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Crl.A.Nos. 329 and 338 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 23.07.2024

PRONOUNCED ON : 29.07.2024

CORAM :

THE HON'BLE MR. JUSTICE M.S.RAMESH

AND

THE HON'BLE MR. JUSTICE SUNDER MOHAN

Crl.A.Nos. 329 and 338 of 2019

- | | |
|--------------------------|---|
| 1.Prakash @ Thavakkalai | ... Appellant in Crl.A.No.329
of 2019 / A1 |
| 2. Prasad @ Panai Prasad | |
| 3. Shankar Raj | ... Appellants in Crl.A.No.339
of 2019 / A2 & A3 |

v.

State represented by Inspector of Police, E-3 Teynampet Police Station, Chennai – 600 006. (Crime No.1907 of 2011)	... Respondent/Complainant in both cases.
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Criminal Appeals filed under Section 374(2) of Code of Criminal Procedure, 1973, against the conviction of the appellants/accused and sentence in S.C.No.448 of 2011 dated 15.04.2019, on the file of the learned II Additional Sessions Judge, Chennai, and set aside the conviction and sentence imposed in judgment dated 15.04.2019 and acquit the appellants/



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accused.

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For Appellants
in Crl.A.No.329/2019 : Mr.C.D.Johnson

in Crl.A.No.338/2019 : Mr.R.C.Paul Kanagaraj

For Respondent : Mr.E.Raj Thilak
Additional Public Prosecutor

COMMON JUDGMENT

(Order of the Court was made by SUNDER MOHAN,J.)

Challenging the conviction and sentence imposed vide judgment dated 15.04.2019 in S.C.No.448 of 2011, on the file of the learned II Additional Sessions Judge, Chennai, Accused No.1 has preferred Crl.A.No.329 of 2019 and Accused Nos.2 and 3, have preferred Crl.A.No.338 of 2019. Both the appeals are taken up together, heard and disposed of by way of this Common Judgment.

2. For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

3.(i) It is the case of the prosecution that A1 was a history sheet



rowdy; that the deceased was a police informer; that because of the steps taken by the deceased, the police had taken action against A1 in several cases; that hence, A1 decided to do away with the deceased with the help of A2 and A3; that on 20.08.2011 at about 9.30 p.m., when the deceased was going along with his sister and other relatives, A1 to A3 waylaid the deceased; that A2 and A3 held the deceased and A1 picked up a broken bottle and stabbed the deceased on the left abdomen; and that the deceased succumbed to the injuries at the hospital, on 25.08.2011 at about 11.10 pm.

(ii) PW1, the sister of the deceased, lodged a complaint [Ex.P1] and PW15, the Inspector of Police, received the complaint registered an FIR [Ex.P13] in Cr.No.1907 of 2011 against the accused, for the offences under Sections 341, 307 and 506 (ii) of the IPC. Thereafter, he went to the scene of the occurrence, prepared the Observation Mahazar [Ex.P15] and Rough Sketch [Ex.P14]. He examined the witnesses and on 21.08.2011, arrested A2 and recorded his confession, based on which, he arrested A1 and A3 near SIET Bus Stop and recorded their confession. On 25.08.2011, at about 23.10 hours, he received the information that the victim died in the hospital



and hence, altered the offence to Sections 341, 302 and 506 (ii) of the IPC.

The alteration report is marked as Ex.P17. On 26.08.2011, at about 7.00 a.m., he went to the hospital and conducted the inquest over the dead body of the deceased between 7.30 a.m. to 9.30 a.m., in the presence of panchayathars and examined the doctor, who treated the deceased and prepared the inquest report [Ex.P18]. Thereafter, he sent the body of the deceased for postmortem, which was conducted by PW12, who had issued Ex.P10-Postmortem certificate. After examination of all other witnesses, he filed the final report against the accused for the offences under Sections 341, 302 and 506 (ii) of the IPC before the learned XVIII Metropolitan Magistrate, Saidapet, Chennai.

(iii) On the appearance of the appellants, the provisions of Section 207 Cr.P.C., were complied with, and was committed to the Court of Session in S.C.No.448 of 2011 and made over to the learned Additional Sessions Judge, Chennai, for trial. The trial Court framed charges for the offences under Sections 341, 302 r/w 34 and 506 (ii) of the IPC against the appellants, and when questioned, the appellants pleaded 'not guilty'.



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(iv) To prove the case, the prosecution examined 15 witnesses as P.W.1 to P.W.15, marked 21 exhibits as Exs.P1 to Ex.P21 and marked 3 material objects as M.O.I to M.O.III. When the appellants were questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against them, they denied the same. The appellants neither examined any witness nor marked any document on their side. However, the Serology Reports were marked as Ex.C1 and Ex.C2.

(v) On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established its case beyond reasonable doubt and held A1 guilty of the offences under Sections 341 and 302 of the IPC and Accused Nos.2 and 3, guilty of the offences under Sections 341 and 302 r/w 34 of the IPC. The appellants were sentenced as follows:

<i>Accused No.</i>	<i>Offence under</i>	<i>Sentence imposed</i>
A1	341 IPC	To undergo SI for one month and to pay a fine of Rs.500/- in default to undergo SI for one week.
	302 IPC	To undergo life imprisonment and to pay a fine of Rs.5,000/-, in default to undergo RI for six months.
A2 & A3	341 IPC	Each of them to undergo SI for one month



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<i>Accused No.</i>	<i>Offence under</i>	<i>Sentence imposed</i>
		and to pay a fine of Rs.500/- in default to undergo SI for one week.
	302 r/w 34 IPC	Each of them to undergo life imprisonment and to pay a fine of Rs.5,000/-, in default to undergo RI for six months.
The sentences were ordered to run concurrently.		

Hence, the accused have preferred these appeals, challenging the said conviction and sentence.

4. Heard, Mr.C.D.Johnson, learned counsel appearing for A1/appellant in Crl.A.No.329 of 2019; Mr.R.C.Paul Kanakaraj, learned counsel appearing for A2 & A3/appellants in Crl.A.No.338 of 2019; and Mr.E.Raj Thilak, learned Additional Public Prosecutor appearing for the respondent/State.

5.(i) The learned counsels for the appellants submitted that none of the eyewitnesses examined by the prosecution can be relied upon and the FIR is fabricated; that the version in the FIR is contrary to the entries made in the Accident Register [Ex.P2] and the dying declaration said to have been given by the deceased to his wife [PW6]; and that the FIR was sent to the



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Magistrate only the next day, i.e., on 21.08.2011 at 5.45p.m., and therefore, fabrication cannot be ruled out.

(ii) The learned counsels further submitted that all the eyewitnesses were recalled and during cross examination, they turned hostile and stated that they were not aware of the occurrence, hence, they prayed for acquittal of the appellants.

6. The learned Additional Public Prosecutor *per contra* submitted that the witnesses were recalled after six years and therefore, the evidence recorded in the cross examination may be ignored and the evidence of witnesses, coupled with the other evidence on record, including the dying declaration said to have been made to PW6 by the deceased would establish the guilt of the accused and therefore, submitted that no interference is called for in the judgment of the trial Court.

7. We have carefully considered the rival submissions and have perused all the relevant records.



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8. As stated earlier, the prosecution has examined 15 witnesses. PW1, is the sister of the deceased. PW2, is the husband of PW1. PW3, is the son of PW1. PW1 to PW3 were all eyewitnesses, according to the prosecution and supported the prosecution case, till they were recalled for further cross examination, six years later. PW4, is the Doctor who made entries in the Accident Register [Ex.P2] and had treated the deceased till he died five days after the occurrence. PW5 is another eyewitness, who supported the case of the prosecution. PW6 is the wife of the deceased, to whom the deceased is said to have stated as to who attacked him. PW7 is the observation mahazar witness. PW8 is the Assistant Executive Engineer of the Electricity Department to prove that there was uninterrupted power supply in the place of occurrence. PW9 is the corpse constable. PW10 is the doctor who conducted a surgery on the deceased to remove the glass pieces and had marked the same as M.O.3. PW11 is the doctor who issued the death certificate of the deceased. PW12 is the doctor who conducted postmortem. PW13 is the Forensic Sciences expert, who issued the report [Ex.P11]. PW14, is the witness to the arrest and confession of the accused



and PW15 is the investigating officer.

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9. From the above narrative, it could be seen that PW1 to PW3 who were closely related to the deceased, originally supported the prosecution case and turned hostile, when they were recalled a few years later. In the cross examination they had stated that their deposition in chief is not true and that they were not aware of the occurrence. It is highly unsafe to rely upon such witnesses. Even if we were to believe their deposition in chief examination and ignore their deposition in cross examination by accepting the submissions on behalf of the prosecution that they were won over, though that has not been established, their version is not consistent with the other evidence on record.

10. In the Accident Register [Ex.P2] which was recorded by PW4, it is mentioned as follows:

“H/o. assault by one known person using broken bottle
over left side abdomen”.

It is also mentioned that the patient was conscious and he had made the said statement. The presence of three persons is not referred to in the said



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Accident Register.

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11. That apart, we find from the evidence of PW6, the wife of the deceased, who had consistently supported the prosecution case, that the deceased had told her that it was A1, who had caused the injury with a broken bottle. Even to PW6, the deceased has not stated about the involvement of A2 and A3. The relevant portion of PW6's evidence reads as follows:

“அப்போது எனது கணவரிடம் என்ன நடந்தது என்று கேட்டபோது அவர் தவக்களை என்ற பிரகாஷ் என்னை குத்திவிட்டான் என்று கூறினார். ஏன் குத்தி விட்டார் என்று கேட்டதற்கு போலீசிடம் அவரைப்பற்றி தகவல் கூறியதால் நீ தான் அடிக்கடி போலீஸ்க்கு தகவல் கூறுவதாக என்று கூறி தன்னை குத்திவிட்டதாக கூறினார்.”

12. Therefore, we are unable to accept the prosecution case that three persons were involved in the occurrence and since the version in the FIR itself appears to be doubtful, we are also not inclined to accept the evidence of PW5, who was also examined as an eyewitness. As submitted by the learned counsel for the appellants, the FIR, as stated earlier, was sent to the



Magistrate only at 5.45 p.m., the next day. ***Hence, A2 and A3 are entitled to acquittal.***

13. However, in the facts and circumstances of the case, we are not inclined to disbelieve the entire prosecution case, as the Accident Register [Ex.P2] and the evidence of PW6, which are consistent with each other, refer to the involvement of one person and the said person, is A1. Therefore, we are of the view that the prosecution had established that A1 was involved in the attack on the deceased.

14. The next question is as to whether, considering the nature of the weapon used and the injury, A1 had the requisite *mens rea* to hold him guilty of the offence of murder. It is the admitted case, A1 has inflicted a single stab injury on the left abdomen. The deceased died five days after the occurrence and the Postmortem report [Ex.P10] shows that the deceased died due to complications of a stab injury to the left side of the abdomen. This establishes that the deceased suffered a homicidal death. In Ex.P9-



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Mortuary Card, the cause of death is shown as follows:

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“STAB INJURY ABDOMEN
SEPTICEMIA
MULTIORGAN DYSFUNCTION SYNDROME
ACUTE RESPIRATORY DISTRESS SYNDROME”

15. The accused had not carried any weapon to attack the deceased.

It is the prosecution case that he picked up the bottle lying in the road and inflicted a single stab injury. The prosecution witnesses, especially PW1 to PW3 are unbelievable, as stated earlier and therefore, their version with regard to the exact manner of occurrence, cannot be relied upon. But the attack on the deceased by A1, is otherwise established.

16. Considering all the above facts, it is very difficult to conclude that A1 had the requisite *mens rea* to commit murder within the meaning of Section 300 of the IPC. The Hon'ble Supreme Court in ***Anbazhagan v. The State represented by the Inspector of Police***, reported in **2023 (10) Scale 173**, had culled out a few important principles of law based on the decisions of the Hon'ble Supreme Court and in Paragraph No.60, which reads as



follows:

“60. Few important principles of law discernible from the aforesaid discussion may be summed up thus:-

(1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused. To illustrate : 'A' is bound hand and foot. 'B' comes and placing his revolver against the head of 'A', shoots 'A' in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of 'B' in shooting 'A' was to kill him, though only single injury was caused. The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, 'B' sneaks into the bed room of his enemy 'A' while the latter is asleep on his bed. Taking aim at the left chest of 'A', 'B' forcibly plunges a sword in the left chest of 'A' and runs away. 'A' dies shortly thereafter. The injury to 'A' was found to be sufficient in ordinary course of nature to cause death. There may be no difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of the IPC and render him guilty of the offence of murder although only single injury was caused.

(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the



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purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3rd part of Section 299 of the IPC.

(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

(4) Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the IPC, are fulfilled and the offence would



be murder.

(5) Section 304 of the IPC will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

(6) The word 'likely' means probably and it is distinguished from more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

(7) The distinction between culpable homicide (Section 299



of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

(8) The court must address itself to the question of mens rea. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

(9) Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary course of nature to cause death also makes a culpable homicide a murder if death has actually been caused and



intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention or not, is a question of fact which has to be determined on the facts of each case.

(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.

(12) In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC.”

17. Considering the facts that the motive has not been clearly established; the presence of A2 and A3 also has not been conclusively



established; the deceased died five days after the occurrence due to septicemia; a surgery was performed on him; and that a bottle piece which was lying on the road was picked up and used by A1 in the attack, and also considering the principles laid down by the Hon'ble Supreme Court in Anbazhagan's case [cited supra], we are of the view that the act of A1 only had the requisite intention to commit the offence of culpable homicide viz., causing the bodily injury which is “likely” to cause death and therefore, he would be guilty of the offence under Section 304 (I) of the IPC.

18. Accordingly, in the facts and circumstances of the case, we deem it appropriate to impose the sentence of seven years of rigorous imprisonment for the said offence of Section 304 (I) IPC against A1 and to pay a fine of Rs.5,000/- in default to undergo Rigorous Imprisonment for a period of six months.



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19. In the result,

(a) **The Criminal Appeal No.338 of 2019 filed by A2 and A3, is allowed** and the conviction and sentence imposed upon them vide judgment in S.C.No.448 of 2011, dated 15.04.2019 on the file of the learned II Additional Sessions Judge, Chennai, are set aside. The appellants/A2 and A3 are acquitted of all charges and directed to be released forthwith, unless their presence is required in connection with any other case. The fine amounts, if any, paid by the appellants shall be refunded. Bail bonds, if any, executed shall stand discharged.

(b) **The Criminal Appeal No.329 of 2019 filed by A1 is Partly Allowed.** The judgment of conviction and sentence vide judgment in S.C.No.448 of 2011, dated 15.04.2019 on the file of the learned II Additional Sessions Judge, Chennai, as against A1 is modified as follows:

(i) A1 is convicted for the offence under Section 304 (I) of the IPC instead of Section 302 of the IPC and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.5,000/- in default to undergo Rigorous Imprisonment for a



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period of six months. ;

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(ii). The conviction and sentence imposed upon the A1 by the trial Court for the offence under Section 341 of the IPC, are confirmed;

(iii). The sentences are directed to run concurrently; and

(iv) It is directed that the period of sentence already undergone by A1 shall be set off under Section 428 Cr.P.C.

(M.S.R.,J.) (S.M.,J.)

29.07.2024

Index : yes/no
Speaking /Non-speaking order
Neutral citation : yes/no
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M.S.RAMESH,J.

AND

SUNDER MOHAN,J.

ars

To

1. The II Additional Sessions Judge,
Chennai.

2. The Inspector of Police,
E-3 Teynampet Police Station,
Chennai.

3. The Superintendent,
Central Prison, Puzhal, Chennai

4. The Public Prosecutor,
High Court, Madras.

Pre-delivery common judgment in
Crl.A.Nos.329 and 338 of 2019

29.07.2024