



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date : 21.06.2023

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CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.A.(MD)No.221 of 2016

Pathukasu Shankar @ Udayasankar

... Appellant/Accused No.1

vs.

State represented by,
The Inspector of Police,
Thanjavur Medical College Police Station,
Thanjavur District.

(In Crime No.51 of 2015).

... Respondent/Complainant

PRAYER : Criminal Appeal has been filed under Section 374(2) of Cr.P.C., to allow this appeal and acquit the appellant from all the charges by setting aside the impugned Judgment passed by the learned I Additional District and Sessions Judge, (P.C.R), Thanjavur in S.C.No.308 of 2015, dated 06.05.2016.

For Appellant : Mr.C.Vadivel @ Sekar
for Mr.J.Selvam

For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been preferred as against the Judgment and conviction made in S.C.No.308 of 2015, dated 06.05.2016, on the file of the learned I Additional District and Sessions Judge, (P.C.R), Thanjavur.

2.The case of the prosecution is that P.W.1 and the appellant/first accused are residing with their families as tenants on the first floor of the same apartment belonging to one Rangaraj. The apartment is situated at 3rd Street, AKL Colony, Upparigai, Mandaba Road, Manojipatti. The deceased Selvakumar, who is the son of P.W. 1, used to tease the daughter of the first accused and used to tap the doors of the house whenever she was alone in the home. In view of the same, there was previous enmity between both families. Accused No.2 is a close friend of Accused No.1. Both of them had a common intention to murder the deceased. Accordingly, on 20.02.2015 at about 10.30 p.m., the appellant was standing in the veranda in front of the house of P.W.8 situated on the ground floor of the apartment and he shouted in filthy language. Hearing the noise, the deceased came down to the ground floor and asked the appellant as to why he is scolding unnecessarily. The appellant scolded the deceased in filthy language and asked him as to why he



is teasing her daughter and attacked him with a cricket stump and hit his face on the wall and grill gate. P.W.1 and P.W.2 tried to catch the appellant when the deceased tried to go away. At that time, Accused No.2 hold the head of the deceased and hit the face on the wall of a closed shop belonging to Rangaraj. Accused No.2 also kicked and pushed the deceased and thereby both of the caused the death of the deceased. Hence, the complaint.

3. Based on the said complaint, the respondent registered the F.I.R in Crime No.51 of 2015 for the offence under Section 302 of I.P.C. After completion of the investigation, the respondent filed a final report against both the accused for the offences under Sections 294(b), 302 r/w 34 of I.P.C and the same has been taken cognizance by the trial Court in S.C.No.308 of 2015, on the file of the learned I Additional District and Sessions Judge, (P.C.R), Thanjavur.

4. On the side of the prosecution, they had examined P.W.1 to P.W.20 and marked Exs.P.1 to P.13 and the prosecution has also marked M.O.1 to M.O.6 and on the side of the accused, no one was examined and no documents were marked.



5. On perusal of both oral and documentary evidence, the trial Court acquitted the second accused from all the charges and acquitted the appellant for the offence under Section 294(b) of I.P.C and convicted the appellant for the offence under Section 304(ii) of I.P.C and sentenced to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.5,000/- and in default to undergo six months Simple Imprisonment. Aggrieved by the same, the present Criminal Appeal has been preferred by the appellant/first accused.

6. The learned senior counsel appearing for the appellant would submit that there are totally two accused, in which the trial Court found the appellant alone guilty, that too, for the offence under Section 304(ii) of I.P.C. Originally, the appellant was charged for the offence under Section 302 of I.P.C r/w 34 of I.P.C against two accused persons. Accused No.2 also similarly placed and same overt act, even then, the trial Court acquitted Accused No.2 and the appellant alone was convicted for the offence under Section 304(ii) of I.P.C. There are a lot of contradictions on the part of the prosecution witnesses viz., P.W.1 to P.W.4, who were said to have witnessed the scene of the crime. Though the trial Court does not believe the evidence of P.W.3 and P.W.4, since they could not be



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eyewitnesses to the occurrence, only on the basis of the voice of the first accused convicted the appellant/first accused. P.W.1 and P.W.2 are none other than the parents of the deceased, who came to the scene of the crime only after 15 minutes. Therefore, they did not have seen the occurrence. They also deposed that they had chased the accused persons after the crime. Therefore, these contradictions are fatal to the case of the prosecution. There was a delay in the lodgement of the complaint. According to P.W.1, the time of occurrence is about 10.30 p.m on 20.02.2015. He preferred the complaint only at 01.00 a.m on 21.02.2015. The delay was not explained by the prosecution in preferring the complaint. That apart, the body of the deceased was found in front of the shop. Whereas, according to the prosecution, the occurrence had taken place in front of the house of P.W.8. Further, the trial Court completely ignored to consider the evidence of P.W.9, who was also an eyewitness to the occurrence. He categorically deposed that he found the body of the deceased in front of the closed shop. Only after hearing the noise of P.W.1 and P.W.2, he rushed to the spot and found the body of the deceased in front of the shop. Therefore, the prosecution completely failed to prove the case beyond any doubt. He further submitted that the material objects produced by the prosecution are not at all accepted by the trial Court. If at all the occurrence could have happened in front of the house of P.W.8,



there was no sand. The Investigating Officer mechanically produced blood-stained soil and plain soil. The recovery was also made after so many days from the date of occurrence. Therefore, the benefit of the doubt goes in favour of the accused and he is liable to be acquitted.

7.Per contra, the learned Additional Public Prosecutor appearing for the respondent would submit that in order to prove the charges to home, the prosecution had examined P.W.1 to P.W.20 and marked Ex.P.1 to Ex.P.13 and also produced material objects M.O.1 to M.O.6. P.W.1 and P.W.2 were eyewitnesses to the occurrence and they categorically deposed that the appellant attacked the deceased and due to which, he sustained grievous injuries and he died on the spot. The prosecution also proved that there was previous enmity between both families. The deceased used to tease the daughter of the first accused and used to tap the doors of the house when she was alone. Therefore, on 20.02.2015 at about 10.30 p.m., the appellant abused the deceased with filthy language in front of the house of P.W.8. After hearing the noise, the deceased came to the ground floor from the first floor and asked why he was scolding unnecessarily and about whom he was scolding, for which, the appellant abused him with filthy language and also attacked the deceased with a cricket stump and hit his face



on the wall and grill gate. Immediately, P.W.1 and P.W.2 came to the scene of the crime and attempted to catch the accused. However, they flew away from the scene of the occurrence. Therefore, they categorically deposed and supported the case of the prosecution and the trial Court rightly convicted the first accused. Though the charge was framed under Section 302 r/w 34 of I.P.C, the trial Court rightly convicted the appellant for the offence punishable under Section 304(ii) of I.P.C, since the act of the appellant was on sustained provocation and he had no intention either to cause the death of the deceased or to cause such bodily injury likely to cause death or to cause such bodily injury which sufficient to cause the death of the deceased. Further, the accused has acted with knowledge that his action would result in the death of the deceased in all probability and hence, the action of the appellant does not fall in any of the limbs of Section 300 of I.P.C. Hence, he was convicted for the offence punishable under Section 304(ii) of I.P.C. In so far as the second accused is concerned, no one had spoken about his overt act and presence. Therefore, he was acquitted from the entire charges. Hence, he prayed for the dismissal of the appeal.

8.Heard the learned counsel appearing on either side and perused the materials available on record.



9. There are totally two accused in which the appellant is arraigned as first accused. Both the accused were originally charged for the offence under Sections 294(b) and 302 r/w 34 of I.P.C. It is seen that the daughter of the appellant herein was teased by the deceased and he also used to tap the doors of the house whenever she was alone in the house. The appellant and the deceased are residing adjacent to their house in the first floor of the apartment. According to P.W.1 and P.W.2, the occurrence had happened in the ground floor of their apartment in front of the house of P.W.8. On perusal of the deposition of P.W.1 revealed that he heard the noise of the appellant and he was abusing the deceased. Therefore, the deceased went to the ground floor and questioned the same. After 15 minutes, P.W.1 and P.W.2 went to the ground floor. At that juncture, the appellant attacked the deceased head on the cricket stump. The second accused caught hold of the deceased and hit his head on the wall. When P.W.1 was attempting to prevent the deceased, the appellant and the second accused also hit him on the grill gate. Immediately, they flew away from the scene of the crime. P.W.1 and P.W.2 also attempted to catch them. However, they escaped from the scene of crime. P.W.1 and two others namely P.W.3 and P.W.4 went to the Police Station and lodged the complaint. Thereafter, the police personnel came to the scene of crime and called 108 Ambulance and the deceased was taken to the



Government Hospital, Tanjore. P.W.1 lodged a complaint which was marked as Ex.P.1. The complaint was lodged at about 01.00 a.m.

Thus, it is clear that after visiting the scene of crime by the police personnel and after sending the body of the deceased to the Hospital, they registered the F.I.R. However, Ex.P.1/complaint was written by P.W.7. Whereas P.W.1 did not even whisper about the presence of P.W.7 in the scene of crime and also in the Police Station.

10.On perusal of Ex.P.1 also revealed that it was not written by P.W.1 and it was written by police personnel and signed by P.W.1. In fact, P.W.7 deposed that on the date of occurrence, he was on night duty. His duty time was 08.00 p.m to 06.00 a.m. He was on duty. Therefore, the prosecution is not clear about the lodgment of the complaint and the registration of F.I.R. It is seen that Ex.P.1 was subsequently written by police personnel and obtained a signature from P.W.1.

11.Further, it is also seen that P.W.1 and P.W.2 came to the scene of crime only after hearing the noise. They also did not even whisper about the presence of P.W.3 and P.W.4 at the scene of crime. On perusal of the evidence of P.W.4 revealed that he received a phone call from P.W.1 and thereafter, he went to the scene of



crime. He had seen the appellant while he was attacking the deceased by a cricket stump on the head of the deceased. Whereas, he did not even whisper about the presence of Accused No.2. Therefore, the evidence of P.W.3 and P.W.4 are not supported the case of the prosecution and they are chance witnesses. Hence, the trial Court rightly disbelieved the evidence of P.W.3 and P.W.4. The other eyewitnesses, namely P.W.5, P.W.6, P.W.8 and P.W.10, who are the residents of the same locality, did not support the case of the prosecution and as such, they were treated as hostile witnesses. The another independent witness was examined by the prosecution as P.W.9. He deposed that no one had witnessed the occurrence including P.W.1 and P.W.2. He was residing in a house opposite to the house of the deceased. He further deposed that he heard the hue and cry of P.W.2, after he return back from his work. In fact, while he was returning to his house, he had seen the deceased who was lying near a closed shop. He thought that always the deceased was in a drunken mood and as such, on that day also under the influence of alcohol, he was lying in front of the closed shop. Therefore, he was under the impression that the deceased was in an inebriation stage and lying down and went to his house. Only after hearing the noise of P.W.2, he saw that the deceased was lying in the blood pool. Whereas, the case of the prosecution is that the scene of the crime is in front of the house of P.W.8.



12. On perusal of the rough sketch, which was marked as Ex.P.11, revealed that there is much distance between the house of P.W.8 and the body of the deceased, which was lying in front of the shop. Therefore, the scene of crime itself is not proved by the prosecution. Further, in so far as the recovery is concerned, the appellant was arrested on 22.02.2015 in the presence of P.W.12. On his confession, M.O.1 to M.O.3 were recovered at about 11.30 a.m from a bush in Karuvai Thoppu. It was not supported by P.W.12, though M.O.1 to M.O.3 were recovered after two days, it was produced before the Court only on 12.03.2015 under Form 95. In fact, the said Form 95 was returned by the Court for four times for the reason for the non-production of the material objects. Further, the trial Court convicted the appellant on the assumption that P.W.1 and P.W.2 would have recognized the voice of the appellant and the abusive utterances of the appellant. Even then, the trial Court acquitted the appellant for the charge under Section 294(b) of I.P.C. P.W.1 deposed that he had seen the occurrence when the appellant was attacking the deceased. On the other hand, P.W.1 and P.W.2 came to the scene of crime only after 15 minutes and they heard abusive language from the appellant against the deceased. Therefore, P.W.1 and P.W.2 also could not have witnessed the occurrence. The conviction based on the assumption that P.W.1 and



P.W.2 could recognise the voice of the appellant is unsustainable. It is also relevant to note that when the trial Court found the second accused was not guilty, then the same benefit ought to have extended to the appellant also since he is also standing on the same footing as Accused No.2. Therefore, the conviction as against the appellant under Section 304(ii) of I.P.C cannot be sustained and it is liable to be set aside.

13. Accordingly, the order made in S.C.No.308 of 2015, dated 06.05.2016, on the file of the learned I Additional District and Sessions Judge, (P.C.R), Thanjavur, is set aside and the Criminal Appeal is allowed. The appellant/Accused is acquitted. Bail bond if any executed by the appellant/Accused shall stand cancelled and a fine amount if paid is ordered to be refunded to the appellant/Accused forthwith.

21.06.2023

NCC : Yes/No
Index: Yes/No
Internet: Yes
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To

- 1.The I Additional District and Sessions Court,
(P.C.R), Thanjavur.
- 2.The Inspector of Police,
Thanjavur Medical College Police Station,
Thanjavur District.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

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