



Crl.A(MD)No.94 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 27.02.2024

Delivered on : 15.03.2024

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

AND

THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN

Crl.A(MD)No.94 of 2021

Ganesan

... Appellant/Sole accused

Vs.

State represented by
The Inspector of Police,
Ulagampatti Police Station
Sivagangai District.
(Crime No.33 of 2010)

... Respondent/Complaint

Prayer: This Criminal Appeal is filed under Section 374(2) of Cr.P.C., against the judgment dated 19.02.2020 passed in S.C.No.186 of 2010 on the file of the learned Mahila Fast Track Court, Sivagangai.

For Appellant : Mr.M.Jegadesh Pandian

For Respondent : Mr.RMS.Sethuraman

Additional Public Prosecutor



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JUDGMENT

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

The instant criminal appeal has been filed by the sole accused against the conviction judgment dated 19.02.2020 passed in S.C.No.186 of 2010 by the learned Mahila Fast Track Court, Sivagangai, in and by which, the appellant was convicted for the offences under Section 354 IPC and sentenced to undergo 2 years of rigorous imprisonment and imposed a fine of Rs.1,000/- in default to undergo 3 months rigorous imprisonment. Similarly for the offence under Section 302 IPC he was sentenced to undergo the life imprisonment and to pay a fine of Rs.2,000/-, in default, to undergo one year rigorous imprisonment. Further, for the offence under Section 309 IPC he was sentenced to undergo one year simple imprisonment.

2.The case of the prosecution is that,

On 25.03.2010, at about 09.30 a.m, when the deceased was alone in the residence, the accused attempted to commit rape against her. The attempt was resisted by the deceased and raised noise. Furiated, by the conduct of the



victim, the accused took a hammer and attacked the deceased on her head and caused head injuries. On hearing the distress sound raised by the deceased, the witnesses P.W.13 and P.W.14 rushed to the scene of occurrence. While so, the accused ran away from the scene of occurrence with hammer. The witnesses, on seeing the deceased, who was on the floor with blood in her face and the head, took her to the hospital. However, in spite of treatment, on the next day, at about 01.00 'o' clock, the victim died.

2.2.On knowing about the death of the deceased, her father P.W.1 came down from Kumbakonam and rushed to the hospital. On seeing the victim and on hearing the nature of occurrence, he set the law in to motion through his complaint(Ex.A.1) dated 26.03.2010 at 02.15 p.m. On receipt of the complaint, P.W.17-Sub Inspector has registered the FIR in Crime No.33 of 2010 for the offences under Sections 354 and 302 IPC and forwarded the same to the concerned judicial Magistrate Court. The said FIR was received in Court on 27.03.2020. Thereafter, the Investigating Officer- P.W.18 took up the investigation and rushed to the scene of occurrence and prepared observation mahazar and rough sketch in the presence of the witnesses. Thereafter, he also



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recorded the statement of Nagarajan-P.W.1 and Poongothai-P.W.2, who are the parents of the deceased, and on 26.03.2010, the body was sent to the Government Hospital at Ponnamaravathi for conducting postmortem, where he prepared inquest report-Ex.A.11. He also collected the clothes of the deceased and forwarded the same to the Court under Form-95. Thereafter, he arrested the accused, on 27.3.2010 at about 07.00 a.m.

2.3.After the arrest in the presence of P.W.8-Maharajan(VAO) and in the presence of another witnesses, recorded the confession of the accused and recovered the Hammer. Thereafter, on 23.04.2010 he sent alteration report-Ex.P.14 altering the charge to 354, 302 and 309 IPC. Thereafter, the Investigating Officer examined the Doctor, who examined the deceased and the doctor who conducted the postmortem. Further, the Investigating Officer-P.W.18 has collected the accident report of the accused-Ex.P.2. Thus, after completing the investigation, he laid a charge sheet against the accused for the offence under Sections 309, 354 and 302 IPC.



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3.Before the trial Court, on behalf of the prosecution, 18 witnesses was examined as P.W.1 to P.W.18 and 15 documents were marked as Ex.P.1 to Ex.P.15. Three material objects were also marked as M.O.1 to M.O.3. However, no document was marked and no witness was examined on the side of the accused.

4.The trial Court, after having considered the oral and documentary evidence and on considering the material objects, found that the accused is guilty under Sections 354, 302 and 309 IPC. Aggrieved with the said conviction, the sole accused is before this Court.

5.The learned counsel appearing for the appellant/accused would contend that there are no eye witnesses to the occurrence and that the rough sketch-Ex.P.10 did not disclose about the existence of the agricultural field near the scene of occurrence. The learned counsel would further contend that according to the rough sketch, there were many houses nearby the scene of occurrence, but none of the neighbors were examined. It was also contended by the learned counsel for the appellant that, even according to the prosecution



case, the accused too became unconscious due to consumption of poison.

Therefore, the recovery and arrest as projected by the prosecution is *Ipso facto* false. It was also contended by the learned counsel for the appellant that there were wild contradiction between the evidence of P.W.3 about the hospital in which the deceased was first treated. The learned counsel for the appellant further contended that there were unexplained delay in registering the FIR. Hence, the learned counsel would contend that there is serious doubt in the prosecution case. Hence, he prays to allow the appeal by interfering with the order of the trial Court.

6.Per contra, the learned Additional Public Prosecutor appearing for the State would contend that, though there was some delay in preferring the complaint, the same become in significant in the presence of impeccable testimony of the eye witnesses, and whose evidences were corroborated by the subsequent conduct of the accused and his non-explanation as to the cause of the death of the deceased when the deceased and the accused were alone in the scene of occurrence. It was also contended by the learned Additional Public Prosecutor that the consumption of poison by the accused immediately after the



occurrence would also relevant consideration in deciding the appeal. It is the further submission of the learned Additional Public Prosecutor that the trial Court has appreciated the evidence in its right perspective and imposed the appropriate punishment. Hence, contended that the conviction does not deserve any interference. Hence, he prayed to dismiss the appeal.

7.We have given our anxious consideration on the submissions made by either side.

8.The first and foremost submission of the learned counsel for the appellant is that, though the occurrence was on 25.03.2010 at about 09.30 a.m., the father of the deceased gave a complaint only on 26.03.2010 at about 02.15 p.m. Therefore, such long delay in preferring the complaint would impeach the prosecution case by depriving the spontaneity. No doubt, there was a delay of nearly 17 hours in preferring the complaint. But according to the prosecution the complainant was not in the village on the fateful day.



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9.At this juncture, the learned counsel for the appellant would draw the attention of this Court in respect of the doctor's report(Ex.P.6) of the deceased, wherein, it was recorded that the deceased fell down in a Well. However while examining the Doctor,(P.W.9), who gave a report-Ex.P.6 stated that the said information was informed by one Selvaraj. Admittedly, at the time of admission, the deceased was unconscious. Therefore, on record there was some delay in registering the complaint, and also there was discrepancy in respect of nature of occurrence as found in the doctor's report-Ex.P.15. Hence, it is the duty of this Court to find out whether this discrepancy would stare against the prosecution and would cause a reasonable doubt in the prosecution case.

10.In this regard, the learned Additional Public Prosecutor would draw the attention of this Court about the evidence of P.W.2, who is the mother of the deceased, and another witness P.W.3, who is also the occurrence witness. Both had consistently spoken that when they reached the scene of occurrence on hearing the hue and cry from his daughter, the accused came out from house(the scene of occurrence) along with a hammer, at the same transaction



while the witnesses entering the residence(scene of occurrence) they found that the deceased lie down on the floor with head injury. P.W.2-mother of the deceased had spoken that when she was entering the residence along with P.W. 3-Ammakannu, P.W.13-Palaniyappan and his wife P.W.14-Rani were present. She has further stated about the information divulged by the accused about his consumption of poison.

11.It is apparent that though Ex.P.6- doctor's report of the deceased, contains the reason for cause of injury as fall from Well, which factum was stoutly denied by all the eye witnesses. P.W.3-.Ammakannu, who is also the occurrence witness, had also spoken that when she was entering the residence of the deceased, the accused came out along with hammer and at the same transaction the deceased was in the floor with pool of blood. She has also spoken about the consumption of poison by the accused. she came to know about the consumption of poison only through the mouth of the accused. She was consistent in her testimony both in his chief and cross examination. This Court absolutely do not have any material to suspect the credibility P.W.2 and P.W.3.



12. In addition to that, the evidence of P.W.2 and P.W.3 have also been corroborated by P.W.13 and P.W.14, who are also the occurrence witnesses. Though they have been treated as hostile witnesses, their testimony is very much reliable, where P.W.13 has categorically stated that immediately on hearing hue and cry, when he entered the scene of occurrence, the deceased was on the floor with injury, and the accused ran away from the house. He also spoke that the deceased was admitted in Dr. Alagesan Hospital. In similar line, P.W.14, who is none other than the wife of P.W.13 has also deposed before this Court and she has also been treated as hostile witness. But the fact remains that both P.W.13 and P.W.14 have not been cross-examined by the accused.

13. Therefore, their evidence in respect of the accused's presence in the scene of occurrence and his conduct of fled away from the scene of occurrence, and the presence of the deceased body on the floor with injuries, and the consumption of poison, and the subsequent fall down of the accused nearby the scene of occurrence, are all unchallenged. Therefore, the unchallenged version of time of the incidence, scene of occurrence and consumption of poison by the accused would cumulatively strengthen the



testimony of the occurrence witnesses P.W.2 and P.W.3. Therefore, in the background of such sterling unimpeachable and overwhelming evidences, the discrepancy found in Ex.P.6-A.R copy of the deceased and the delay in giving complaint pales into insignificance.

14. There is no serious dispute about the residence of the accused. That the accused being the son-in-law of P.W.1 and P.W.2 and the sister's husband of the deceased, both the accused and the deceased were residing in the same house along with P.W.1 and P.W.2. Through the postmortem report it emerges that, the deceased sustained following injury.

“Moderately built and nourished female body lies on the back with both arms on the side. Symmetry of body – symmetrical colour of skin – fair. Length of hair head – shaven. Armpits – 3 cm Pubis – 6cm colour of hair – Black. No signs of decomposition. General appearance – do tally with police report. Eye lids – partially open mouth & lip – closed. Tongue inside the mouth ears – Normal. Generative organs – Normal extremities – normal Ribs – Intact. Heart – filled with Blood lungs – Normal. Hyoid Borne- Normal, stomach contents – Empty, Liver – Normal, spleen – Normal Kidney – Normal. Intestine – Empty. Bladder – Empty. Spinal and Normal.



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(i)Sutured wound 8 cm Rt. Side of occipital area of scalp
(ii)Sutured wound 3 cm Rt fore head (iii)Sutured wound 5 cm
lt., fore head (iv)Sutured wound 4 cm lt., occipital area of scalp
(v)Rt., frontal borne 5 cm full thickness (vi)Subdural
hammertoe 8 x 7 cm covering birth parietal lobes (vii) Base of
skull Rt. 8 cm full thickness (viii) Dot like intracerebral
Hemorrhages both sides.”

15.If there being the case, as per Section 106 of the Indian evidence Act, there is a duty cast upon the accused to explain as to how the injury was sustained by the deceased. Therefore, when there are no explanation from the mouth of the appellant about his non involvement and his alleged innocence, when such factum are exclusively within his knowledge, there is no other option except to presume the guilt of the accused. Further Such conduct of the accused would clearly complete the chain of event, unerringly pin point the culpability of the appellant without any other hypothesis.

16.In this regard, it is pertinent to refer the judgment of the Hon'ble Supreme Court in *State of W.B. v. Mir Mohammad Omar and Others.*, reported in (2000)8 SCC 382, wherein paragraph Nos.36, 37 and 38 are



extracted hereunder:

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“36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows: “When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambhu Nath Mehra v. State of Ajmer [AIR 1956 SC 404 : 1956 SCR 199 : 1956 Cri LJ 794] the learned Judge has stated the legal principle thus:

“This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or



at any rate disproportionately difficult for the prosecution to establish facts which are ‘especially’ within the knowledge of the accused and which he could prove without difficulty or inconvenience.”

17. Here palpably the appellant failed to discharge his burden. Therefore, when there are abundant evidence against the appellant's presence at the scene of occurrence coupled with his failure to discharge the burden as to the cause of death of the deceased would clearly demonstrate that the prosecution has proved the charge under Section 302 IPC beyond reasonable doubt.

18. It is also relevant to mention that, the subsequent conduct of the accused immediately after the occurrence would also further vindicate the culpability of the accused. Here, the learned counsel for the appellant would contend that the Doctor, who has given treatment to the appellant for the alleged consumption of poison was not examined. However, while perusing the document submitted by the prosecution, Ex.P.2 is the first accident register of the accused given at Valayapatti Hospital, and EX.P.15 was given to the accused at Government Headquarters Hospital at Pudukkottai.



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19.It is pertinent to mention here that Doctor who gave Ex.P.2 was examined as P.W.5. In his statement he has recorded that while the appellant was admitted he was in unconscious state, and that it was informed to him by one Ponnusamy that the appellant has consumed poison. Ex.P.2 and the evidence of P.W.5 is corroborated by the unchallenged testimony of P.W.13 and P.W.14. Therefore, this Court can safely arrive at a conclusion that the prosecution has also proved the offence of attempt to commit suicide under Section 309 IPC beyond reasonable doubt.

20.In respect of Section 354 IPC no witnesses have spoken about the outrage of modesty of deceased. Therefore, this Court is of the firm view that through the evidences of the prosecution witnesses, no ingredients were found for Section 354 IPC.

21.As rightly contended by the learned counsel for the appellant there are variance in respect of recovery of weapon. But the fact remains that, all the witnesses had seen the hammer in the hands of the appellant. Therefore, though this Court did not believe the arrest and recovery of weapon, the same



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will in no way dent the prosecution case in view of overwhelming of evidence of other witnesses.

22. There was also feeble attempt made by the learned counsel for the appellant that some of the witnesses more particularly, P.W.3 and P.W.11 had referred about one Alagesan Hospital, was the hospital where the deceased was first admitted. However, the document submitted by the prosecution qua doctor's report of the deceased which is marked as Ex.P.6 is in the name of Sri Durga Surgical Clinic & Research Centre. Therefore, it was contended that on the above discrepancy the prosecution case is highly doubtful. But, this Court is not persuaded with the submission made by the learned counsel for the appellant, on the simple ground that P.W.9 Dr. Alagesan, is a doctor in Sri Durga Surgical Clinic & Research Centre where the deceased was admitted. Therefore the reference of Alagesan Hospital by the above witnesses are natural and cannot be construed as contradiction.

23. Therefore, on cumulative consideration of all the above circumstances and the testimony of the witnesses, this Court is of the firm view that the conviction imposed by the trial Court under Section 302 and 309 IPC,



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is perfectly in order, as the prosecution has proved the above charges beyond reasonable doubt. However, as discussed herein above there are no ingredients made out to prove the charge under Section 354. Therefore, the conviction and punishment imposed against the appellant in respect of Section 354 IPC alone is liable to be set aside.

24. Accordingly, the Criminal Appeal is partly allowed and the judgment and conviction of the trial Court is confirmed in respect of the offences under Sections 302 and 309 IPC. However, the judgment and conviction in respect of the offence under Section 354 of IPC is set aside. Hence, the bail bond executed by the appellant shall stand cancelled. The appellant shall surrender before the trial Court within 15 days from today, to undergo the remaining period of sentence for the offence under Sections 302 and 309 IPC. Failing which, the respondent Police shall secure him and commit him to prison to undergo the remaining period of sentence.

(G.J.,J.) (C.K.,J.)
15.03.2024

NCC:Yes/No
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DR G. JAYACHANDRAN,J.
AND
C.KUMARAPPAN,J.
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To

- 1.The Mahila Fast Track Court,
Sivagangai.
- 2.The Inspector of Police,
Ulagampatti Police Station
Sivagangai District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 4.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

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