
(2009) 10 MAD CK 0272

In the Madras High Court

Case No : Criminal Appeal No. 747 of 2006

Dhanabal and Kunju @ Venkattan

APPELLANT

Vs

State by Inspector of Police

RESPONDENT

Date of Decision : 27-10-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304(1), 34

Citation : (2009) 10 MAD CK 0272

Hon'ble Judges : Aruna Jagadeesan, J

Bench : Single Bench

Advocate : R. Rajan, for the Appellant; Hasan Mohammed Jinnah, APP, for the Respondent

Final Decision : Dismissed

Judgement

Aruna Jagadeesan, J.—This Criminal Appeal is filed by A1 and A2 in SC. No. 355/2005 on the file of the learned Additional District and Sessions Judge Cum Special Judge for EC Act Cases, Salem against the judgement dated 29.8.2006, convicting each of them u/s 304(1) of IPC and sentencing each of them to undergo four years Rigorous Imprisonment and to pay a fine of Rs. 500/- in default to undergo Rigorous Imprisonment for two months.

2. The case of the Prosecution is as follows:

The incident had occurred on 7.7.1997 at 11.00 a.m. 1st Appellant/A1 is the son of the 2nd appellant/A2. The absconding accused against whom, the case was split up is the another son of the 2nd Appellant. PWs.1 and 2 are the brothers of the deceased Lakshmanan. PW.3 is the Village Administrative Officer of Daviskottai Village. On 7.7.1997, PW.3, his Assistant and the Revenue Inspector of Kadayampatti Village had gone to Vannankuttai on getting information that A1, A2 and the absconding accused were cutting the trees standing in the Government Poramboke land and prevented them from further cutting the trees. PW.3 had called PW.2 Govindaraj, who was engaged in the agricultural operations

and enquired about the act of the accused in cutting the trees. On seeing the same, the absconding accused Venugopal rushed towards him to attack PW.2. However, PW.2 ran away from the said place chased by the absconding accused and on seeing it, PW.1 and the deceased Lakshmanan tried to rescue their brother. At that time, the absconding accused attacked PW.1 with a knife on his right head and cut him on his back side of the head. A2 assaulted with a wooden log on the back and left hand of the deceased. A1 assaulted the deceased with a wooden log on his head and on his left hand and on the left side of his head. On hearing their cry, the other family members rushed to the spot and on seeing them, all the accused ran away from the place of occurrence.

3. PW.1 and the deceased sustained bleeding injuries and were taken to a private hospital by name Bethalla Hospital in Vadakkupatti and therefrom, they were taken to Omalur Government Hospital. PW.1 was admitted as an inpatient and as the condition of the deceased was serious, he was taken to Salem Rajaji Government Hospital, where he was pronounced dead at about 2.30 p.m.

4. On receiving intimation from the Omalur Government Hospital, PW.8 Sub Inspector of Police attached to the Deevattipatti Police Station proceeded to the said Hospital and recorded the statement of PW.1 and returned back to the Police Station and submitted the same to the Inspector of Police. Ex.P9 is the said intimation received from the Hospital. PW.10 Inspector of Police on receiving the said statement registered a case in Cr.339/1997 and prepared Ex.P15 First Information Report. Thereafter he proceeded to the place of occurrence at 5.30 p.m. and in the presence of the witness PW.4 and one veerappa Mudaliar prepared observation mahazar under Ex.P2 and a rough sketch under Ex.P16. On 8.7.1997 at 9.00 a.m. to 11.00 a.m. he conducted inquest on the body of the deceased Lakshmanan in the presence of the witnesses and Ex.P17 is the inquest report. Then he sent the body for postmortem through PW.7 Police Constable.

5. PW.9 The Doctor Vallinayagam attached to the Salem Government Hospital conducted autopsy on 8.7.1997 at 11.45 a.m. and he has found the following injuries on the body of the deceased as per Ex.P11:

- 1 .An oblique lacerated injury present on right side of forehead 3.5 cms x 0.5 cm x bone deep.
2. Fracture dislocation of left humerus in its middle 1/3rd.
3. Contusion right cheek, 3 cms x 2 cms x 1 cm.
4. Contusion right temporal region of scalp, 8cms x 5 cms x 0.5 cm Dard red.
5. Fissured fracture of right temporal bone present 8 cms in length.
6. Subdural and subarchnoid hemorrhage present over both cerebrum hemispheres.
7. Fracture middle cranial fossa present 3 cms in length.

The above injuries are antemortem in nature.

The visura from the body of the deceased has been taken and sent for chemical examination and Ex.P13 is the chemical analysis report. After receipt of the said report, PW.9 opined that the deceased had died of head injuries sustained by him.

6. In the mean while, on 11.7.1997 both the accused surrendered before the learned Judicial Magistrate, Bhavani and after getting the order from the learned Magistrate both the accused were taken to the police custody by PW.10. On 22.8.1997 at 7.00 p.m. on the confession statement given by A1 and A2, weapons Mos.1 to 3 viz. Koduval and wooden log were seized from the house of A1 under Ex.P5 and P6 mahazars. Mos.4 to 7 Clothes were recovered from the body of the deceased. Thereafter, PW.10 had examined some more witnesses and after completing the investigation laid charge sheet against both the accused on 27.8.1997 for the offence under Sections 302 read with 34 and 324 read with 34 of IPC.

7. In order to substantiate the charges levelled against the accused, the prosecution examined as many as 10 witnesses and also marked 17 documents and 7 MOs. PW.1 was the first informant and the younger brother of the deceased and PW.1 to 3 are the eye witnesses. It is also to be noted that PW.1 was the injured witness.

9. This Court heard the learned Counsel on either side and also perused the materials placed on record.

10. Mr. R. Rajan, the learned Counsel for the Appellants has submitted that the evidences of the Prosecution witnesses PWs.1 to 3 are contradictory to each other with regard to the overt-act attributed to each of the accused and the medical evidence is also not consistent with the oral testimony of the witnesses and no credibility can be placed on their evidence in view of the contradictions and discrepancies in the testimony. The learned Counsel would submit that the earlier report given by PW.1 to Omalur Police Station was suppressed and Ex.P1 is not the first information report as alleged by the Prosecution and it cannot be relied upon, when PW.1 has denied knowledge about its contents. He would submit that PW.1 has deposed that the weapons were thrown by the accused persons in the place of occurrence itself before they left the scene of occurrence, whereas the investigating officer had recovered the weapons on the confession allegedly given by the appellants in their house and in such circumstances, recovery of the weapons has not been proved by the Prosecution. The learned Counsel would further contend that the genesis and origin of the occurrence has been suppressed and true facts have not been presented before the court.

11. The learned Counsel for the Appellants would mainly contend that according to PW.1, he had gone to the Omalur Police Station and reported the incident and only thereafter, they have proceeded to the Omalur Government Hospital and therefore, an adverse inference ought to have been drawn against the Prosecution for withholding the FIR lodged by PW.1.

12. On the other hand, Mr. Hasan Mohammed Jinnah, the learned Additional Public Prosecutor for the Respondent has submitted that only PW.1 has stated so and a perusal of the entire evidence, it appears that he has made the said statement in a state of confusion, as he was also heavily injured and the defence witnesses having been not clarified the said point from the police officers especially PW.8 who recorded the statement of PW.1, no adverse inference could be drawn against the Prosecution for withholding the FIR.

13. The learned Additional Public Prosecutor placed reliance on the decisions of the Honourable Supreme Court rendered in the cases of Pothakamuri Srinivasulu Alias Mooga Subbaiah v. State of AP 2002 SCC Cri 1337, Ramesh Baburao Devaskar and Ors. v. State of Maharashtra 2007 13 SCC 501 and Vikram and Ors. v. State of Maharashtra 2008 1 SCC Cri 362 in support of his aforesaid contention.

14. At the outset, every information cannot be said to be a FIR, simply because it is first in point of time. In the case reported in 2007-13-SCC-501 cited supra, the Honourable Supreme Court has held that an information received by the office in charge of a Police Station for commission of an cognizable offence must be reduced into writing so as to enable him to start investigation and lodging of a FIR is necessary for setting the criminal law in motion. It further held that the FIR should not be too sketchy so as to make initiation of investigation on the basis thereof impossible.

15. In the present case, PW.1 has answered to the question put to him in the cross examination by the defence in the affirmative and in the plurality that they have informed the police about the incident and they were asked to come to the Hospital. Except the above said affirmative statement, PW.1 has not given any other details as to who actually went inside the Police Station and to which officer they informed about the incident. In the absence of any evidence in that regard, no inference could be drawn that the complaint with all details had been lodged with the said police. In such a state of affairs, it cannot be said that the First Information Report has been suppressed by the Police.

16. There cannot be any dispute regarding the presence of PW.1 in the place of occurrence, as he has got injured in the said incident. The testimony of the injured is of great value in the murder case and the injuries confirmed the presence of PW.1 on the spot. The genesis of the occurrence started with PW.2 with whom the revenue officials had enquired about the unauthorised act of the accused in cutting the trees and therefore, the presence of PW.2 is also cannot be doubted. PW.3 is the Village Administrative Officer, who had come to the place of occurrence on getting information along with the revenue inspector and they have actually resisted the said cutting of trees. This factum is not disputed by the accused and no material has been elicited in the cross examination denying the presence of PW.3 on the spot. The presence of Pws.1 to 3 in the place of occurrence appears to be natural and there are good reasons for them to be present at the time of occurrence. The testimony of PWs.1 to 3 does not suffer

from any inherent infirmity or intrinsic contradictions and their testimony cannot be discarded merely because PWs.1 and 2 are related to the deceased.

17. In a recent judgement of Honourable Supreme Court rendered in the case of The Director General of Police Central Reserve Police Force New Delhi and Others Vs. P.M. Ramalingam, , it is held that the evidence of eye witnesses when found to be consistent and trustworthy corroborated by medical evidence cannot be discarded on the ground of insignificant contradictions in their testimony nor can it be rejected being testimony of the interested witnesses. There may be some minor discrepancies in the evidence of PW.3 in relation to the role played by each of the accused in attacking the deceased and PW.1, but on the said ground his evidence cannot be rejected.

18. The Honourable Supreme Court has consistently held that discrepancies which do not go to the root of the matter and shake the basic version of the witness cannot be given much importance, more so, when all the important "probabilities factor" echoes in favour of the version narrated by the witnesses. Their Lordships in the case of Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, has enumerated the following points:

- i. by and large, a witness cannot be accepted to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is placed on the mental screen;
- ii. ordinarily, a witness is overtaken by events. The witnesses would not have anticipated the occurrence having an element of surprise. The mental faculties, therefore, cannot be expected to be attuned to absorb the details.
- iii. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of the another;
- iv. by and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder;
- v. in regard to the exact time of the incident or the duration of an occurrence, usually people make their estimate by guesswork on the spur of the moment at the time of interrogation. One cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time sense of an individual, which varies from person to person;
- vi. ordinarily, a witness cannot be expected to recall accurately the sequence of the events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on;
- vii. a witness though wholly truthful is liable to be overawed by the court atmosphere and the piercing cross examination made by a counsel and out of

nervousness, mixes up facts, gets confused regarding the sequence of events, or fill up details from imagination on the spur of the moment.

19. It is relevant to point out that the discrepancies in matters of detail always occur even in the evidence of truthful witness because of natural differences in faculties of individuals. The credibility of the Prosecution witnesses should be subjected to judicial evaluation of totality and not isolated scrutiny. The evidence of PW.1 to 3 is in accordance with the medical evidence and is also corroborated by recovery of weapons of attack in pursuance of disclosure statement of both the accused and in such circumstances, there is no reason to disbelieve their evidence.

20. The learned Counsel for the Appellants commented upon the conduct of PW.3 Village Administrative Officer in not taking any steps to prevent the assault and also not reported the matter to the Police immediately after the occurrence. PW.3 in his cross examination has stated that since he thought that it was an ordinary quarrel between two groups, who are related to each other, he did not think of giving a complaint to the police and he had come to know about the death of the deceased only later. Every person who witnesses an incident of assault reacts in his own way. Some may shout for help and some become speechless and some may run away to keep themselves as far removed from the spot as possible and yet others may rush to the spot to the rescue of the victim. There is no such rule of natural reaction to discard the evidence of PW.3 on the ground that he did not react in a particular manner. Therefore, the contentions raised by the learned Counsel for the Appellants does not merit acceptance.

21. The Trial Court has accepted the testimony of the eye witnesses as true and worthy of credence and held that it was the matter in between the two groups involved in quarrel and the mistakes in the statement of the witnesses in narration of the minor facts are natural. The court below has taken into consideration the above facts and come to the conclusion that commission of the act by accused would come under Exception 4 to Section 300 of IPC and convicted the accused for the offence punishable u/s 304(1) and not u/s 302 of IPC. The judgement of the court below is a well reasoned one and I do not find any valid ground to dislodge the said conclusion arrived at by the court below and to interfere with the sentence imposed on the accused by the court below.

22. In the result, the criminal appeal fails and the same is dismissed. The conviction and sentence imposed on the accused are confirmed and the bail granted in favour of the Appellants is cancelled. The court below shall take steps to secure their presence and commit them to prison to undergo the remaining period of sentence.