets were prescribed during treatment.



* The certificate has been obtained subsequent to the incident and that by itself will not prove that the appellant was suffering from unsound mind on the date of the incident. _

WEB COPY

9. This Court has carefully considered the submissions made on either side and also assessed the oral and documentary evidence.

Discussion:

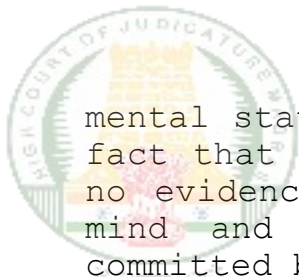
10. A careful reading of the evidence of P.W.1, P.W.2 and P.W.12, makes it clear that it was the appellant, who had attacked the deceased indiscriminately with the iron pipe in his head. Their evidence has not been in any way discredited in the cross-examination. In view of their clear evidence regarding the incident, this Court finds no ground to disbelieve their evidence.

11. The learned counsel for the appellant has raised the alternative plea of unsoundness of mind and has claimed exception, under Section 84 of IPC. According to the learned counsel for the appellant, the appellant was suffering from a major medical illness and he was diagnosed with Paranoid Schizophrenia, even as per the report sent by the Director of Institute of Mental Health, to the Judicial Magistrate, Srivaikundam.

12. In cases where exception under Section 84 of the Indian Penal Code is claimed, the Court has to consider, whether at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act. The burden of proving the existence of circumstances to bring the case within the purview of Section 84, lies upon the accused under Section 105 of the Indian Evidence Act. However, the proof that is expected is only preponderance of probabilities.

13. The evidence of D.W.1 shows that he was the Doctor, who had given treatment to the appellant. In his evidence, this Doctor does not state the nature of mental illness and the extent to which the appellant was affected and also the medicines that were taken by the appellant for the illness. This Doctor only makes a general statement without any particulars.

14. Even the evidence of D.W.3 shows that he had examined the appellant on 18.12.2013 (much after the incident) and found that the appellant has a mental illness of Paranoid Schizophrenia. This Doctor specifically states that he cannot say whether the appellant suffered from illness on the date of incident on 01.10.2013. Therefore, even the evidence of this Doctor does not help the appellant, since there is no material to show that the appellant suffered from that mental illness on the date of the incident. The



mental status of the accused on the date of the incident is a vital fact that has to be ascertained in cases of this nature. There is no evidence to show that the appellant was suffering from unsound mind and that he was incapable of understanding the offence committed by him on 01.10.2013.

WEB COPY

15. The appellant himself had given a written answer at the time of being questioned under Section 313(1)(b) of Cr.P.C. He states that he was taking treatment for mental illness and after continuous treatment given in the jail, he has recovered substantially. He also attempts to take the stand that he did not know what happened on the date of the incident. The burden of proof is upon the appellant under Section 105 of Indian Evidence Act, to prove his insanity and this Court does not find that the appellant has discharged this burden.

16. It will be relevant to rely upon the Judgments cited by the learned counsel for the appellant. In the Judgment of the Hon'ble Supreme Court reported in **(CDJ 2018 SC 678)** referred supra, it has been held as follows:-

"10. The law undoubtedly presumes that every person committing an offence is sane and liable for his acts, though in specified circumstances it may be rebuttable. The doctrine of burden of proof in the context of the plea of insanity was stated as follows in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat*, (1964) 7 SCR 361.

(1) The prosecution must prove beyond reasonable doubt that the Accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.

(2) There is a rebuttable presumption that the Accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the Accused may rebut it by placing before the court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.

(3) Even if the Accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the Accused or by the prosecution may raise a reasonable doubt in the



ingredients of the offence, including mens rea of the Accused and in that case the court would be entitled to acquit the Accused on the ground that the general burden of proof resting on the prosecution was not discharged.

WEB COPY

11. Section 84 of the Indian Penal Code carves out an exception, that an act will not be an offence, if done by a person, who at the time of doing the same, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law. But this onus on the accused, Under Section 105 of the Evidence Act is not as stringent as on the prosecution to be established beyond all reasonable doubts. The Accused has only to establish his defence on a preponderance of probability, as observed in *Surendra Mishra v. State of Jharkhand*, (2011) 11 SCC 495, after which the onus shall shift on the prosecution to establish the inapplicability of the exception. But, it is not every and any plea of unsoundness of mind that will suffice. The standard of test to be applied shall be of legal insanity and not medical insanity, as observed in *State of Rajasthan v. Shera Ram*, (2012) 1 SCC 602, as follows:

19.Once, a person is found to be suffering from mental disorder or mental deficiency, which takes within its ambit hallucinations, dementia, loss of memory and self-control, at all relevant times by way of appropriate documentary and oral evidence, the person concerned would be entitled to seek resort to the general exceptions from criminal liability.

15. The Accused was taken into custody on 28.09.2006. Charge-sheet was submitted on 29.12.2006 and commitment done on 16.02.2007. The Trial Court records reflect several medical visits in prison, even weekly, 12 in number, between the period from 09.01.2007 to 07.04.2007, administering of antipsychotic drugs such as tablet Haloperidol and tablet Olanzapine and tablet Diazepam to the Appellant with the impression recorded by the Doctor that the patient is psychotic and needs continuation of treatment. The significance of use of the words "continuation" cannot be lost sight of, and has obviously been used with regard to a preexisting condition and which includes the period prior to and



WEB COPY

from 26.09.2006 to 28.09.2006. On 03.05.2007, an application was moved on behalf of the Appellant under Chapter-XXV of the Code of Criminal Procedure that he was not fit to face trial. A fresh medical report was called for on 14.06.2007 which opined on 19.06.2007 that the Appellant was a chronic patient of psychotics who has been evaluated time and again by the Mental Hospital, Nagpur, the present doctor at Akola and also by the Psychiatrist. On 13.07.2007, the Trial Court directed him to be sent to the Mental Hospital and called for a fresh report. On 11.04.2008, fresh report was called for and the Appellant was prescribed Trinicalm Forte tablet/Trinicalm Plus tablet amongst other medicines. The treating Doctor, Dr. Pramod Thakare, opined in writing on 20.05.2009 as follows:

21. We are therefore of the considered opinion, that the Appellant has been able to create sufficient doubt in our mind that he is entitled to the benefit of the exception Under Section 84 Indian Penal Code because of the preponderance of his medical condition at the time of occurrence, as revealed from the materials and evidence on record. The prosecution cannot be said to have established its case beyond all reasonable doubt. The Appellant is therefore entitled to the benefit of doubt and consequent acquittal. The appeal is allowed. He is directed to be released from custody unless wanted in any other case."

17. It is clear from the above Judgment that there were abundant materials available before the Court to show the nature of treatment that was taken by the accused and the medication that was taken by him. Therefore, the Hon'ble Supreme Court held that the burden has been discharged by the accused by preponderance of probabilities. This judgment will not apply to the facts of the present case, since there are absolutely no materials regarding the treatment underwent by the appellant and the medicines taken by him. Courts must be very careful while dealing with the ground of unsoundness of mind, since any person can start claiming this exception after the incident, without providing sufficient materials.

18. It will also be relevant to rely upon the Judgment of the Supreme Court in the Judgment reported in **(CDJ 2019 SC 601)**. (*referred supra*). The relevant portions are extracted hereunder;-

"65. Before we analyse this case at hand, a

<https://hcservices.ecourts.gov.in/hcservices/> prior survey of classification of mental illness and



its impact on death penalty needs to be considered. The Diagnostic and Statistical Manual of Mental Disorders (DSM), is one of the most well-known classification and diagnostic guides for mental disorders in America. Its fifth edition (DSM-5), published in 2013, defines mental disorder as follows: -

A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion Regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.

66. 'Severe Mental Illness' under the 'International Classification of Diseases (ICD)', which is accepted Under Section 3 of the Mental Health Care Act, 2017, generally include-

1. schizophrenic and delusional disorders
2. mood (affective) disorders, including depressive, manic and bipolar forms
3. neuroses, including phobic, panic and obsessive-compulsive disorders
4. behavioural disorders, including eating, sleep and stress disorders
5. personality disorders of different kinds.

68. In line with the above discussion, we note that there appear to be no set disorders/disabilities for evaluating the 'severe mental illness', however a 'test of severity' can be a guiding factor for recognizing those mental illness which qualify for an exemption. Therefore,

<https://hcservices.ecourts.gov.in/hcservices> envisaged herein predicates that the



offender needs to have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders-with schizophrenia.

69. Following directions need to be followed in the future cases in light of the above discussion-

a. That the post-conviction severe mental illness will be a mitigating factor that the appellate Court, in appropriate cases, needs to consider while sentencing an Accused to death penalty.

b. The assessment of such disability should be conducted by a multi-disciplinary team of qualified professionals (experienced medical practitioners, criminologists etc), including professional with expertise in Accused's particular mental illness.

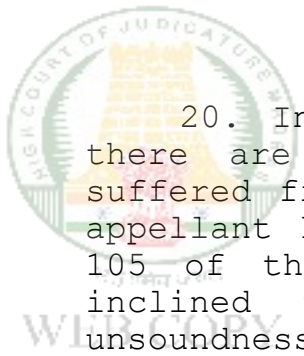
c. The burden is on the Accused to prove by a preponderance of clear evidence that he is suffering with severe mental illness. The Accused has to demonstrate active, residual or prodromal symptoms, that the severe mental disability was manifesting.

d. The State may offer evidence to rebut such claim.

e. Court in appropriate cases could setup a panel to submit an expert report.

f. 'Test of severity' envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that objectively the illness needs to be most serious that the Accused cannot understand or comprehend the nature and purpose behind the imposition of such punishment."

19. It is clear from the above Judgment that the accused has to demonstrate that the severe mental disability incapacitated him from understanding the nature of the act that was committed by him at the time of incident. This disability will have to be assessed by a Multi Disciplinary Team of qualified professionals and their report can be taken into consideration.



20. In the present case, we are of the considered view that there are absolutely no materials to show that the appellant suffered from mental disorder at the time of the incident and the appellant has not discharged the burden as required under Section 105 of the Indian Evidence Act, 1872. Therefore, we are not inclined to accept the defence of the appellant regarding unsoundness of mind.

Conclusion :-

21. In view of the above discussion, we find absolutely no grounds to interfere with the Judgment passed by the trial Court and we hereby confirm the Judgment of conviction and sentence passed against the appellant and accordingly, this Criminal appeal is dismissed. Consequently, the connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar(CS)

To

1. The Judicial Magistrate,
Srivaikundam.
2. The Additional District and Sessions Court,
Tuticorin,
3. The Inspector of Police,
Srivaikundam Police Station,
Tuticorin District.
4. The Superintendent, Central Prison,
Palayamkottai.
5. The Additional Public Prosecutor
Madurai Bench of Madras High Court,
Madurai.

MPK

VB 16/10/2019 11P 6C

Judgment made in
Crl.A. (MD) No.353 of 2017
24.09.2019