



Crl.A.No.538 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.08.2023

Delivered on: 12.12.2023

CORAM:

**THE HON'BLE MR.JUSTICE R.SURESH KUMAR
and
THE HON'BLE MR.JUSTICE K.KUMARESH BABU**

Crl.A.No.538 of 2020

1.Nandalal Kembram
2.Sudhir Kerai

...Appellants

vs.

State represented by
Inspector of Police,
Sirumugai Police Station
Coimbatore District
Crime No.166 of 2016.

...Respondent

Prayer: Criminal Appeal filed under Section 374 (2) Cr.P.C., against the judgment and order convicting the appellants under Section 302 IPC and 404 IPC in S.C.No.128 of 2018, dated 12.09.2019 on the file of V Additional District and Sessions Judge, Coimbatore and sentencing them to undergo life imprisonment each for offence under Section 302 IPC and to pay fine of Rs.5000/- each in-default to undergo simple imprisonment for two month each. Further the accused are convicted and sentenced to undergo three years rigorous imprisonment each under Section 404 of IPC and to pay a fine of Rs.100/- each, in-default to undergo simple imprisonment for one month each. Total fine Rs.12000/-. The period already undergone shall be set-off under



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Section 428 Cr.P.C., and the said conviction and sentence is illegal.

For Appellant : Mr.R.Sankarasubbu
For Respondent : Mr.R.Muniyapparaj
Additional Public Prosecutor
Assisted by Mr.M.Sylvester John

J U D G M E N T

K.KUMARESH BABU,J.

The appellants are the accused in S.C.No.128 of 2018 on the file of the learned V Additional District and Sessions Judge, Coimbatore. They stood charged for the offences under Sections 302 and 404 of IPC.

2.The case of the prosecution in brief is as follows:

The case of the prosecution is that 10 days prior to the occurrence there was a quarrel between the appellants/accused and deceased, as the appellants/accused teased PW-1 who is the wife of the victim. PW-1 Mallika has complained the same to her husband, the deceased and he has warned the appellants/accused, on account of this the appellants/accused had planned to take revenge on the victim and on 09.08.2016 at about 8.30.p.m. A2 had taken the victim from his house on the pretext that A1 wanted to meet him. The victim and A2 went in M.O.4/TVS XL Super Heavy Duty two wheeler bearing registration No.TN-40- E-9473 which belonged to the victim.



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3. On the morning of 10.08.2016, the body of the victim was found near the field of PW-9 with severe head injuries. PW-1 had identified the body and had filed a complaint at Sirumugai Police Station in Crime No.166 of 2018 under Section 302 IPC. Pursuant to the investigation that had been conducted, the prosecution had paraded PWs-1 to PWs-20 and had marked exhibits P1 to P23 and Mos-1 to Mos-12 to prove the case of the prosecution. However on the side of the appellants/accused no evidence whatsoever have been produced.

4. After completion of the trial, the appellants/accused were questioned under Section 313 of the Cr.P.C., where they had denied the commission of the offence. The Court below having considered all the evidences that had placed before it, by judgment dated 12.09.2019, convicted the appellants/accused under Sections 302 and 404 of IPC and sentenced them to undergo imprisonment for life and to pay a fine of Rs.5,000/- each, in default to undergo simple imprisonment for a further period of two months each, for the offence under Section 302 IPC and to undergo three years rigorous imprisonment each and to pay a fine of Rs.1000/- each in default to undergo simple imprisonment for one month each for the offence under Section 404 of



IPC. Challenging the said conviction and sentence, the appellants/accused are before this Court with this appeal.

5. Heard the arguments of Mr.R.Sankarasubbu, learned counsel appearing on behalf of the appellants and Mr.R.Muniyapparaj, learned Additional Public Prosecutor on behalf of the respondent.

6. The learned counsel for the appellants/accused submitted that there is no *mens rea* proved against the accused to commit the murder of the deceased. PW-1, wife of the deceased has not supported the prosecution case regarding the motive and quarrel between the deceased and accused, therefore it raises a doubt upon the prosecution case. The witnesses produced on the side of the prosecution are not credible as there is material discrepancies regarding place and time. The extra-judicial confession made by the accused before PW-11 is also highly unreliable as there are no materials to prove as to why the accused would choose PW-11, who is in no way related to them or is not in any position to help them. Therefore, the prosecution has failed to prove the case beyond reasonable doubt, and that the benefit of doubt has to be given to the accused. He would also contend the chain is not continuous for to



hold the accused guilty in the context of this case. Therefore, he prays this Court to set aside the conviction and sentence imposed on the appellants.

7.Countering his argument MrR.Muniyapparaj, learned Additional Public Prosecutor would submit that the prosecution case is based upon the circumstantial evidence which had been clearly established by the oral and documentary evidences that had been produced before the Court below. He would submit that the chain of evidences that had led to the crime would clearly establish that the appellants/accused with a motive had committed the offence. He would further submit that testimony of PW-1 to PW-5 would clearly show that it is the appellants/accused who had taken the deceased at 8.30 pm and atleast till 10.30 pm on that day, the victim was seen in the company of the accused. He would also submit that last seen theory remained intact as there was no contrary evidences that were provided by the appellants/accused. He would further submit that even though PW-1 turned hostile as regards the motive she had clearly admitted that the victim and the accused had quarrelled 10 days prior to the incident. Therefore, the claim of the appellant that there is no motive to punish them for offence under Section 302 is without any merits. He would submit that the Court below had



categorically given a finding that the admitted quarrel between them was a motive. He would further submit that PW-5 to PW-7 had also deposed that even on that day, the appellants/accused and the victim quarrelled between themselves, such deposition has also not been whittled down by the appellants/accused in their cross examination. He would also submit that after committing the crime the accused had taken the mobile phone of the victim which would also add to the motive of the appellants/accused. Therefore, he would submit that the sentence and conviction imposed upon by the trial Court need not be interfered with and appeal be dismissed.

8.We have considered the rival submissions made on either side and perused the materials placed on record.

9.The case of the prosecution based upon the complaint given by PW-1 who is the second wife of the victim was that PW-1 was teased by the appellants/accused 10 days prior to the incident. This was the reason that had been assigned to drive home the *mens rea* on the part of the appellants/accused to commit the crime. However PW-1 had been treated as hostile and during the course of cross examination by the prosecution, she had



specifically stated that she had no knowledge that the appellants/accused had teased her. She had also denied the suggestion that she had informed her husband/victim about such incident. Infact she admits that there was some dispute between the appellants/accused and her husband 10 days back.

10.The fact that the appellants/accused picking up the victim had been spoken to by PW-1 & PW-4. PW-1 had deposed that it was the second appellant, who had picked up the victim. But however PW-4 had specifically deposed that both the appellants/accused had picked up the victim. Thereafter, the victim and the appellants/accused were seen together by PW-5, PW-6 and PW-7. PW-5 & PW-6 had deposed that about 10.00pm on 09.08.2016, the deceased and the appellants had fought among themselves in front of the hotel run by PW-6. But however PW-5 during his cross examination had categorically stated that the appellants and the victim did not fight in front of the hotel. He had also deposed that the appellants and the deceased did not come near the shop and he had made the statement only at the behest of the prosecution. But however, on the contrary PW-6 in his cross examination has reiterated the fight between the appellant and the deceased. PW-7 who claims to be the cousin of the deceased had deposed that he has



seen the appellants and the deceased in a lane adjacent to KG company compound. He had also deposed that the appellants/accused and the deceased were fighting among themselves and he has advised them to go back to their homes. The categorical evidence of PW-1, who had turned hostile in her cross had categorically denied of any knowledge of the appellants/accused teasing her and she had also denied of informing the deceased about any such incident. This evidence had not been dislodged by the prosecution to drive home the theory of motive of the appellants/accused to commit the crime.

11.Further, it is the case of the prosecution that the deceased had been picked up by the second appellant herein at 8.30 pm on 09.08.2016. If as alleged by the prosecution that there was an enmity between the appellants/accused and the deceased, it is very surprising that the victim had agreed to accompany with the second appellant that too in his own vehicle.

12.A further contradiction with the deposition of PW-1 & PW-4 is with regard to state in which the deceased was at 8.30 pm on 09.08.2016. According to PW-1, the deceased had moderately taken alcohol. But however PW-4 in his cross has categorically stated that the deceased did not consume



alcohol.

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13.Exhibit P-14, which is the viscera report of the deceased categorically concludes the presence of ethyl alcohol. The final opinion of PW-13 which was marked as Ex.P-15 also states that the deceased has consumed ethyl alcohol prior to death and could have been under that influence.

14.From the conjoint reading of the deposition of PW-1, PW-4, PW-5, PW-6 and PW-7 would only lead to a conclusion that the appellants/accused and deceased were together from 8.30 pm on 09.08.2016 atleast till 10.30 pm. In view of PW-14 & PW-15, it could be safely concluded that the deceased had also consumed alcohol during the said period along with the appellants/accused . This causes a doubt on the theory of the prosecution of a motive of the appellants/accused to do away with the deceased for their action of teasing the deceased wife for which the deceased has detrimental the appellants/accused.

15.From a reading of the judgment of the Court below, it could be seen



that the Court below was also not convinced with the case of the prosecution with regard to the motive as charged. But however, the Court below had taken into consideration the deposition of PW-1 and PW-4 to come to a conclusion that there was a quarrel between the victim and the appellants/accused 10 days prior to the incident and therefore, the Court below had held that there is a clear motive to commit the crime. We are of the opinion that such a conclusion arrived at by the Court below is wholly erroneous. It is seen that PW-1 had deposed that the victim had a habit of quarrelling with everyone. Even though PW-1 in her complaint before the Police Station had indicated that the appellants/accused had teased her only upon which the victim quarrelled with appellants/accused, but however the said statement has been retracted by her during her deposition only for which she was treated as hostile. The said version of PW-1 in FIR was supported by PW-4, who was neighbour. The evidence of PW-4 according to us does not seem to be speaking the truth. Even in the complaint, Exhibit P1 given by PW-1, it is a case that the second appellant had come to pick up the victim and the charge sheet after investigation had also been laid so. Even in the deposition of PW-1 she had stated that it is only the second appellant, who had picked up the victim on the contrary PW-4, deposes as if both the appellants had picked up



the victim. Therefore, the evidences of PW-4 is doubtful.

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16.Be that as it may, the evidences of PW-1, PW-4, PW-5 to PW-7 as regards to the appellants/accused being with the deceased have not been dislodged by them in their cross examination. Therefore, it is concluded that the deceased was last seen with the appellants/accused. No explanation had been made by the appellants/accused, when questioned under Section 313 Cr.P.C. They have also failed to provide any defence witness to substantiate that they had not been with the victim, which forces us to come to the conclusion that the appellants/accused were the reason behind the death of the victim in the manner opined in the post-mortem report. The findings in the post-mortem report had also not been dislodged by the appellants/accused during the course of trial.

17.In such circumstances, we find that the appellants are guilty of committing the crime, but however, the question is as to whether they could be punished under Section 302, for or an offence punishable under Section 304 Part I. As we have concluded that there was no *mens rea* that had been established by the prosecution against the appellants/accused, we



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hold that the appellants/accused are liable to be punished for offences under Section 304 Part I. The Court below had imposed a sentence of life imprisonment and also a fine of Rs.5000/- against each appellants/accused.

18.The sentence is modified to a sentence of seven (7) years imprisonment and the fine imposed by the Court below is confirmed. As regards the offence under Section 404 IPC we do not find any infirmity in the conviction and sentence imposed by the Court below. As held by the Court below, the sentences shall run concurrently, the period already undergone by the appellants shall be set off under Section 428 Cr.P.C.

19.In fine, the Criminal Appeal No.538 of 2020, is allowed in part and the sentence imposed by the Court below is modified as indicated supra.

(R.S.K.,J.) (K.B.,J.)
12.12.2023

Index: yes/no
Speaking order:yes/no
pbn



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To

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1. V Additional District and Sessions Court, Coimbatore
2. The Public Prosecutor,
High Court of Madras, Chennai – 104.
3. Inspector of Police,
Sirumugai Police Station
Coimbatore District
(Crime No.166 of 2016)
4. The Superintendent of Police
Central Prison,
Coimbatore.



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R.SURESH KUMAR, J.
and
K.KUMARESH BABU, J.

pbn

**Pre-delivery judgment in
Crl.A.No.538 of 2020**

12.12.2023