

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	PRONOUNCED ON
23.11.2019	25.02.2020

CORAM

THE HONOURABLE MR. JUSTICE C.SARAVANAN

Crl.A.No.84 of 2019
and
Crl.MP.No.2141 of 2019

Balasubramanian ... Appellant

vs

The State, rep.by
Inspector of Police,
Killai Police Station,
Cuddalore District. ... Respondent

Criminal Appeal filed under Section 374 (2) of Cr.P.C., to set aside the conviction and sentence in S.C.No.158 of 2016 dated 07.01.2019 passed by the II Additional District Sessions Judge, Chidambaram.

For Appellant : Mr. R.Sankarasubbu
For Respondent : Mr.T.Shanmuga Rajeswar
Government Advocate
(Crl.side)

J U D G M E N T

The appellant is aggrieved by the impugned order dated 07.01.2019 passed by the II Additional District and Sessions Judge, Chidambaram (Trial Court for brevity) in S.C.No.158 of 2016.

2. By the impugned order, the Trial Court has found the appellant guilty of offences under Section 294(b) and 304 Part I of the IPC.

3. The Trial court has also sentenced the appellant to pay a fine of Rs.500/- for the offence under Section 294(b) of IPC

and in default to undergo one week's simple imprisonment.

4. For the offence under Section 304 Part I of the IPC, the appellant has been sentenced to undergo 10 years rigorous imprisonment with a fine of Rs.5,000/- and in default to undergo three month's simple imprisonment. While sentencing the appellant, the Trial court has set-off the period of detention already undergone by the appellant.

5. The appellant was originally charged on 16.11.2016. The charge reads as under:-

- i. That the appellant and the deceased vocally and auditorily challenged person (deaf and dumb person) kannadhasan were neighbours and there was previous enmity between them on account of rearing of the goat and that on 19.9.2015 at about 8:40 PM the deceased, his wife Selvi and the witness Sugundha there was talking in front of the house of Sudha (wife of Shankar) and that the appellant verbally abused the deceased and showed derogatory -gesture in front of others punishable under Section 294 B of the Indian penal code.
- ii. That the appellant went to his house and picked up a spade and attacked after uttering "as long as the deceased was alive he could not rear his goat peacefully" when the deceased who was proceeding to his house with his wife and thereby injured the deceased on the left side of his neck with a view to cause death to the deceased and that the deceased died on 23.9.2015 and therefore the appellant was punishable under Section 302 of the Indian Penal Code.

6. The brief facts of the case of the respondent-state before the Trial Court was that the deceased Kannadhasan a vocally and auditorily challenged person (deaf and dumb person) was assaulted with a spade marked as Material Object No.1 by the appellant on 19.09.2015 due to previous enmity.

7. The deceased person was admitted at the Rajah Muthiah Medical College & Hospital, Chidambaram, where he later succumbed to the injury on 23.09.2015 while undergoing treatment.

8. After assaulting the victim, the appellant is said to be absconded from the scene of occurrence and was later arrested on the following day i.e on 20.09.2015. While absconding, the

appellant had left Material Object No.1 at the scene of occurrence with the blood stained lung.

9. The appellant was initially charged for the offences under Section 294(b) and 307 of IPC. Thereafter, charge was altered from Section 307 of IPC to Section 302 of IPC as the victim died on 23.09.2015.

10. Before the Trial Court, the respondent-state had examined 16 witnesses and marked 25 documents as Exhibits marked the following material objects:-

Material Object No	Material Objects
1	Spade used for assaulting the deceased Kanadhasan.
2	Soil with the blood of the deceased from the place of occurrence.

11. The appellant has neither produced any witness nor any independent evidence to prove his innocence.

12. The categorical case of the prosecution before the Trial Court was that on 19.09.2015, the deceased Kannadhasan and his wife Selvi (PW1) and Sugandha (PW4) were standing in front of the house of PW2 Sudha and were talking.

13. On hearing the cry of a child coming from their house, PW1 and the deceased proceeded to her house when the appellant confronted the deceased and verbally abused the deceased and went into his goat shed and came back with the Material Object No.1 (Spade) and hit the deceased on the left side of his neck and ran away uttering "as long as you (deceased) are alive, I (appellant) cannot rear my goat peacefully and therefore you should die".

14. This was witnessed by PW2 and PW4 and hearing the commotion and the noise PW3 and PW5 came out of the house and saw the deceased had fallen down and was bleeding profusely. The deceased was therefore rushed to the Hospital for treatment.

15. The appellant was confronted with the statements of PW1, PW2, PW3, PW4 and PW5 after the evidence of each of these witnesses were recorded. Uniformly all these witnesses had

stated the appellant had assaulted on the left side of neck of the deceased Kannadasan using a Material Object No.1 (spade) and after injuring the deceased Kannadasan, the appellant ran away from the place of occurrence leaving the Material Object No.1 (spade) at the place of occurrence.

16. While giving statement under Section 313(1)(b) of the Criminal Procedure Code on 10.12.2018, the appellant has completely denied his involvement and has merely stated that the respondent has foisted a false case against him.

17. PW4 in her statement had stated that due to previous enmity between the appellant and the deceased Kannadasan, on the fateful day, the appellant had verbally abused the deceased Kannadasan. The deceased therefore pushed the appellant down and therefore the enraged appellant went to his goat shed and picked a Material Object No.1 and hit the deceased Kannadasan on the left side of his neck and thereby caused injury with an intention kill him and that the deceased succumbed to the injury on 23.09.2015 while undertaking treatment.

18. However, during the course of the argument, the appellant has denied the previous enmity with the deceased kannadhasan and stated that the deceased had shouted at him and pushed the appellant and involuntarily fell by himself on the spade lying on the ground and injured himself on his neck resulting in injury and his death.

19. The other argument of the appellant before the trial court was that there was also no explanation as to why the dying declaration of the deceased Kanadhasan was not produced before the court.

20. It is the case of the appellant that if the dying declaration of the deceased was produced, it would have clearly shown that the deceased Kanadhasan injured himself on his neck when he voluntarily fell due on the material object No.1. It was submitted that the dying declaration that was recorded has been deliberately suppressed by the prosecution before the Court.

21. However, before the trial court, the investigating officer namely PW15 stated that he could not record any statement from the deceased as the deceased was not only a vocally and auditorily challenged person (dumb and deaf) who had been seriously injured and therefore without the help of a specialist recording of the deceased was not possible.

22. The Trial Court has found the appellant guilty of committing culpable homicide not amounting to murder with an intention to cause death of the deceased under Section 299 of the Indian Penal Code.

23. The Trial court has punished and sentenced the appellant under Section 304 Part I of Indian Penal Code to undergo a rigorous imprisonment for a period of 10 years.

24. In the present Criminal Appeal, the main thrust of the argument of the appellant is that the death was not due to injury but due to loss of blood and therefore the appellant cannot be held guilty of the offence as under Section 304 Part I of Indian Penal Code.

25. During the course of the argument, learned counsel for the appellant submitted that the incident is supposed to have taken place during the night hours after 8.45 p.m. on 19.9.2015 and therefore the statement of PW1 as eyewitness regarding to the commission of the offence cannot be relied upon as admittedly she had gone to attend to the crying child in her house when the appellant is supposed to have assaulted the deceased.

26. It is further stated that the place of occurrence of crime is allegedly in front of the house of the appellant and his goat shed which was at least 20 ft. away from the house of the PW2 and it was highly improbable for PW4 to have witnessed the crime in the dark from about a distance of 20 ft. away to see the appellant allegedly hit the deceased with the Material Object No.1.

27. It is therefore submitted the case of the prosecution that the appellant had assaulted the deceased was improbable. The appellant cannot be held guilty for the offence alleged to have been committed due to improbability. It was also argued that the PW5 was an interested witness and therefore statement of PW5 cannot be relied upon.

28. It is submitted that at best the appellant can be held guilty of having caused grievous injury to the deceased which could have been dealt under other provisions of the Indian penal code.

29. Merely because the deceased died subsequently ipso facto cannot mean that the appellant can be held guilty of the offence under Section 304 Part I of the Indian Penal Code.

30. I have considered arguments advanced on behalf of the either side. I have also considered the evidence and the statements of the respective witnesses.

31. It stands confirmed from Exhibit P16 that the deceased/PW1 and the appellant were next-door neighbours. The appellant's goat shed is opposite to his house. The appellant's house is flanked between deceased & his wife PW1's house and PW2 Sudha's house.

32. To the left of the appellant's house was the deceased & PW1's house and to the right is PW2 Sudha's house. It was in front of PW2 Sudha's house, the deceased along with his wife Selvi PW1 and Sugundha (PW4) were standing and talking on 19.09.2015 before the incident.

33. PW2 and Pw4 have also confirmed the statement of the PW1 regarding the sequence of the events on the evening of 19.09.2015 around 8.45 pm when the deceased Kanadhasan was hit with a spade by the appellant.

34. It stands established that before the incident, hearing the child cry, PW1 and the deceased Kanadhasan decided to proceed to their house from in front of PW2's house to attend to the crying child.

35. To proceed to their house they had to pass in front of the appellant's house. While proceeding to their house, appellant had hurled abusive invectives/expletives at the deceased Kannadhasan in presence of PW1 and PW4 and made derogatory gesture.

36. It appears that PW1 the wife of the deceased rebuked the appellant. The deceased who got enraged appears to have pushed the appellant down. Recovering from the fall, the appellant rushed to his goat shed and returned with Material Object No.1 (spade) and inflicted a blow on the left side of the neck of the deceased resulting in deep injury and profuse bleeding as a result of which the deceased fell down.

37. Ex.P11 Post Mortem Report also concludes that injury and profuse bleeding as a result of which the deceased fell down. Ex.P11 Post Mortem Report concludes as follows :-

Opinion as to cause of death-

- a) Reserved pending report of.....
- b) The deceased would appear to have died due to hypovolemic shock due to injury to major blood vessels (Lt) external carotid artery).

38. Previous enmity between the appellant and the deceased Kannadhasan stands confirmed in unison by PW1, PW2 and PW4.

39. Before inflicting the blow on the left side of the neck of the deceased, the appellant uttered "as long as you (the deceased) are alive, I (appellant) cannot rear my goats peacefully and therefore you (the deceased) should die". This also has been confirmed not only by PW1 but also by PW2 and PW4.

40. The Trial Court has accepted the evidences of PW 2 and PW4 to corroborate the evidence of PW1. Thus, previous enmity between the two families stands confirmed.

41. Regarding the failure to record dying declaration of the deceased, though a flaw in gathering evidence, its absence has no significance in the light of clear evidence of eye witnesses namely PW2 and PW4 who have confirmed the statement of PW1 that the appellant has hit the deceased with Material Object No.1.

42. In my view, it would have been highly impossible to obtain a dying declaration from the deceased as the deceased had died of serious injury within four days of the blow inflicted on him by the appellant.

43. In fact, even if a specialist or an expert was called upon to record dying declaration also it may would have been difficult to elicit any dying declaration from the deceased who died while taking treatment. In this case, no specialist or expert was called for recording the dying declaration.

44. It would have been also impossible to record any dying declaration from the deceased because of the nature the injury.

45. The injury was not only a deep cut on the neck of the deceased indicating that the deceased would have been even incapable moving his neck to effectively communicate with sign even if it was assumed that of the deceased as conscious while undergoing the treatment at the hospital where he later succumbed to death.

46. Communication by the deceased would have been extremely difficult as the deceased was both vocally and auditorily challenged person (deaf and dumb) and his body would have been fully immobilized during treatment with neck being sutured and hands being injected with intravenous tubes. If the deceased was conscious before his death, he could have hardly communicated with his eyes.

47. Absence of dying declaration does not negate the findings given by the Trial Court. The Honourable Supreme Court in Paras Yadav vs. State of Bihar, 1999 (2) SCC 126 held that "It is true that there is negligence on the Part of Investigating Officer. On occasions, such negligence or omission may give rise to reasonable doubt which would obviously go in favour of the accused. But, in the present case, the evidence of prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and he was removed to the hospital by bus. All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of incident. He expired only after more than 24 hours. No justifiable reason is pointed out to disbelieve the evidence of number of witnesses who rushed to the scene of offence at Ghogha Chowk. Their evidence does not suffer from any infirmity which would render the dying declarations as doubtful or unworthy of the evidence. In such a situation, the lapse on the Part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not.

48. In the present case, the evidence of the witnesses particularly PW2, PW4 and PW1 clearly established that the appellant had hit the deceased with the spade and therefore absence of the dying declaration for convicting the appellant is to be sustained.

49. The argument and the contention of the appellant that the deceased pushed the appellant and fell on the spade appear to be far-fetched. The appellant has not stated that the Material Object No.1 (spade) which was used to injure the deceased was a random object lying on the pathway.

50. The witnesses namely PW2, PW4 and PW1 have given a uniform statement that it was the appellant who went to his goat shed and came back with Material Object No.1 (spade) to hit the deceased.

51. Therefore, the argument advanced on behalf of the appellant that the deceased fell and injured himself cannot be accepted as it impossible for the a person to fall on a spade and injure himself on the neck. Therefore, I am unable to find any fault with the finding on the reasoning arrived by the Trial Court as to the manner in which injury was caused and the manner

in which the crime was committed.

52. The fact that the appellant was absconding and had his lungi was bloodstained shows that the theory propounded by the appellant that the deceased fell and injured himself cannot be countenanced.

53. If the deceased had fallen on the pathway as has been argued on behalf of the appellant, it is unlikely that the injury on the left neck would have been deep or would have squirted blood on to Appellant's lungi.

54. On the other hand, it appears only if the appellant had inflicted the blow with the spade, blood would have squirted to his clothe.

55. In my view, there can be no doubt that the appellant had hit the deceased with the Material Object No.1 (spade) which he picked from goat shed to hit the deceased and made the above utterances.

56. Therefore, finding given by the Trial Court that the death was on account of the blow inflicted by the appellant on the deceased cannot be assailed.

57. The Trial Court has given the benefit of doubt to the appellant by treating the offence under Section 299 of IPC instead of Section 300 considering the fact that the appellant had an opportunity to club the deceased and cause instant death of the deceased.

58. New argument that was advanced before this court that the streets in the villages were not well lit and therefore it was impossible for PW4 and PW2 to have witnessed the incident from a distance of 20 ft. cannot be entertained at the stage particularly in view of the fact that the appellant has not denied the incident.

59. This was also not the case of the Appellant before the Trial Court. Three witnesses namely PW2, PW4 and PW1 have confirmed the incident while giving statement before the court. The appellant has not elicited any contradiction from their statements. Therefore, the only issue for consideration is whether the punishment awarded under Part I of Section 304 is to be upheld or not.

60. Section 304 contemplates two situations namely:-

- (1) act by which death is caused is done with the intention of causing death, or causing such bodily injury as is likely to cause death; and
- (2) act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death

61. Therefore, the essential ingredient for attracting Part I of Section 304 of the IPC is the "intention", whereas, the essential ingredient for attracting Part II of Section 304 of IPC is "knowledge".

62. Though the appellant uttered "as long as you (the deceased) are alive I cannot rear my goats peacefully and therefore you (the deceased) should die", cannot be literally taken to mean that the appellant had an intention to kill the deceased. It was uttered in the heat of moment.

63. The appellant uttered these in the background of the fact that the appellant had earlier showered expletives and invectives and chided the deceased. Thereafter, a brief scuffle appears to have ensued between the deceased and the appellant and later being pushed down and on rebound, the appellant ran to his goat shed and returned with Material Object No.1 and hit the deceased. The appellant was certainly not in control of his anger and emotion and had involuntarily played into the hands of his passion to harm the deceased.

64. It was not a case of premeditated intention to either murder or kill the deceased. At the same time, the appellant certainly had sufficient knowledge that by hitting the deceased on the neck with the Material Object No.1, the deceased would die.

65. Considering, the manner in which the crime was committed, I am of the view that it is far-fetched to conclude that the act of picking up Material Object No.1 and hitting the deceased was done with an intention of causing death or causing such bodily injury as was likely to cause death. It was committed in the heat of the moment after the appellant.

66. I am therefore of the view that the appellant had sufficient knowledge that the act of hitting the deceased with the Material Object No.1 on the neck was likely to cause death

particularly in the light of the fact that the injury was administered on the neck of the deceased. If the appellant had intention to kill the deceased, he would have clubbed the deceased to death then and there considering the fact that there were only few powerless women on the street.

67. I am therefore of the view that the conviction and sentence awarded require a slight modification. The punishment awarded under Part I of Section 304 is therefore modified to punishment under Part II of Section 304 of IPC.

68. Considering the age of the appellant and the rustic back ground of the appellant, I am inclined to modify the sentence awarded. Accordingly, the punishment period of 10 years rigorous imprisonment is reduced to 5 years rigorous imprisonment. The punishment awarded under Section 294(b) of the Indian Penal Code remains untouched.

69. The appellant shall be released at the expiry of 5 years after serving the sentence. The period under detention already undergone shall reckoned for determining the aforesaid period of 5 years.

70. Since the appellant and the family of the deceased are from the same village and are neighbours, the appellant is directed not to reside in the same village as neighbour of the family of the deceased. This will rule out the scope further hostility between the family of the deceased and the appellant due to spatial separation.

71. The appellant shall find an alternate place of accommodation and residence for rest of his life. After serving imprisonment and after being released the appellant is directed report to the Chairman, Principal District Judge, District Legal Services Authority, Cuddalore in this regard.

72. The Chairman, Principal District Judge, District Legal Services Authority, Cuddalore shall depute an officer to help the appellant to settle down at a place outside Murugan Koil Street, Pichavaram North, Cuddalore District.

73. Accordingly, the impugned order stands partly modified as follows:-

- i. The punishment ordered under Section 294(b) of the IPC stands confirmed.
- ii. The punishment ordered under Section 304 Part I is modified to punishment under Section 304

Part II of IPC.

iii. The period of 10 years rigorous imprisonment is modified to a period of 5 years rigorous imprisonment.

iv. At the time of release, the petitioner is directed to report to the Chairman, Principal District Judge, District Legal Services Authority, Cuddalore.

74. The present Criminal Appeal is partly allowed in terms of the above observations. Consequently, connected Miscellaneous Petition is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

kkd / jen
To

1. The Inspector of Police,
Killai Police Station,
Cuddalore District.

2. Additional District Sessions Judge,
Chidambaram.

3. The Chairman,
Principal District Judge,
District Legal Services Authority,
District Court Buildings,
Cuddalore 607 001.

4. The Superintendent
Central Prison Cuddalore

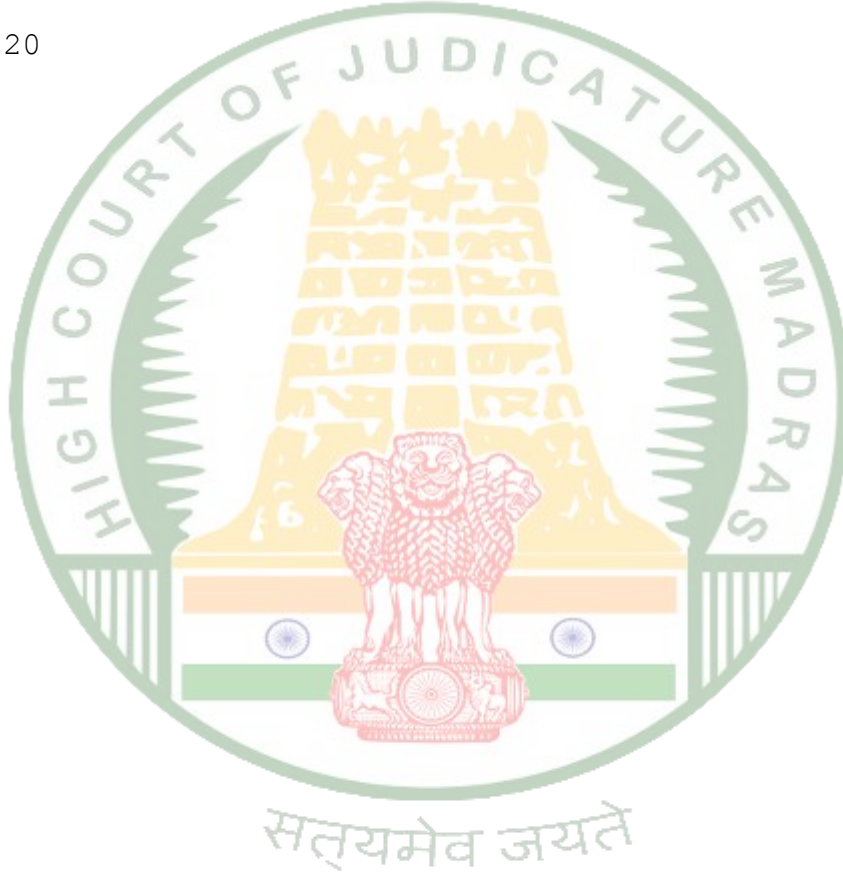
5. The Public Prosecutor
High Court Madras

6. The Judicial Magistrate I
Chidambaram

+1 cc to M/s.R.Sankarasubbu Advocate sr16323

Pre-delivery Judgment in
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and Crl.MP.No.2141 of 2019

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