



BAIL SLIP

The petitioner namely Muthupandi, Male, S/o.Paraman, was released on bail as per Order of this Court in CrI.MP(MD)No.1580 of 2021 in CrI.A(MD)No.66 of 2019.

The Appellant/Accused No.2 namely Kalimuthu, Male, aged 69 years S/o.Nachiappa Thevar, was released on bail as per Order of this Court dated 03.10.2019 in CrI.MP(MD)No.6304 of 2019 in CrI.A (MD)No.113 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 22.11.2021

Delivered on : 02.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

and

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

CrI.A. (MD)Nos.66 and 113 of 2019

Muthupandi ... Appellant in
CrI.A.(MD)No.66/2019 / A1

Kalimuthu ... Appellant in
CrI.A.(MD)No.113/2019 / A2

-vs-

State rep. by
The Inspector of Police,
Aruppukottai Taluk Police Station,
Virudhunagar District.
[Crime No.67 of 2012]

... Respondent in
both the CrI.As.

Prayer in both the CrI.As.:- Appeals filed under Section 374 (2) of Cr.P.C., to call for the records and set aside the judgment of conviction and sentence passed in S.C.No.166 of 2012, dated 22.01.2019, on the file of the Additional District and Sessions Court, Virudhunagar and allow the appeals and acquit the appellants/accused from the charge levelled against them.

For Appellant
in CrI.A.(MD)No.66 / 2019 / A1 : Mr.R.Diwakaran

For Appellant
in CrI.A.(MD)No.113 / 2019 / A2 : Mr.A.K.Azhakarsamy
for Mr.M.Vijayarajan



For Respondent
in both the CrI.As.

: Mr.A.Thiruvadikumar
Additional Public Prosecutor

COMMON JUDGMENT

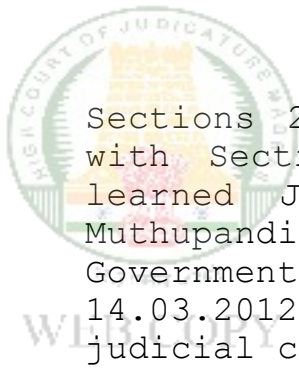
S.VAIDYANATHAN, J.
and
G.JAYACHANDRAN, J.

These Criminal Appeals are filed to set aside the judgment of conviction and sentence passed in S.C.No.166 of 2012, dated 22.01.2019, on the file of the Additional District and Sessions Court, Virudhunagar and to acquit the appellants/accused from the charges levelled against them.

2.The case of the prosecution in nutshell is that, on 06.03.2012 at 6.00 p.m. when one Moorthy (the deceased) was walking near Balavanatham, Therkupatti Irrukankudi Vilakku, Muthupandi (A-1) and Kalimuthu (A-2) [the appellant in CrI.A.(MD) No.66 of 2019 and the appellant in CrI.A.(MD)No.113 of 2019, respectively] stopped him and demanded money to buy Brandy. They abused Moorthy in filthy language and picked quarrel with him. When Moorthy refused to give money, Kalimuthu (A-2) pushed him down and instigated Muthupandi (A-1) to throw stone and kill Moorthy. Accordingly, Muthupandi lifted a stone weighing about 9.850 K.Gms. lying nearby and put it on the deceased. When Selvam (P.W.1), the son of the deceased came to rescue his father, Kalimuthu caught hold of him. After ensuring that Moorthy lost his breath, A-2 left the scene of crime. A-1, who got injury in the melee, got himself admitted in the hospital.

2.1.Selvam (P.W.1) along with one Kannan (P.W.2) took the injured Moorthy to Virudhunagar Government Hospital in an Auto. On receipt of the intimation from the Hospital authorities, Nagarathinam (P.W.14), the Sub-Inspector of Police attached to Aruppukottai Taluk Police Station went to the Government Hospital, Virudhunagar. Since the injured was not in a position to give statement, he recorded the statement of his son Selvam (P.W.1), registered a case in Crime No.67 of 2012 under Sections 294(b), 341 and 307 of I.P.C. The injured Moorthy was later shifted to Government Rajaji Hospital, Madurai, for better treatment.

2.2.Meanwhile, Jeyakodi (P.W.15), Inspector of Police, Aruppukottai Taluk Police Station, who took up the investigation, arrested Kalimuthu (A-2) on 07.03.2012 at 09.30 a.m. and remanded him to judicial custody after recorded his confession statement. Based on the confession statement, P.W.15 recovered the stone used to assault Moorthy. On 12.03.2021 at 9.45 a.m., the injured Moorthy died. Therefore, altered F.I.R. for offences under



Sections 294(b), 341, 352, 336, 506(ii) and 302 of I.P.C. read with Section 34 of I.P.C. was prepared and forwarded to the learned Judicial Magistrate, Aruppukottai. The first accused Muthupandi, who sustained injury in the melee was admitted in the Government Hospital, Virudhunagar and got discharged on 14.03.2012. Thereafter, P.W.15 arrested A-1 and remanded to judicial custody.

2.3.On completion of investigation, final report against A-1 and A-2 was filed before the learned Judicial Magistrate and numbered as P.R.C.No.39 of 2012. Since the offence being exclusively triable by Court of Sessions, the case was committed to the learned District and Sessions Judge, Virudhunagar. On committal, the case made over to the learned II Additional District and Sessions Judge, Virudhunagar. The following Charges were framed against the accused.

'Charge 1: Against A-1 and A-2 for offence under Section 294 (b) of I.P.C.

'Charge 2: Against A-1 for offence under Section 302 of I.P.C.

'Charge 3: Against A-2 for offence under Section 302 r/w. 109 of I.P.C.

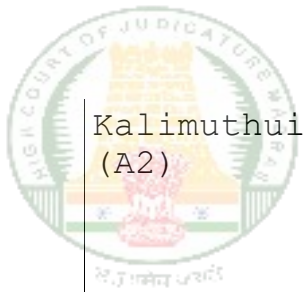
'Charge 4: Against A-2 for offence under Section 342 of I.P.C.

'Charge 5: Against A-1 for offence under Section 506 (ii) of I.P.C.'

Both the accused denied the charges and claimed to be tried. Accordingly, in the trial for the prosecution, 15 witnesses and 20 exhibits were marked, besides 4 material objects. No witnesses, documents or material objects marked on the side of the accused. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., both the accused denied the same as false.

2.4.On appreciation of evidence, the trial Court, vide judgment dated 22.01.2019 found the charges 2 to 5 proved. Convicted A-1 and A-2 and sentenced them as below:-

Accused	Provision under which convicted	Sentence
Muthupandi (A1)	Section 302 of I.P.C.	To undergo life imprisonment and pay a fine of Rs.5,000/-, in default, to undergo three months rigorous imprisonment.
Muthupandi (A1)	Section 506 (ii) of I.P.C.	To undergo two years rigorous imprisonment.



Kalimuthui (A2)	Section 302 read with Section 109 of I.P.C.	To undergo life imprisonment and pay a fine of Rs.5,000/-, in default, to undergo three months rigorous imprisonment.
Kalimuthui (A2)	Section 342 of I.P.C.	To undergo six months rigorous imprisonment.

The sentence imposed on them were ordered to run concurrently and the period of imprisonment already undergone, ordered to be set off under Section 428 of Cr.P.C. M.Os.1 to 4 were ordered to be destroyed after the appeal period.

3. Being aggrieved, the appeals are filed by the accused on the ground that the trial Court failed to note the improbability of the prosecution version in respect of P.W.1's presence at the scene of crime during the occurrence. The contradictions about the time of admission of the deceased first in Virudhunagar Government Hospital and later, in Madurai Rajaji Hospital. There was inordinate delay in forwarding the F.I.R. (Ex.P.1 and Ex.P.14) to the learned Judicial Magistrate, giving scope for falsification. The Accident Register entries (Ex.P.11) belie the version of the prosecution about the presence of P.W.1 at Virudhunagar Government Hospital. The trial Court has failed to consider the entries made in the Accident Register, which clearly say the injured was brought to the Hospital by the Police party. The prosecution failed to produce the Accident Register of A-1, who got injuries in the melee and admitted in Virudhunagar Government Hospital. The time of arrest of A-2 and the time of alteration of F.I.R. will go to show that the alleged confession of A-2 and recovery of M.O.2 is a farce.

4. The learned counsel appearing for the first accused submitted that the first accused also sustained injury and got admitted in Virudhunagar Government Hospital. The said fact is admitted by the Investigation Officer in his chief-examination itself. While so, no proper explanation has been placed by the prosecution why the said A.R. copy and discharge summary of the first accused not placed before the Court. Further, the learned counsel for the first accused submitted that the alleged occurrence has not occurred in the manner in which the prosecution has stated. The presence of P.W.1, P.W.2, P.W.3 and P.W.5 in the scene of occurrence is highly improbable. The trial Court failed to take note of the admission elicited from P.W.1, the son of the deceased that he is a resident of Amathur and employed in a Mill at Amathur. While so, his presence in Therkkupatti at 06.30 p.m. is improbable. Further, while it is admitted by the Investigation Officer that the first accused sustained injury and admitted in



the Hospital and treated as inpatient from 06.03.2012 to 14.03.2012, the evidence of P.W.1 and P.W.2 that the first accused throw M.O.1 Stone on Moorthy is highly doubtful.

5.The learned counsel appearing for the second accused submitted that the evidence of P.W.1, P.W.2, P.W.3 and P.W.5 regarding their presence and witnessing the occurrence is not believable due to the contradictions, particularly, P.W.5, the S.T.D. booth owner, in the cross-examination admitted that when he went to the scene of occurrence, he saw Moorthy in a pool of blood and was throbbing. On the day of occurrence, he was employed in Idhayam Gingelly Oil Company. P.W.2, who turned hostile, in the chief-examination, has stated that Ex.P.1 Complaint was received from P.W.1 by the Police when they were at Madurai Government Hospital, which is contrary to the endorsement found in Ex.P.1, which says as if the complaint was received from P.W.1 at Virudhunagar Government Hospital.

6.The alleged arrest of the second accused on 07.03.2012 at 09.00 a.m. is highly doubtful, since P.W.1 admits that on the occurrence day night itself, the second accused was arrested. The learned counsel for the second accused would further submit that the medical evidence does not corroborate with the ocular evidence of the witnesses. P.W.1 had deposed that the first accused dropped on the head of the deceased M.O.2 stone, weighing about 9.850 K.Gms. Whereas the postmortem report reveals that the deceased had a lacerated injury on the left side forehead. The linear fracture found in the head of the deceased could not have been caused by M.O.2 Stone. In the Accident Register [Ex.P.11], the Doctor has recorded that a smell of alcohol was found on the patient [deceased]. Therefore, the possibility of the deceased falling down on his own and sustaining injury cannot be ruled out.

7.The learned counsel referring to the bad antecedents of the deceased and the smell of alcohol on him coupled with the nature of injuries found on the body, would submit that when there is no substantial evidence to show that the second accused abetted the first accused to cause the alleged death, the trial Court had arrived at an erroneous conclusion of holding the second accused guilty of offence under Section 302 read with Section 109 of I.P.C.

8.In support of his submissions, the learned counsel appearing for the second accused relied on the following judgments:-

(i) **Thambiraja Amson @ Thambiraja Vs. The State, Rep. by the Inspector of Police, Thisaiyanvilai Police Station, Tirunelveli District** reported in 2019 (2) LW (Cr1.) 600.

(ii) **Secretary @ Mara Naicker and 7 others Vs. State by Sub-Inspector of Police, Sathyamangalam** reported in 2005 (2) LW (Cr1.)



779.

(iii) **Manickaraj Vs. State, Rep. by Inspector of Police, Alwarthirunagari Police Station, Thoothukudi District** reported in **2019 (2) MWN (Cr.) 487 (DB)**.

9.The learned Additional Public Prosecutor in response would submit that the case of prosecution has been established through the natural eyewitnesses. The presence of P.W.1 and P.W.2 at the scene of occurrence has been duly explained, the said evidence was not impeached by any contra evidence. Similarly, the presence of P.W.3 - Neethirajan, the brother of the deceased Moorthy and the presence of P.W.5 - Saravanan, neighbouring shop owner, cannot be discarded.

10.The learned Additional Public Prosecutor further submitted that soon after the incident, the injured Moorthy was taken to Virudhunagar Government Hospital. Though in the A.R. report it is stated that he was brought to the Hospital by the Police personnel, the presence of P.W.1 at the Hospital cannot be doubted. Regarding the discrepancies, namely, the time of arrest and confession statement of the second accused, the learned Additional Public Prosecutor submitted that minor contradictions cannot be taken serious note of when there is a direct eyewitness for the occurrence. The intention to cause death is established through the overt act of the accused persons and the Stone, weighing about 9.850 K.Gms., is sufficient to cause death. Therefore, for the offence of culpable homicide amounting to murder, the trial Court based on unimpeached cogent evidence has held that the appellants guilty and hence, there is no necessity to interfere in the judgment of the trial Court.

11.We have considered the rival submissions made by the learned counsel on either side and perused the materials available on record.

12.The injured Moorthy for his injury on the forehead and contusion in the left eye was taken to Virudhunagar Government Hospital on 06.03.2012 at 07.20 p.m. The Accident Register marked as Ex.P.11 shows that when the injured was brought by the police personnel, the following injuries were noted by the Doctor:-

'1. Laceration in left forehead 6 x 2 x 1 cm.

2.Contusion in left eye 4 x 4 cm.

3.Bleeding from nose ''

He was shifted to the Rajaji Government Hospital, Madurai and died on 12.03.2012 at 09.45 a.m. A sutured lacerated wound 10 cm x 1 cm x bone deep involving left eye brow and left frontal region of scalp noted as an ante-mortem injury. On dissection of scalp, skull and dura, the following injuries are noted:-

1. A linear fracture of size 10 cm x 1 cm noted



involving left fronto, temporal bone of skull. Diffused subdural hemorrhage and subarachnoid hemorrhage noted over both the cerebral hemispheres. Contusion brain 6 cm x 6 cm noted involving left frontal lobe of brain. Fracture base of skull 5 cm x 1 cm noted involving left anterior cranial fossa.''

13.The postmortem certificate marked as Ex.P.12 indicates that as per the opinion of the Doctor, the deceased appeared to have died of head injury. As per prosecution, the first accused throw M.O.2 stone on the head of the deceased Moorthy, causing the head injury. P.W.12 - Dr.S.Sathasivam, who conducted postmortem, has opined that the injury found on the deceased might have caused through M.O.2 stone. He has denied the suggestion that the injury found on the body of the deceased might have caused due to accident fall.

14.On a perusal of the evidence of P.W.1 and P.W.2, eye-witnesses to the occurrence, it is seen that the scuffle between the first and second accused with the deceased person is well spoken without any contradiction. After the deceased was pushed down to the floor, it was the first accused to throw the stone on the head of the deceased. In the said melee, the second accused had caught hold of P.W.1 and thereby, prevented him from saving his father from the attack. The prosecution witnesses P.W.1 and P.W.2 [though turned hostile] have spoken about the words uttered by the second accused to instigate the first accused to throw the stone on the deceased Moorthy. The stone, which was used to attack the deceased Moorthy, came to be identified by the second accused and the same was recovered under the cover of Mahazar Ex.P.17. Human blood has been found on the stone as per the Serology Report. Though the blood group could not be ascertained due to disintegration, the fact remains that the Serologist, in his report, which was marked as Ex.P.8, had categorically stated that the blood found on the stone is a human blood and the grouping test not conclusive.

15.The case of the defence is that the first information report marked as Ex.P.1 seems to have been recorded on 06.03.2012 at 23.00 hours at Virudhunagar Government Hospital. Whereas in the evidence of P.W.15 Investigation Officer, it is admitted that the injured was taken from Virudhunagar Government Hospital to Rajaji Government Hospital, Madurai and admitted at 09.16 p.m. Therefore, the presence of P.W.1 at 09.30 p.m. in Virudhunagar Government Hospital is impossible.

16.In this regard, it is to be noted that though the Investigation Officer has stated that the deceased admitted in the

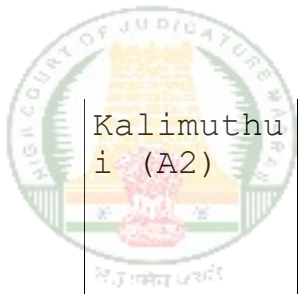


Rajaji Government Hospital, Madurai, at 09.16 p.m., the relevant Accident Register or any other document of that Hospital to show the time of admission is filed. The defence had not called for the Accident Register to show that the injured was shifted to Rajaji Government Hospital, Madurai, at 09.16 p.m. itself. Therefore, this Court is of the view that neither the doubt raised by the defence regarding the presence of P.W.1 in the occurrence place nor the suppression of first complaint, is without any basis.

17.P.W.15 in his chief-examination has admitted that he arrested the first accused on 14.03.2012 after he came to know that the first accused, who got admitted in the Hospital on 08.03.2012, got discharged. The medical report of the first accused was not filed by the Investigation Officer. Though it is admitted by the Investigation Officer that the deceased was taking treatment from 06.03.2012 to 12.03.2012, the first accused also was taking treatment as inpatient from 08.03.2012 to 14.03.2012, no medical record is filed. Therefore, it is suggested to the Investigation Officer [P.W.15] that the complaint given by the first accused regarding the injury caused to him by the deceased was suppressed by him. The said suggestion is denied by P.W.15. However, it is an admitted fact that the first accused sustained injury and was admitted in the Hospital.

18. Therefore, this Court is of the view that though the prosecution has proved that due to throwing M.O.2 stone on the head of the deceased by the first accused on the instigation of the second accused, the death caused. It was during the sudden fight between the deceased and the accused persons acted in fit of anger. We hold that the murder has been committed without any premeditation and out of sudden provocation. In the said circumstances, the act of the accused will fall under the fourth exception to Section 300 of I.P.C. Hence, the appellants are liable to be punished under Section 304(i) of I.P.C. and not under Section 302 of I.P.C. Accordingly, the sentence imposed by the trial Court on the accused persons is modified as below:-

Accused	Provision under which convicted	Sentence Modified by this Court
Muthupandi (A1)	Section 304(i) of I.P.C.	To undergo rigorous imprisonment for a period of ten years and pay a fine of Rs.5,000/-, in default, to undergo three months rigorous imprisonment.
Muthupandi (A1)	Section 506 (ii) of I.P.C.	To undergo two years rigorous imprisonment.



Kalimuthu i (A2)	Section 304 (i) read with Section 109 of I.P.C.	To undergo rigorous imprisonment for a period of ten years and pay a fine of Rs.5,000/-, in default, to undergo three months rigorous imprisonment.
Kalimuthu i (A2)	Section 342 of I.P.C.	To undergo six months rigorous imprisonment.

19.In the result, the life sentence imposed for the offence under Section 302 of I.P.C. is set aside and modified to ten years rigorous imprisonment for the offence under Section 304(i) of I.P.C. With regard to the sentence awarded to the first accused for the offence under Section 506 (ii) of I.P.C. viz., two years rigorous imprisonment and the sentence awarded to the second accused for the offence under Section 342 of I.P.C. viz., six months rigorous imprisonment are concerned, the same shall stand confirmed. The sentences shall run concurrently. The period of imprisonment already undergone by the accused shall be given set off under Section 428 of Cr.P.C. Accordingly, these Criminal Appeals are partly allowed. The trial Court is directed to secure the appellants and commit them to prison for undergoing the remaining period of sentence.

Sd/-

Assistant Registrar (CS II)

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Sub Assistant Registrar(CS)

To

1.The Additional District and Sessions Judge, Virudhunagar.

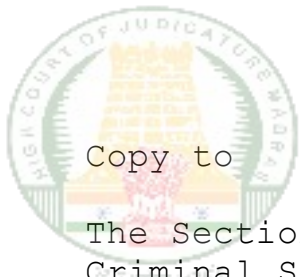
2.The Judicial Magistrate, Aruppukottai.

3.The Chief Judicial Magistrate,
Virudhunagar District at Srivilliputhur.

4.The Superintendent,
Central Prison, Madurai.

5.The Inspector of Police,
Aruppukottai Taluk Police Station,
Virudhunagar District.

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



Copy to

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

+1 CC to M/s.D.GEETHA, Advocate (SR-37080[F] dated 02/12/2021)

Cr1.A. (MD)Nos.66 and 113 of 2019
02.12.2021

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