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Crl.A(MD)No.61 of 2021



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.02.2024

CORAM :

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

Crl.A(MD)No.61 of 2021

Gandhimathi

... Appellant

vs.

State Rep. by
The Inspector of Police,
Tirunelveli Town Police Station,
Tirunelveli City.
(Crime No.155 of 2019)

... Respondent

Appeal filed under Section 374 of the Criminal Procedure Code, 1973, to call for the records in S.C.No.375 of 2020 dated 16.12.2020 on the file of learned 4th Additional District and Sessions Court, Tirunelveli, set aside the judgment and acquit the appellant/sole accused.

For Appellant : Mr.N.Mohideen Basha
For Respondent : Mr.E.Antony Sahaya Prabahar
Additional Public Prosecutor

J U D G M E N T

DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.

Appeal is by sole accused convicted for offence under Section 302 IPC and sentenced to undergo imprisonment for life with a fine of Rs.5,000/- in default to undergo 3 years rigorous imprisonment.



The charge as framed by the trial Court based on the materials collected during the course of investigation is that the accused Gandhimathi earlier married one Venkatesan and blessed with one daughter. In the year 2007, the said Venkatesan died and thereafter she married one Radhakrishnan and through him, she has one son and one daughter. The said Radhakrishnan is Painter by profession. He used to drink Alcohol and became an addict. He had been regularly abusing his wife Gandhimathi [accused] and causing cruelty. While so, on 08.05.2019 at their residence about 10.00 p.m., the said Radhakrishnan came home in a drunken mood and caused sexual torture. When Gandhimathi refused to have cohabitation, Radhakrishnan had abused her in filthy language unmindful of the fact that the children are present. Therefore, Gandhimathi has attacked Radhakrishnan severely by hitting his head on the floor repeatedly and thereafter strangled his neck using a nylon rope causing his death. Hence, charge under Section 302 IPC for intentionally causing death of Radhakrishnan been framed and tried.

2. To prove the charge, the Prosecution has examined 20 witnesses, marked 22 exhibits through them besides 4 material objects. The Court below on appreciating the evidence has arrived at the conclusion that the guilt of the accused proved beyond doubt for offence



under Section 302 IPC causing death with intention. The present appeal is preferred on the ground that the Court below miserably failed to take note of the fact that apart from the deceased and the accused, their children were present in the house but they were not examined though they are the best witnesses. The occurrence is alleged to have taken place on 08.05.2019 about 10.00 p.m., whereas the Police has registered FIR at 12.30 hours on 09.05.2019. According to the Prosecution, the informant is the Village Administrative Officer to whom the accused alleged to have confessed about her guilt. However, the witnesses to the prosecution invariably deposed that Police were present in the scene of occurrence at 06.00 a.m on 09.05.2019. The evidence further reveals that the body was taken with the help of Ambulance by 8.00 a.m in the morning. However, unexpected delay in registering the FIR causes doubt about the case of the prosecution.

3. Further, the learned counsel appearing for the appellant submitted that the extra judicial confession statement relied by the Prosecution is highly doubtful and if the version of the accused as found in the confession statement is to be believed, then there must be some injury on the head of the deceased since the accused has confessed that she first banged her husband on the floor repeatedly and only thereafter



strangulated his neck using nylon rope marked as M.O.3. However, the postmortem report marked as Ex.P10 does not indicate any head injury. Since the hyoid bone been intact, the theory of the prosecution that the accused first banged the deceased on the floor and thereafter strangulated his neck using M.O.3 gets falsified. The learned counsel for the appellant finally submitted that apart from the inconsistency in the case of the prosecution which creates doubt about the version projected by the Prosecution, there is a sustained provocation caused to the appellant which has led to the incident and even on that score, the appellant is entitled for acquittal.

4. Per contra, the learned Additional Public Prosecutor appearing for the State submitted that the occurrence has taken place inside the closed wall and the appellant is the only adult member present apart from the deceased in the house, who has to explain how the deceased died. The postmortem report though says that hyoid bone is intact but the Doctor has observed that complete horizontal ligature mark of length 45 cm and breadth 1cm seen around the neck. Its upper margin lies 7cm below right mastoid, 7cm below chin and 7 cm below left ear. The Doctor who has conducted the postmortem been examined as PW16. He had opined that the death might have caused by asphyxia due to



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strangulation. Regarding non examination of the minor children, it is stated by the Prosecutor that the minor children having lost their father and the mother as accused will not be a reliable witness and further the confession statement of the appellant to the Village Administrative Officer coupled with other circumstantial evidence particularly, the testimony of PW1 and PW2 clearly prove without doubt that the appellant alone is the accused in the case who has caused the death of Radhakrishnan.

5. Heard the counsels. Evidence perused.

6. The case of the Prosecution is based on the evidence of PW1 who has set the law into motion. She is the Village Administrative Officer of the concerned village. According to her, on 08.05.2019 at about 10.00 a.m., when she and her Assistant were in the office, the accused/appellant came to her office and with remorse confessed about her guilt of committing murder of her husband. The statement which is confessional in nature been recorded and same is marked as Ex.A1. PW1 and her Assistant had signed in it. The content of the statement been deposed by PW1. Thereafter, the accused along with statement had been taken to the Police leading to registration of FIR.



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7. In this regard, the evidence of PW5 also warrants consideration since PW5 is the neighbouring resident. He has specifically stated that on the fateful night of 08.05.2019, there was a fight between husband and wife as usual. Radhakrishnan was quarrelling with his wife [appellant] loudly but after 11.00 p.m., there was no noise. On the next day when the Police came, he came to know about the murder of Radhakrishnan. Though this witness was treated as hostile since he has not supported the case of the prosecution, on other aspects, as far as the circumstances as spoken by PW5, it requires explanation from the accused who alone can dispel the strong suspicion as well as the presumption against her.

8. PW2 Kannan is the brother-in-law of the deceased. He came to know about the death of the deceased through the accused who had called the wife of PW2 over phone and informed that Radhakrishnan died due to fall in the bathroom. Thereafter, when he reached Tirunelveli Town, he came to know that the accused is in the Tirunelveli Town Police Station. According to the said witness, this has happened at 12.00 noon on 09.05.2019. There is no cross examination of PW5 in respect of his evidence that he heard fighting noise of the accused and deceased on the fateful night but after 11.00 p.m., it stopped.



9. Now coming to the postmortem report and viscera report along with the opinion given by the Doctor, the deceased being a chronic alcoholic was fully drunk and his stomach and it's contents detected about 995.0 milligrams of ethyl alcohol, intestine and it's contents detected 242.0 milligrams of ethyl alcohol and liver and kidney detected 633.0 milligrams of ethyl alcohol. The Doctor has opined that he would have died of Asphyxia due to strangulation. The ligature mark on the neck of the deceased corroborates the statement of the accused given to the Village Administrative Officer. The discrepancies both at the time of receiving the information regarding the FIR and forwarding it to the Magistrate does not impeach the case of the prosecution for the reason that other material evidence more of circumstantial in nature sufficiently and unerringly prove that the appellant had caused the death of Radhakrishnan.

10. However, whether the act of causing death was intentional or with knowledge that the injury is sufficient to cause death or whether her act to be considered as a culpable homicide not amounting to murder is to be seen. The learned counsel for the appellant submitted that circumstantial evidence which is pitted against the appellant also without any contradiction indicates that the deceased was a chronic alcoholic and



used to pick quarrel with his wife/accused and used to abuse her in filthy language and also tortured her sexually in front of their children. This amounts to a provocation and the sustained provocation principle is to be applied. In support of his submission, the learned appellant counsel would rely upon the judgment of the Hon'ble Supreme Court in **Dauvaram Nirmalkar vs. State of Chhattisgarh** reported in **2022 Live Law (SC) 650**, wherein the Hon'ble Supreme Court after referring the oft-quoted judgment of the Supreme Court in **K.M.Nanavati vs. State of Maharashtra** reported in **1962 Supp (1) SCR 567** has held as below:

12. The question of loss of self-control by grave and sudden provocation is a question of fact. Act of provocation and loss of self-control, must be actual and reasonable. The law attaches great importance to two things when defence of provocation is taken under Exception 1 to Section 300 of the IPC. First, whether there was an intervening period for the passion to cool and for the accused to regain dominance and control over his mind. Secondly, the mode of resentment should bear some relationship to the sort of provocation that has been given. The retaliation should be proportionate to the provocation. The first part lays emphasis on whether the accused acting as a reasonable man had time to reflect and cool down. The offender is presumed to possess the general power of self-control of an ordinary or reasonable man, belonging to the same class of society as the accused, placed in the same situation in which the accused is placed, to temporarily lose the power of self-control. The second part emphasises that the offender's reaction to the provocation is to be judged on the basis of whether the provocation was sufficient to bring about a loss of self-control in the fact situation. Here again, the court



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would have to apply the test of a reasonable person in the circumstances. While examining these questions, we should not be short-sighted, and must take into account the whole of the events, including the events on the day of the fatality, as these are relevant for deciding whether the accused was acting under the cumulative and continuing stress of provocation. Gravity of provocation turns upon the whole of the victim's abusive behaviour towards the accused. Gravity does not hinge upon a single or last act of provocation deemed sufficient by itself to trigger the punitive action. Last provocation has to be considered in light of the previous provocative acts or words, serious enough to cause the accused to lose his self-control. The cumulative or sustained provocation test would be satisfied when the accused's retaliation was immediately preceded and precipitated by some sort of provocative conduct, which would satisfy the requirement of sudden or immediate provocation.

13. Thus, the gravity of the provocation can be assessed by taking into account the history of the abuse and need not be confined to the gravity of the final provocative act in the form of acts, words or gestures. The final wrongdoing, triggering off the accused's reaction, should be identified to show that there was temporary loss of self-control and the accused had acted without planning and premeditation. This has been aptly summarised by George Mousourakis's elucidation in his paper 'Cumulative Provocation and Partial Defences in English Criminal Law' and 1975 Criminal LR 558-559 in the following words:

"[T]he significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased's final act and the accused's retaliation should continue to tell against him. The point is that the significance of the deceased's final act and its effect upon the accused - and indeed the relation of the retaliation to that act - can be neither understood nor evaluated without reference to previous dealings between the parties"

Exception 1 to Section 300 recognises that when a reasonable person is tormented continuously, he may, at one point of time, erupt



and reach a break point whereby losing self-control, going astray and committing the offence. However, sustained provocation principle does not do away with the requirement of immediate or the final provocative act, words or gesture, which should be verifiable. Further, this defence would not be available if there is evidence of reflection or planning as they mirror exercise of calculation and premeditation."

11. It is also profitable to refer a judgment of the Madras High Court in **Rajendran and Etc. vs. State of Tamil Nadu [Crl.A.Nos.657 of 1987 and 129 of 1990 decided on 03.03.1997]** which was rendered in the year 1997, wherein the principle of sustained provocation been discussed in the following words:

"37. As per Exception 1 to Section 300 of the Indian Penal Code, culpable homicide is not murder, if the offender, while depriving of the power of self-control by grave and sudden provocation, caused the death of the deceased. So, we have to assess whether the offender was out of the power of self-control and whether such deprivation was due to the grave and sudden provocation. For finding out this situation, we have to keep in our mind, earlier situations and circumstances.

38. There may be the acts of sudden provocation at to lead to loss of self-control without any previous history. There may be some acts of provocation, which, if considered in isolation would not be sufficiently grave so as to cause loss of power and self-control. Some of the circumstances even may appear as an important to some persons, but they may assume the status of gravity in view of the state of mind of the persons concerned on account of previous history.

39. The sustenance of power of self-control differs from man to man. If the offending acts are of the same nature and emanate from



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the same persons as in this case, these acts could have a cumulative effect and each time there is added strain on the concerned individual to keep himself controlled and his patience should not be overtaxed. Thus, we would call, in common parlance, even the last straw which may be weak could break camel's back."

12. In this judgment also, **Nanavathi's case** (cited supra) has been referred and it was ultimately held that the mental background created by the previous act of the victim should also be taken into consideration in ascertaining whether the subsequent acts caused grave and sudden provocation for committing the offence.

13. While considering the mitigating circumstances, it is the case of the appellant that there was a sustained provocation. Though this Court visualize the unbearable torment caused by the deceased to the appellant through the argument of the learned counsel for the appellant, there are no evidence disclosing as to how the deceased has caused provocation to the accused. However, there are instances in the confession statement of the accused.

14. It is well settled principles of law that under Section 25 of the Indian Evidence Act, the confession statement of the accused shall not be proved against the accused. However, there is no express



prohibition in any of the Statute to use the confession statement **in favour** of the accused to advance and to find out the possible defence put-forth by the accused. In this regard, it is useful to refer the oft quoted judgment of this Court in *Mottai Thevan-Vs-State*, reported in **1951 SCC Online Mad 247**, which has been subsequently followed by the Division Bench of this Court in *Re : Ganesan* case, reported in **1973-L.W(Crl.) 42** and in *Balu-Vs-State* reported in **2013-1-LW(Crl.)579**. Apart from that, the Hon'ble Supreme Court has also applied this principles in *Murli Alias Denny-Vs-State of Rajasthan*, reported in **1995 SCC(Crl.)57**.

15. With the above legal principles while considering Ex.A.1- confession statement, the appellant spoke about the continues sexual torture committed by the deceased and on the fateful day, when similar torture was faced by the appellant as projected by the prosecution, the same had become last straw that had broken the camel's back, as held in *Rajendran and Another-Vs-State of Tamil Nadu, rep. by Inspector of Police, Neyveli Police Station, Neyveli*, reported in **1997 SCC Online Mad 191**.



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16. In the light of the above discussion of the facts and the law, this Court is in total agreement with the submissions made by the learned counsel for the appellant that it is a case which falls under the first exception to Section 300 IPC and therefore, it has to be treated as culpable homicide not amounting to murder. The offence therefore should fall under 1st Exception of Section 300 IPC. Accordingly, the sentence warrants modification.

17. Learned counsel for the appellant submitted that three children are now dependents of the appellant and she has already suffered in her life at the hands of the deceased. Hence, contended that any further incarceration in the Prison will amount to double jeopardy.

18. This Court, after having given anxious consideration to the submissions finds force in the submission and is inclined to alter the sentence from Section 302 IPC to Section 304 Part-1 IPC, and modifies the punishment of life imprisonment to a term of three years rigorous imprisonment along with fine of Rs.1,000/- (Rupees one thousand only). In default to pay fine, the appellant must undergo further two months simple imprisonment. The period of imprisonment already undergone shall be set off under Section 428 IPC. The bail bond executed by the



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Crl.A(MD)No.61 of 2021



appellant shall stand cancelled. The appellant shall surrender before the trial Court within a period of 30 days from today, to undergo the remaining period of sentence, failing which, the respondent Police shall secure the accused and commit her to prison after the expiry of the said 30 days.

19. With the above modification in sentence, the Criminal Appeal is partly allowed.

(G.J., J.) (C.K., J.)
22.02.2024

Index : Yes / No
Neutral Citation : Yes / No
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To

1. The Inspector of Police,
Tirunelveli Town Police Station,
Tirunelveli City.
(Crime No.155 of 2019)

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



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JUDGMENT MADE IN
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