



CrI.A.(MD)No.253 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 21.08.2024

PRONOUNCED ON : 01.10.2024

CORAM

THE HON'BLE MR.JUSTICE **C.V.KARTHIKEYAN**
AND
THE HON'BLE MR.JUSTICE **J.SATHYA NARAYANA PRASAD**

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Sivapandi

... Appellant

VS

State represented by
The Inspector of Police,
Aundipatty Police Station,
Theni District.
(in Cr.No.552 of 2009)

...Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, to set aside the judgment and sentence passed in Sessions Case No.63 of 2016, dated 21.02.2020 on the file of the Additional District & Sessions Judge (FTC), Theni, convicting the appellant for the offence under Section 302 of IPC and sentence to undergo life imprisonment and imposed a fine of Rs.5,000/- in default to undergo a simple imprisonment for one year.



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For Appellant : Mr.V.Illanchezian
For Respondent : Mr.S.Ravi
Additional Public Prosecutor

JUDGMENT

(Judgment of this Court was delivered by **C.V.KARTHIKEYAN, J.**)

The accused in S.C.No.63 of 2016 aggrieved by the judgment dated 21.02.2020 by which judgment, the learned Additional District and Sessions Judge (FTC), Theni, had convicted him for offence punishable under Section 302 IPC and had sentenced him to undergo life imprisonment and fine of Rs.5,000/- in default to undergo imprisonment for a further period of one year simple imprisonment, has filed the present Criminal Appeal.

2.The case of the prosecution was that on 11.09.2009 at around 02.30 pm, when the appellant/accused and his friends were playing cards near Maravapatti Muthalamman Temple, the deceased Ranjith Kumar came there and sat down and started to advise one of the other players, Thangaraju, by saying *do not put that card, do not put this card* focussing against the accused. This led to a wordy quarrel between the accused and Ranjith



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Kumar, in the course of which, the deceased had abused the accused by using foul language and had taken a wooden log and assaulted the accused.

At that time, those who were present had separated them. The deceased then told the accused to come to the banyan tree in the village crematorium wherein, they can engage in a fist fight. The deceased shouted as above. All of them separated and went away.

3.It is the further case of the prosecution that later, the accused with intention to kill the deceased, purchased a soori knife at Andipatti. In the evening at 05.20 pm on the same day, 11.09.2009, he had challenged the deceased, Ranjith Kumar, who was standing near Maravapatti Muthallamman Temple and called him to have a fist fight. The deceased, Ranjith Kumar responded and walked in front, creating a big noise with the accused was following him. They went to the north of the banyan tree in Maravapatti crematorium, near Palpandi land and near the wall of the land of Kandasamy. It is the case of the prosecution that at around 5.30 p.m., the accused stabbed the deceased Ranjith Kumar in the back and also on the left side upper stomach and hit him on the left side lower chest causing blood injuries. The deceased Ranjith Kumar was taken to K.Vilakku Government



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Medical College and Hospital but died on the way at around 06.40 pm.

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4.The prosecution had thus laid a final report charging the accused with commission of offence punishable under Section 302 IPC. The final report was taken cognizance as P.R.C. No.07 of 2010 by the District Munsif-cum-Judicial Magistrate, Andipatti. Since the charge was triable exclusively by a Court of Sessions, after completing the formalities of furnishing copies of documents under Section 207 of Cr.P.C., the case was committed to the Principal District and Sessions Court, Theni District and taken on file as S.C.No.63 of 2010. The learned Principal District and Sessions Judge, Theni, questioned the accused on the charges. He denied the same. Thereafter, S.C.No.63 of 2016 was made over for trial before the Additional District and Sessions Court (FTC), Theni.

5.The prosecution was then called upon to prove the charges in manner known to law. The prosecution examined PW-1 to PW-21 witnesses and marked Ex-P1 to Ex-P14 and produced MO-1 to MO-8. On conclusion of trial, the incriminating portion of evidence were put to the accused and his statements were recorded. The accused did not produce any



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witness nor mark any exhibits.

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6.On analysis of the evidence adduced by the prosecution, the learned Additional District and Sessions Judge, FTC, Theni, had convicted the accused for offence punishable under Section 302 IPC and had sentenced him to undergo life imprisonment and fine of Rs.5,000/- in default to undergo a further period of one year simple imprisonment. The period of remand was directed to be set off with the period of sentence under Section 428 Cr.P.C. The material objects were directed to be destroyed after the expiry period for filing of appeal or after the disposal of the appeal. Questioning the said conviction and sentence, the accused had filed the present appeal.

7.As stated, the prosecution had examined 21 witnesses, as PW-1 to PW-21.

8.PW-1, who had lodged the complaint, Ex-P1, was the father of the deceased, Ranjith Kumar. In his chief examination, he stated about the quarrel between the accused and the deceased at the time when the accused



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was playing cards with his friends on 11.09.2009 in the afternoon at around 02.00 pm near Muthalamman Temple in their village, Maravapatti. He stated that this quarrel was informed to him in the evening at 05.00 pm, when he had finished his work at Andipatti and was going towards his house. When he was sitting in his house, the accused came and called over the deceased to come over to the village crematorium to have a fist fight. Thereafter, the accused and the deceased walked towards the south direction. The witness, PW-1 accompanied by PW-2 Pandi, PW-3, Suresh, PW-4, Palpandi and others, namely, Pandi, Sottai Alagumalai followed them in a distance of 20 feet.

9.The witness further stated that at that time the accused shouted *die now* and stabbed the deceased in the back. He further stated that the deceased then turned around and caught hold of the neck of the accused. At that time, the accused caused a further stab injury in the stomach of the deceased. The deceased then fell down. Those who came there and witnessed the incident chased the accused, who ran away. PW-1 further stated that he put his son in an auto which came there and went to Andipatti Police Station. Thereafter, the ambulance came and took his son to



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K.Vilakku Hospital. At that time, the Doctor informed that his son had died.

10.PW-1 further stated that thereafter, he gave a complaint to Andipatti Police Station which he identified as Ex-P1. He also identified the knife used by the accused as MO-1. He then stated that after postmortem, the body was handed over to him and that the family members cremated the deceased.

11.The chief examination of the witness was conducted on 05.09.2018. The witness was cross examined on 01.03.2019.

12.During the cross examination of PW-1, he stated that he is running a vegetable shop at Andipatti market. His wife was also running a vegetable shop there. He stated that he only heard about the quarrels which took place at the time of playing of cards between the accused and the deceased. He further stated that he went to the Police Station after admitting his son in the hospital and after he was informed that the son had died, at around 09.00 to 09.30 pm. He was then examined by the Police officials. He had got the



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complaint written by an Advocate and he signed the complaint.

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13.During his cross examination, he further stated that when he saw his son in the evening, he was lying down dead in the road next to the land of Kandasamy. He confirmed that when his statement recorded under Section 164 Cr.P.C., he had stated that his son called out to him and the appellant stabbed his son twice and that he took the accused and his son in an auto and on the way, dropped the accused at Andipatti Police Station and then took his son to the Government Hospital at K.Vilakku.

14.PW-1 denied the suggestion that there were others also who incited the accused to kill the deceased. He also stated that he had given a statement in the first instance before the Police and later had given another statement. He specifically denied that he was under pressure not to implicate two other persons, Murthy and Selvakumar who controlled the vegetable market at Aundipatti. He further denied the suggestion that a panchayat was held and the aforementioned two persons' names were removed by the Police. He also denied that at the time when the incident happened, others who had been mentioned by him in the chief examination



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did not follow him to the crematorium, where the accused and the deceased were going to have a fist fight. He also stated that the aforementioned Murthy also gave a blow to the deceased and he caught hold of the deceased when he was just about to fall down.

15.The prosecution further examined PW-2, Pandi, who was an elder brother of PW-1. In his chief examination, he spoke about his knowledge of the quarrel which happened between the accused and the deceased at 02.00 pm at the time when the accused was playing cards. He also stated that he followed both the accused and the deceased in the evening, when they were proceeding to the crematorium for fist fight. He also stated that he saw the accused stabbing the deceased in the back and the deceased turning around and catching the neck of the accused and at that time, the accused stabbing the deceased again in the stomach and the deceased collapsing. He further stated that all those who were present then chased away the accused. He further stated that PW-1 had taken the deceased in an auto and later, an ambulance came and took the deceased to K.Vilakku Government Hospital. He was informed that the deceased had died.



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16.It is pertinent to point out that the chief examination was conducted on 05.09.2018 and the cross examination was done on 02.03.2019.

17. During his cross examination, he stated that he had been threatened to depose as he had stated in the chief examination. He stated that he had no direct knowledge of any of the incidents and had gone over to the hospital after the deceased body had taken there.

18.The prosecution also examined PW-5, Pappa, mother of the deceased. She did not have any direct knowledge of any of the events and stated that she only heard about the same. She was then cross examined and again, she reiterated that she did not have direct knowledge of either the quarrel at 02.00 pm or the subsequent events leading to the death of her son in the evening. The witness was once again recalled and further examined on 09.10.2018, after the Court had declared her as a hostile witness.

19.But, however neither PW-1 or PW-2 in their chief examination had spoken about her presence either at the time when the dispute arose at



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the time of playing cards or in the evening, when the event unfolded leading to death of her son. It is thus seen that the prosecution mainly relied on the evidence of PW-1 and PW-2.

20.PW-1 had deposed in chief on 05.09.2018 and was cross examined on being re-called on 01.03.2019. Though during cross examination, he had given contradictory statements, still substantially he had stated about witnessing the stabbing of the deceased by the accused, first on the back and later, when the deceased turned and caught the accused on his neck, for a second time, on the stomach. His further statement about how the deceased was taken to the Hospital differed from the version given by PW-2.

21.The prosecution also examined PW-3, Suresh. He had been declared as a hostile witness and was not helpful to the case of the prosecution.

22.Similarly, PW-4, Palpandi, had also been declared as hostile.

23.The prosecution also examined PW-6, Balu, who had also been



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declared hostile.

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24.The prosecution also examined PW-7, Rajendran, who spoke about the incident at the time of playing of cards, but not about the commission of offence for which the appellant had been charged.

25.The prosecution also examined PW-8, Pandi who had been declared hostile.

26.The prosecution also examined PW-9, Thangaraju, who spoke only about the incident which happened at the time of playing of cards alone.

27.The prosecution further examined PW-10, Madhavan, who also stated he had no direct knowledge about the offence for which the appellant was charged.

28.The prosecution further examined PW-11, Vijayan, who was the Village Administrative Officer and who was witness to the arrest of the



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accused and the recording of the confession statement of the accused. He identified the mahazar prepared, Ex-P3 and the blood stained shirt of the accused which was recovered as MO-2 and the blood stained Lungi, MO-3.

29.The prosecution further examined PW-12, Guusamy who was running a textile business. At the time of the incident, he was running an old iron shop. He claimed that he did not know the accused. He claimed that the accused had purchased a knife for Rs.25/- and that the respondent Police had shown a knife to him and enquired whether it had been purchased from his shop and he answered in the affirmative. Neither during cross examination nor even during chief examination, the knife, MO-1 was shown to the witness for identification.

30.The prosecution further examined PW-13, Gandhi, who was witness to the observation mahazar, Ex-P4 and for recovery of blood stained sand and sand without blood and one pair of slippers. The mahazar prepared for such recovery was Ex-P5 and the blood stained sand and sand without blood stain and the pair of slippers were produced and identified as MO-4, MO-5 and MO-6.



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31.The prosecution also examined PW-14, Thangadurai, who was the Scientific Officer in Regional Forensic Laboratory, Madurai and who had issued certificate, Ex-P6 which analysed the blood in the material objects recovered by the prosecution. He also identified the certificate issued, Ex-P7 in which, he had stated that the blood group found in the material objects was human blood with 'B' group.

32.The prosecution further examined PW-15, Dr.Juliana Jeyanthi, the Doctor, who conducted the postmortem over the dead body of the deceased.

The following injuries were noted on the dead body of the deceased:

“1)A stab wound of size 2 cms x 1.5 cms x 6 cms. seen 8 cms. below the left nipple and 6 cms. away from the midline.

2)A stab wound of size 3.75 cms.x 2 cms.x8 cms. seen at the back on right side, 3 cms. above the on the right hip bone and 6 cms. away from the midline.

3)An abrasion of size 4 cms.x 2 cms. was seen over the lateral aspect of the right eye.

4)An abrasion of size 0.5 cm.x0.5 cm was seen over right side of the nose.

5)Nail marks 3 in number were seen below the right eye (2 cms.x0.25 cm., 1 cm.x0.25 cm. And 0.5 cm.x0.25 cm)

6)An abrasion of size 0.25 cm.x0.25 cm seen below the lower lip on right side.”



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33.PW-15 had given an opinion Ex.P.13 that the deceased appeared to have died of injury No.1 and its complications. In the opinion, it was stated that the injury passes obliquely upwards and inwards piercing the underlying muscles, vessels, nerves and left atrium of heart.

34.The prosecution further examined PW-16, Prabhu, who was also witness to the recovery of the material objects consequent to mahazar Ex-P5.

35.The prosecution further examined PW-17, Vasanthi, who was a Steno in District and Sessions Court at Theni for forwarding the material objects for forensic examination.

36.The prosecution further examined PW-18, Dr.Birla, who had first examined the deceased in Government Hospital and College in Theni.

37.The prosecution also examined PW-19, Alagumalai, who was the Head Constable in Aundipatti Police Station on 12.09.2009 and who was present during the inquest and thereafter, had forwarded the body for



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postmortem and later had handed over the body of the deceased for cremation to the family members.

38.The prosecution further examined PW-20, Muthu Premchand, Sub-Inspector of Police, who had received the complaint lodged by PW-1, Rajendran, on 11.09.2009 at 09.00 pm and had registered FIR in Cr.No.552 of 2009 under Section 302 IPC. He had then forwarded the FIR and the complaint through express tapal to the Magistrate Court at Andipatti.

39.The prosecution finally examined PW-21, Gopinath Pandian, who was the Circle Inspector, Andipatti on 11.09.2009. He had taken over the investigation in FIR in Cr.No.552 of 2009 registered under Section 302 IPC registered by PW-20. He had gone over to the scene of crime in the night at 10.15 pm and prepared observation mahazar, Ex-P11 in the presence of witnesses, Prabhu (PW-16) and Gandhi (PW-13). He then recovered the blood stained sand (MO-4), sand without blood stain (MO-5) and pair of slippers (MO-6). He then conducted inquest over the dead body of the deceased at 11.45 pm in the K.Vilakku Government Hospital and College in the presence of panchayatars. He then forwarded the body for conducting



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postmortem. He collected the postmortem report, Ex-P13.

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40.PW-21 then recorded the statements of witnesses, Rajendran, PW-1, Suresh (PW-3) (declared hostile), Palpandi (PW-4) (declared hostile), Alagumalai (not examined), Pandi (not examined), Pappa (PW5) (declared hostile), Kavitha (not examined), Balu (PW-6) (declared hostile) Muthu Kannan (not examined), Rajendran (PW-7), Pandi (PW-8) (declared hostile), Thangaraju (PW-9), Prabhu (PW-16), Gandhi (PW13), Dr.Birla (PW-18), Grade-I Police, Ramaraj (not examined) and Sub Inspector of Police, Muthu Premchand (PW-20).

41.He then arrested the accused on 14.09.2009 at 11.15 am in Kuppampatti Road Junction in the presence of the witnesses, Vijayan (PW-11) and Amavasai (not examined). He recorded the confession of the accused and recovered MO-1, knife, MO-2, blood stained shirt and MO-7, blood stained pant. He then forwarded the material objects to the Magistrate Court for forensic examination. He then recorded the statements of witnesses Gurusamy (PW-12), Madhavan (PW-10), Amavasai (not examined) and Vijayan (PW-11). He filed an application for recording the



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statement under Section 164 Cr.P.C., of the witnesses, Rajandran (PW-1), Pappa (PW-5) and Kavitha (not examined) before the Judicial Magistrate Court at Theni.

42.PW-21 also examined Dr.Juliana Jeyanthi (PW-15) who conducted postmortem and recorded her statement. He also recorded the statement of Alagumalai, Head Constable (PW-19). He recorded the further statement of Rajendran (PW-1), Pappa (PW-5) (declared hostile) and Kavitha (not examined). He also recorded the statement of Thangadurai (PW-14), Scientific Officer, Regional Forensic Laboratory, Madurai. He then filed another application to record the statement under Section 164 Cr.P.C., of the eye witnesses Suresh (PW-3) (declared hostile), Palpandi (PW-4) (declared hostile), Alagumalai (not examined) and Pandi (PW-8) (declared hostile). He recorded the further statements of the said witnesses. He also recorded the statements of witnesses Annakodi (not examined) and Moorthi (not examined). After completing the investigation, he filed final report in the District Munsif-Judicial Magistrate Court, Andipatti, charging the accused with commission of offence punishable under Section 302 IPC.



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43.The learned Judicial Magistrate took cognizance of the final report as P.R.C. No.07 of 2010. He furnished free copies of the documents to the accused under Section 207 of Cr.P.C. He then committed the case to the Principal District and Sessions Court at Theni, since the offence was triable exclusively by the Court of Sessions. The case was taken on file as S.C.No.63 of 2016.

44.The only charge framed against the accused was for commission of offence punishable under Section 302 IPC. The learned Principal District Sessions Judge, Theni, then made over the Sessions cases to the Additional District and Sessions Court (FTC), Theni for trial. On conclusion of trial, the statement of the accused was recorded under Section 313 IPC. By judgment dated 21.02.2020, the accused was found guilty of offence punishable under Section 302 IPC and was convicted for the said offence and sentenced to undergo life imprisonment and fine of Rs.5,000/- in default to undergo further period of one year simple imprisonment. The period of remand was directed to be set off under Section 428 IPC. The said judgment is under challenge in the present Criminal Appeal.



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45. Heard arguments advanced by Mr.V.Ilanchezian, learned Counsel appearing for the appellant/accused and by Mr.S.Ravi, learned Additional Public Prosecutor appearing for the respondent/State.

46. The point to be determined in this case is whether the conviction of the appellant/accused for offence punishable under Section 302 IPC is to be upheld or modified or set aside.

47. The facts are not in dispute. The appellant/Sivapandi was playing cards on 11.09.2009 at around 02.30 pm near Muthalamman Temple in Maravapatti village within the jurisdiction of Andipatti Police Station with his friends. At that time, the deceased came there and sat and told one of the players, Thangaraju (PW-9) to *play this card and that card* directly affecting the interests of the appellant. This led to a quarrel between the appellant and the deceased, Ranjith Kumar.

48. Even in the charge, it had been stated that the deceased Ranjith Kumar had abused the appellant in filthy language using bad words and assaulted the appellant with wooden log. At that time, those who were



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present prevented the deceased from assaulting the accused further. It is also in the charge that it was the deceased who then challenged the appellant to come to the village crematorium near the banyan tree and that he and the appellant can engage in a fist fight at that place. Even in the charge, it had been stated that the deceased Ranjith Kumar had stated the said words loudly (சுப்தம் போட்டுள்ளார்). It is the further case of the prosecution that thereafter with intention to murder the deceased, the appellant had purchased a knife in Andipatti from PW-12, Gurusamy, who at that time is said to be running an iron scrap material shop.

49.PW-12 in his evidence stated that the accused had purchased a knife for Rs.25/-. He did not give the date. As a matter of fact, on the date of his examination, he was running a clothes shop. He stated in his chief examination that the respondent Police came and showed him a knife and asked him whether it had been purchased from his shop and he had replied in the affirmative. However, during examination in Court, the material object was not shown to the witness/PW-12 for identification.

50.The knife, MO-1 was recovered consequent to the confession



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statement of the appellant, when he had been arrested on 14.09.2009. It was recovered in the presence of the witnesses, Vijayan (PW-11) and Amavasai (not examined). PW-11 in his chief examination was shown MO-2, blood stained shirt and MO-3, Lungi. The knife, MO-1, was not shown to Vijayan (PW-11).

51.The prosecution showed the knife to PW-1 who identified it as the weapon used by the accused. It was then marked as MO-1.

52.But very crucially it was not shown and not identified by either PW-12 who allegedly sold it to the accused or by PW-11 who was present when it was recorded.

53.It must also be pointed out that though the incident took place on 11.09.2009, PW-1 was examined in chief on 05.09.2018, nearly 9 years later. In his chief examination, PW-1 stated that immediately after the incident, he only concentrated on taking his son to the hospital. It is just not possible for him to remember the weapon used after 9 years.



54.It had been held in **2022 SCC OnLine SC 1424** in the case of ***State through the Inspector of Police vs Laly and others*** by the Hon'ble Supreme Court that if there is direct evidence in the form of eye witness, even in the absence of recovery of the weapon, the accused can be convicted. In the instant case, the weapon had not been shown either to PW-11 or PW-12. We hold that this would not materially affect the case of the prosecution.

55.In **2022 SCC OnLine SC 1424** in the case of ***State through the Inspector of Police vs Laly and others***, the Hon'ble Supreme Court had held as follows:

“20.The submission on behalf of the accused that as the original informant - Mahendran has not been examined and that the other independent witnesses have not been examined and that the recovery of the weapon has not been proved and that there is a serious doubt about the timing and place of the incident, the accused are to be acquitted cannot be accepted. Merely because the original complainant is not examined cannot be a ground to discard the deposition of PW1. As observed hereinabove, PW1 is the eye witness to the occurrence at both the places. Similarly, assuming that the recovery of the weapon used is not established or proved also cannot be a ground to acquit the accused when there is a direct evidence of the eye witness. Recovery of the weapon used in the commission of the offence is not a sine qua non to convict the accused. If there is a direct evidence in the form of eye witness, even in the absence of recovery of weapon, the accused can be convicted. Similarly, even in the case of some



contradictions with respect to timing of lodging the FIR/complaint cannot be a ground to acquit the accused when the prosecution case is based upon the deposition of eye witness.”

56.In the instant case, the weapon had been recovered but not shown for identification before PW-11 and PW-12, but ocular evidence is available regarding the offence.

57.It is the further case of the prosecution and also according to the charge that on 11.09.2009, the accused then called the deceased Ranjith Kumar for a fist fight in the evening at 05.20 pm. It is in the charge that the deceased walked in front shouting out loudly (சப்தம் போட்டுக்கொண்டு) and the appellant was only following him. It is further in the charge that the appellant had caused a stab injury in the back of the deceased. It is evidence of PW-1, the father the deceased that at that time, the deceased turned around and caught hold of the neck of the appellant (எனது மகன் எதிரியை கழுத்தை பிடித்தபோது.....). Thereafter, it is stated that the appellant had caused a stab injury on the stomach of the deceased owing to which the deceased fell down.



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58. In the evidence of PW-2, the appellant first caused a stab injury on the back of the deceased and then, the deceased had caught the neck of the appellant (எதிரியின் கழுத்தை பிடித்தப்போது.....). After which, the appellant had stabbed on the stomach of the deceased.

59. The only two eye witnesses are PW-1 and PW-2. They were not declared hostile. Their examination in chief was first conducted on 05.09.2018. Thereafter, they were re-called for cross examination and cross examined on 21.03.2019. We hold that the learned trial Judge should have controlled the flow of trial in a more effective manner and should have ensured that cross examination of the material witnesses is conducted immediately after their chief examination had been recorded and certainly not after a gap of more than six months. At any rate, the evidence in chief is clear and lucid.

60. The sequence of events are as follows:

(1) The appellant was playing cards with his friends on 11.09.2009 at around 02.30 pm near Muthalamman Temple in Maravapatti Village



in Aundipati Taluk;

(2)The deceased was not a member of that particular team playing cards;

(3)He intruded in the scene and sat down and started to advice one of the players, Thangaraju (PW-9) to put (play) this card and that card focussing against the fortunes of the appellant;

(4)The appellant protested;

(5)The deceased had abused the appellant and attacked the appellant with a wooden log;

(6)They were separated; and

(7)The deceased challenged the appellant to have a fist fight in the village crematorium near the banyan tree.

61.It is thus seen that the appellant was never the aggressor. He was only playing cards like any other player. It was the deceased who came there without being invited and started to advise one of the players, Thangarasu (PW-9) as to what card to put and what card not to put. This was against the interests of the appellant. In the ensuing quarrel, it was the deceased who



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was the aggressor who took out a wooden log and attacked the appellant.

After they were separated, it was the deceased who challenged the appellant to come in the evening for a fist fight in the village crematorium near the banyan tree. Therefore, the appellant did not create the quarrel in the first place. He was not the aggressor. He was actually attacked by a wooden log in the first incident.

62.The learned Counsel for the appellant pointed out the evidence of PW-1, when he was recalled the for cross examination after nearly six months, when he stated about the presence of Annakodi, his son Moorthy and Selva Kumar son of Chelladurai, who also instigated the accused to kill the deceased. It was pointed out that PW-1 had further stated that he had taken the accused along with his son and left the accused in the Police Station and took his son to the hospital. It was also pointed out that the prosecution had not examined Pandi, an Advocate, who had written down the complaint. The learned Counsel argued that the respondent had deliberately screened and had not arrayed as accused, Moorthy son of Annakodi and Selvakumar son of Chelladurai only because they controlled the market, where PW-1 and his wife, PW-5, Pappa were having vegetable



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63.The following dates would throw clarity on the wavering nature of evidence of PW-1 :

(a)He was examined in chief on 05.09.2018. He gave very clear statements on that date.

(b)He was then recalled for cross examination on 01.03.2019. On that date, he gave an additional statement about Annakodi, his son Moorthy and Selvakumar son of Chelladurai.

(c).He was thereafter, again recalled on application filed by the prosecution for cross examination by the prosecution. This was on 06.02.2020. There again, he gave further additional statements.

64.It is thus seen that PW-1 must certainly have become very confused owing to the nature of the Court proceedings adopted. When he gave evidence in the first place on 05.09.2018, he was clear and categorical in his statement that he had witnessed the occurrence directly. Thereafter, the nature of Court proceeding must have overwhelmed him, when he was recalled for cross examination after nearly six months on 01.03.2019 and



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further recalled for further cross examination, this time by the Public Prosecutor, after a further period of eleven months on 06.02.2020. This substantial time gap from the date of initial examination in chief would have naturally blurred in the mind of a person more specifically, a father who suffered the death of his son and who would just want the case to get over and who had undergone the experience of coming to Court in intervals of six months on three occasions. We would therefore brush aside the discrepancies.

65.The prosecution had placed total reliance on the evidence of Rajendran, PW-1 and PW-2, Pandi, paternal uncle of the deceased/brother of PW-1. It must be kept in mind that the PW-5 Pappa mother of the deceased had been declared hostile. PW-1 and PW-2 were following the deceased and the accused, when they were going towards the crematorium in the evening at 05.20 pm on 11.09.2009. It is in evidence that the deceased was walking in front shouting out loudly. He intended aggression.

66.It the case of the PW-1 and PW-2 that the accused first stabbed in the deceased in the back. PW-15, Dr.Juliana Jeyanthi, conducted the



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postmortem and issued the postmortem certificate, Ex-P8. In Ex-P8, it is noted that the stab injury on the back right side was 3.75 cms x 2 cms x 8 cms. It was 3 cms above on the right hip bone and 6 cms away from the midline. It was observed on dissection that the wound passed upwards and inwards piercing the underlying muscles, vessels and nerves and ended as a point in the right psoas muscle. But however, in the opinion of the Doctor, this was not the wound which probably caused the death of the deceased.

67. Even according to PW-1 and PW-2, after receiving this wound on the back, the deceased who was the aggressor earlier and who, shouting loudly was walking in front, turned around and caught the neck of the appellant. Naturally, there was every possibility of him suffocating the appellant to death. In that sudden movement, the appellant had stabbed the deceased in the stomach. The injury could have gone deep also because of the aggressive movement of the deceased in turning around and catching hold of the neck of the appellant, which would have brought his body close proximate to the hands of the appellant.

68. It is clear that the appellant had neither intended to cause death nor



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would have any knowledge, when the body of the deceased pressed on him on turning back and catching him of the neck, that the second stab would cause the death of the deceased. The appellant was never the aggressor. He was not the aggressor in the quarrel at 02.30 in the afternoon. As a matter of fact, he was attacked with a wooden log by the deceased. It was the deceased who challenged the appellant to have a fist fight. It was the deceased who went in front shouting out loudly, when the appellant caused a stab injury on the back, but which injury was not the cause for the death. When the appellant's neck was held by the deceased, naturally, the body of the deceased had come in close proximity to the body of the appellant and the stab injury in the stomach side could have happened. But, there could not have been any intention to cause death as it was quite sudden and also owing to the movement of the body of the deceased in turning around and catching hold of the neck of the appellant. The neck of the appellant was held by the deceased and the appellant had to protect himself and there was a stab injury on the stomach of the deceased. The depth of the stab injury was also deep, only due to the body of the appellant coming in close proximity to the hands of the appellant. The injury could not have been caused solely due to the thrust of the appellant of the knife in the stomach of



the deceased.

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69. The Hon'ble Supreme Court in the judgment of **(2009) 16 SCC 361, *Felix Ambrose D'souza -vs- State of Karnataka***, while dealing with the plea of mitigation and conversion of conviction from offence punishable under Section 302 IPC to offence punishable under Section 304 part II IPC had held as follows:-

7. The learned counsel for the appellant in the alternative has made a submission that, at any rate, the facts even held proved, could not be considered to be just and sufficient to warrant a conviction under Section 302 IPC and if at all conviction under Section 304 part II IPC alone could have been rendered possible. Though the learned counsel for the respondent - state strongly insisted that keeping in view the gravity of the offence and the brutal manner in which it has been committed with the background of animosity and ill-will there was no need for altering the nature of offence and that the finding of the High Court in this regard may not call for any interference. As noticed earlier and having regard to the materials



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and the evidence on record as spoken to even by the prosecution witnesses there does not appear to be any premeditated plan or intention to either put an end to the life of the deceased or cause any injury with the intention of causing his death or causing such bodily injury which within the knowledge of the accused was likely to cause his death even in the ordinary course of nature. Irrespective of the silent nature ill-feelings which existed between the parties, it appears to have surfaced with a violent turn on the fateful day due to sudden quarrel which even according to the prosecution witnesses, commenced with an altercation and attempts to break open the lock which was said to have been placed on the door of the store room by the appellant in addition to the one part by the father and the deceased. In the tussle and altercation and an attempt to break the lock by the deceased with an hammer in his hand and attempts made by the appellant to physically prevent the deceased from so doing, and physical use of force in the process,



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passions seem to have flared up beyond proportion all of a sudden, perhaps neither anticipated nor intended by either of them. The prosecution version itself lends credence and support to the plea of sudden provocation on the spur of moment. Therefore, we are of the view that the High Court was not right in arriving at the conclusion to convict the appellant under Section 302 IPC. In our considered view, on the proved facts the only offence that could reasonably be said to have been made out and for which the appellant could be convicted would be under Section 304 part II IPC and to this extent we partly allow the appeal and set aside the order of conviction under Section 302 IPC and instead convict him under Section 304 part II IPC.”

70. We hold, on analysing the entire sequence of events, that it is clear that the reasoning and ratio laid down in the aforementioned judgment squarely applies to the facts of this case.



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71.We therefore hold that the conviction of the accused for offence punishable under Section 302 IPC has to be set aside and we set aside the same and instead convict the accused for offence punishable under Section 304 part II IPC.

72.Taking all factors into consideration, we would sentence the appellant/accused to punishment of four years rigorous imprisonment. We would however retain the fine portion of the judgment, namely, Rs.5,000/- and in default, to undergo one year simple imprisonment. We are informed that the fine amount had been paid.

73.We therefore direct the trial Court to take the accused into custody to serve the remaining period of sentence. We also direct that the sentence already undergone by the appellant/accused to be set off under Section 428 Cr.P.C.



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74.In the result, the Criminal Appeal is partly allowed setting aside the conviction for offence punishable under Section 302 IPC, but convicting the accused for offence punishable under Section 304 part-II IPC and sentencing him to undergo the imprisonment for four years rigorous imprisonment with set off under Section 428 Cr.P.C. for the period of imprisonment already undergone.

[C.V.K., J.] & [J.S.N.P., J.]
01.10.2024

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

cmr



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To

- 1.The Additional District & Sessions Judge (FTC), Theni.
- 2.The Inspector of Police,
Aundipatty Police Station,
Theni District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.
- 4.The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court, Madurai.



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C.V.KARTHIKEYAN, J.

AND

J.SATHYA NARAYANA PRASAD. J.

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Pre-delivery Judgment made in
Crl.A(MD)No.253 of 2020

01.10.2024