

(2007) 04 MAD CK 0183

In the Madras High Court

Case No : Criminal Appeal (MD) No"s. 28 and 35 of 2005

Kannan @ Prabhu @ Prabhu Kannan, Desinghu Rajan @
Desinghu, Ganesan and Sivakumar @ Kumar @
Sappanikumar

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 11-04-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 300, 302, 307, 34, 341

Citation : (2007) 04 MAD CK 0183

Hon'ble Judges : P.R. Shivakumar, J;M. Chockalingam, J

Bench : Division Bench

Advocate : Chellapandian for P. Gopinath, for A-1 and K.S. Doraipandian, for A-2 and A-3 in C.A.28/2005 and A.K. Azagarsami, in C.A.35/2005, for the Appellant;

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—This judgment shall govern these two appeals in C.A. No. 28 of 2005 by A-1 to A-3 and C.A. No. 35 of 2005 by A-4.

2. These appellants who stood charged, tried, found guilty under Sections 341 and 302 read with 34 of I.P.C. and awarded life imprisonment along with a fine of Rs. 5,000/- and default sentence u/s 302 read with 34 of I.P.C. and 1 month Rigorous Imprisonment u/s 341 of I.P.C., have brought forth these two appeals before this Court challenging the said conviction and sentence.

3. The short facts necessary for the disposal of these appeals can be stated thus:

(a) The deceased Malaiyarasan purchased a property from one Viswanathan, the Head Constable. A-1 also made an attempt for the purchase of the same; but, he could not. Thus, A-1 was on inimical terms with the deceased Malaiyarasan. P.W.1 is the brother-in-law, and P.W.6 is the wife of the deceased. On 17.7.2002 at about 7.00 P.M., Malaiyarasan witnessed A-1 telling three others that the

deceased did not allow him to purchase the property, and hence, he should be finished off. On the date of occurrence, that was on 18.7.2002, at about 10.30 A.M., the deceased accompanied by P.W.1, proceeded to the Bus Stand at Mattuthavani. When he was coming near the Law College Hostel, all the four accused armed with deadly weapons, waylaid the deceased and it was A-1, who instigated the others. At that time, A-1 began to attack him with an aruval on his head, while all the other three accused who were armed with knives, attacked him on different parts of the body. The occurrence was witnessed not only by P.W.1, who accompanied the deceased, but also by P.Ws.2 to 5. When there was a distressing cry and the crowd gathered, all the accused persons fled away from the place of occurrence. Immediately, P.W.1 and others took the deceased to Rajaji Government Hospital, Madurai, where P.W.7, who was the Doctor on duty, admitted him at about 11.00 A.M. The accident register copy in that regard is marked as Ex.P2. A communication was sent to the Judicial Magistrate, who is examined as P.W.17. He arrived at about 12.45 P.M. and after getting the certificate from the concerned Doctor that the deceased was in a fit state of mind to give a declaration, recorded the dying declaration. The said dying declaration is marked as Ex.P13.

(b) On receipt of the intimation, P.W.14, the Sub Inspector of Police, attached to the respondent Police Station, proceeded to Rajaji Government Hospital and recorded the statement of the deceased which is marked as Ex.P1, on the strength of which a case came to be registered in Crime No. 413/2002 u/s 307 of I.P.C. The express First Information Report, Ex.P9, was despatched to the Court. Following the same, P.W.15, the Sub Inspector of Police, took up investigation, proceeded to the scene of occurrence, made an inspection and prepared Ex.P7, the observation mahazar, and Ex.P10, the rough sketch. The bloodstained earth, M.O.5, and sample earth, M.O.6, were recovered under a mahazar, Ex.P8. The said Malaiyarasan despite treatment, died at about 2.05 P.M. on 25.7.2002.

(c) On receipt of the death intimation, P.W.16, the Inspector of Police, converted the case to Section 302 of I.P.C. and took up investigation. The express report, Ex.P11, was despatched to the Court. Then, the Investigator conducted inquest on the dead body of Malaiyarasan in the presence of witnesses and panchayatdars and prepared Ex.P12, the inquest report. Then, a requisition, Ex.P5, was forwarded to the hospital authorities for the conduct of autopsy.

(d) On receipt of the said requisition, P.W.10, the Assistant Professor of Forensic Medicine & o/o District Police Surgeon, Madurai Medical College, Madurai, conducted autopsy on the dead body of Malaiyarasan and found 12 injuries. The Doctor has issued a postmortem certificate, Ex.P6, with his opinion that the deceased would appear to have died of external injury No. 1 to 3 and its corresponding internal injuries and its complications thereof.

(e) P.W.18, the Inspector of Police, took up further investigation. He arrested A-1 to A-3 on 24.7.2002. A-1 gave a confessional statement voluntarily, which was recorded. The admissible part of the said confession is marked as Ex.P3. M.Os.1

to 4, the weapons of crime, were recovered under a mahazar, Ex.P4, pursuant to his production. On the very day, A-4 was also arrested. They were all sent for judicial remand. A requisition was made to the Judicial Magistrate's Court for the purpose of sending all the material objects for chemical analysis. On completion of investigation, the Investigator filed the final report.

4. The case was committed to Court of Session and necessary charges were framed. In order to substantiate the charges, the prosecution marched 18 witnesses and also relied on 13 exhibits and 6 material objects. On completion of the evidence on the side of the prosecution, the accused were questioned u/s 313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses, which they flatly denied as false. No defence witness was examined. The trial Court heard the arguments advanced on either side, made a scrutiny of the available materials, considered the submissions made, found the appellants/accused guilty as per the charges and awarded the punishment referred to above. Hence these appeals at the instance of the appellants herein.

5. Advancing his arguments on behalf of A-1, the learned Senior Counsel Mr. Chellapandian, would submit that in the instant case, the prosecution rested its case on the direct evidence by examining P.Ws.1 to 5 as eyewitnesses; that P.Ws.4 and 5 have turned hostile, and thus, the prosecution relied on the evidence of P.Ws.1 to 3; that as far as P.W.1 was concerned, he is the brother-in-law of the deceased; that so far as P.Ws.2 and 3 were concerned, it cannot be stated that they were independent witnesses; that they were all neighbours; that they have been planted to suit the prosecution case; that neither P.W.1 nor P.Ws.2 and 3 could have seen the occurrence; that as regards the motive alleged by the prosecution, there was a rival attempt made by A-1 and the deceased in respect of purchase of a land, and A-1 could not; that under the circumstances, he developed animosity against the deceased, and that was the motive for the entire occurrence; that in the case on hand, the investigation in that regard is totally silent; that nothing has been investigated in regard to the motive part at all, and thus, the prosecution has miserably failed to prove the motive; that the earliest document is the statement made to P.W.7, the Doctor, by P.W.3 Muthiah; that according to him, four persons were the assailants at the time of the occurrence, and it was recorded; that it would also be indicative of the fact that the Doctor could not examine Malaiyaran who was in a semi-conscious stage and could not speak, and under the circumstances, it was P.W.3, who gave the statement to the Doctor; that following the same, there was an intimation, according to the prosecution, to the Judicial Magistrate, P.W.17, who went over to the hospital and recorded the declaration of Malaiyaran; that following the same, an intimation was given to the Out Post Police Station and in turn, to the respondent police; that the Sub Inspector of Police went over there and recorded the statement of the deceased which is marked as Ex.P1; that it has also come into existence within a short span of an hour and half; that when the earliest document namely the dying declaration recorded by the Judicial Magistrate, and also the subsequent document, which is Ex.P1, recorded by the Sub Inspector of

Police of the respondent Police Station, are compared, it would contain lot of discrepancies in the material particulars, which would indicate that the same person could not have been the author for both the documents; that once the Doctor, P.W.7, has specifically admitted in evidence that he was semi-conscious, there was no possibility of the said Malaiyarasan giving any declaration since he could not have been in such a frame of mind; that under the circumstances, it is highly doubtful whether these two documents could have come into existence as put forth by the prosecution; that as far as the declaration made by the deceased to P.W.17, the Judicial Magistrate, is concerned, if it is perused, it would indicate that the assailants were six in number; but, before the Court only four accused stood charged; that what had happened to the other two remained unknown till the end; and that no explanation was forthcoming from the prosecution in respect of the other two.

6. Added further the learned Senior Counsel that even the dying declaration speaks about pattakathi and knives; but, it is found to be different weapons from the one relied on by the prosecution, since the prosecution has recovered aruval; that according to the prosecution, they were the weapons of crime; and that in this regard also, the prosecution has got a different version to urge.

7. The learned Senior Counsel would further add that so far as Ex.P1 document is concerned, there are only four persons shown who are A-1 and other three persons; that the other three persons are not named, and thus, who are the other three persons remained unknown; that in the dying declaration, the earliest document, six are shown; that in the next document, Ex.P1 the statement, given by Malaiyarasan, only four are shown; that it is a vital discrepancy which would go to the root of the matter and cast a suspicion whether the prosecution has come with the real facts unfolded; that apart from that, the bloodstained clothes were not recovered; that not even the weapons of crime were sent for chemical analysis, and under the circumstances, the lower Court should have rejected the case of the prosecution.

8. The learned Senior Counsel would further submit that Ex.P1, on the basis of which the case came to be registered, cannot be the first information given to the respondent police; that according to P.W.1, the Police Personnel came to the spot, and it was he who gave the report, and it was also recorded; that under the circumstances, the earliest information given by P.W.1, who claimed to be an eyewitness, has been thoroughly suppressed; that so long as that document is not before the Court, the prosecution made an attempt to suppress the real facts of the case; that what is on hand namely Ex.P1, is only the second information, and that is only a statement which cannot have the legal significance as one of F.I.R.; and that it also casts a doubt on the prosecution case.

9. The learned Senior Counsel would further add that in the instant case, so long as the first information has been suppressed and the names of P.Ws.2 and 3 are also not shown as eyewitnesses in that document, it is highly doubtful whether P.Ws.2 and 3 could have been eyewitnesses to the occurrence.

10. The learned Senior Counsel would further submit that in the instant case, even P.W.1 is nothing but a chance witness; that P.W.3 claimed that he was a driver working at Kalaiyarkoil during the relevant time; that if to be so, he could not have been in the place of occurrence; and that he has been added to suit the prosecution case.

11. Added further the learned Senior Counsel that no one of the eyewitnesses who claimed to be so, has witnessed the occurrence; but, they were all planted to suit the prosecution case; that though the first information alleged to have been recorded within a short time, and the F.I.R. has also been registered within a few hours, it has reached the Court only on 24.7.2002, and thus, it would be indicative of the fact that all these records have been created to suit the prosecution case and also to include the names of these accused; that the prosecution has not proved the case beyond reasonable doubt, and hence, he is entitled for acquittal.

12. Advancing his further arguments, the learned Senior Counsel would submit that there was a sudden provocation, due to which, he has acted so, and hence, the same has got to be considered by this Court.

13. Apart from the arguments put forth by the learned Senior Counsel, the learned Counsel appearing for A-2 to A-4 would submit that in the instant cast, their names did not find place either in the dying declaration or in the F.I.R.; that as far as A-2 to A-4 are concerned, the claim by P.Ws.1 to 3 that they they knew them was only false; and that under the circumstances, an identification parade should have been conducted, but not done so.

14. Added further the learned Counsel that as far as A-4 was concerned, there is already a case registered by the same Investigating Officer against him; that the said criminal case is also pending trial; that he was compelled by the Investigating Officer to make an admission in that case, to which course he was not amenable; that under the circumstances, he has been falsely roped in; that nowhere the motive in respect of A-2 to A-4, is made mention, and under the circumstances, they are entitled for acquittal in the hands of this Court.

15. The Court heard the learned Additional Public Prosecutor on the above contentions and paid its anxious consideration on the submissions made.

16. It is not a fact in controversy that one Malaiyarasan, the husband of P.W.6, sustained injuries in an incident that took place at about 10.30 A.M. on 18.7.2002, and he was taken to Rajaji Government Hospital, Madurai. Despite treatment, he died on 25.7.2002. Originally, the case was registered u/s 307 of I.P.C., and on his death, it was altered to Section 302 of I.P.C. The inquest was made by the Investigating Officer. Following the same, the dead body was subjected to postmortem by P.W.10, the Doctor, who has given a categorical opinion in Ex.P6, that he died out of external injury No. 1 to 3 and its corresponding internal injuries and its complications thereof. Thus, the prosecution has adduced sufficient evidence in that regard. The fact that he died

out of homicidal violence was never questioned by the appellants/accused at any stage of the proceedings. Hence, without any impediment, it could be factually recorded so.

17. In order to substantiate the case that these four accused armed with deadly weapons, waylaid Malaiyarasan and attacked him at the time of occurrence, the prosecution has examined P.Ws.1 to 5. It is true that P.Ws.4 and 5 have turned hostile. But, fortunately, the prosecution had the evidence of P.Ws.1 to 3 who have spoken about the occurrence. According to the prosecution, there was a rivalry between A-1 and the deceased in respect of purchase of a land from the Head Constable, and the property was actually purchased by the deceased, and thereby, A-1 was on inimical terms. True it is, the Investigator has not made any investigation in this regard. While the prosecution has marched three witnesses, who have given a clear narrative of the entire incident, this Court is of the considered opinion that the motive cannot play a vital role. P.W.1 is the brother-in-law, who accompanied the deceased Malaiyarasan at the time of the occurrence and was standing nearby. P.Ws.2 and 3 are the independent witnesses, who have nothing to do with the family of P.W.1 or the deceased. P.W.3 has categorically spoken to the fact that during the relevant time, he was employed as a driver at Kalaiyarkoil; that he was proceeding to the Bus Stand at Mattuthavani; and that he happened to see the occurrence that had taken place at about 10.30 A.M. on the date of occurrence. According to the witnesses, when the deceased accompanied P.W.1, all these four accused waylaid him, and it was A-1, who attacked him with an aruval on the head, and A-2 to A-4 also followed him in cutting the deceased indiscriminately. All these three witnesses have given a clear narrative of the entire incident.

18. In the instant case, apart from the evidence of P.Ws.1 to 3, the prosecution had to its benefit Ex.P2, which is the accident register copy. Immediately after the occurrence, the deceased Malaiyarasan was taken to Rajaji Government Hospital at about 11.00 A.M., where P.W.7 was the Doctor on duty. It was P.W.3, who gave the statement to the Doctor, and it has been recorded in Ex.P2. In that accident register copy, it is found that four known persons attacked him with aruval at the place of occurrence. Now, at this juncture, it remains to be stated that P.W.3 was an eyewitness, and he gave the statement to the Doctor what is recorded in Ex.P2, which, in the opinion of this Court, would be pointing to the occurrence and the participation of the assailants. Following the same, it was the Judicial Magistrate, P.W.17, who proceeded to Rajaji Government Hospital and after verifying the mental condition of the declarant namely Malaiyarasan, recorded the dying declaration, which is marked as Ex.P13, wherein the declarant has clearly given the name of A-1 and also mentioned as four persons and one Muneeswaran and his brother. As far as this dying declaration was concerned, the Doctor has certified that he was in a fit state of mind to give a declaration, and the document remained unchallenged. Thus, the contents of the document have got to be given full effect to, since it was a dying declaration.

19. Following the dying declaration, an intimation was given to the respondent Police Station through the Out Post Police Station, and the Sub Inspector of Police who came over to the Government Hospital, has recorded the statement of Malaiyarasan, which is Ex.P1. It is pertinent to point out that Ex.P1 was the statement given by the deceased, on the strength of which a case came to be registered originally u/s 307 of I.P.C. The F.I.R. which came into existence, has reached the Court after six days. Now, it has to be stated that it was originally not a case u/s 302 of I.P.C.; but, it was a case only u/s 307 of I.P.C. Taking into consideration the earliest document, Ex.P2, coupled with Ex.P1 and the other document namely the dying declaration, Ex.P13, this Court is of the considered opinion that the delay in F.I.R. reaching the Court has neither been vital nor caused any prejudice to the interest of the accused. When the case was converted to Section 302 of I.P.C., the F.I.R. has reached the Court within a short span of time.

20. Now, the learned Senior Counsel for the appellant/A-1 was able to show the discrepancies among these two documents namely Exs.P1 and P13. Now, at this juncture, it is to be pointed out that Ex.P13, the dying declaration, was followed by Ex.P1. The Medical Officer, P.W.7, has categorically deposed in the cross-examination that the declarant Malaiyarasan, was able to speak, though he was semi-conscious. The intervening circumstance at that juncture, was the dying declaration recorded by the judicial Magistrate, P.W.17, on being certified that the mental condition of Malaiyarasan was perfectly right, and he was in a fit state of mind to give a declaration. Following the same, Ex.P1 document has come into existence. In such circumstances, it cannot be stated that Malaiyarasan was not the author of Ex.P1, since he has already given a declaration to the Judicial Magistrate marked as Ex.P13, and he was also in a fit state of mind to give the declaration. The Court has to necessarily point out that in both the documents Exs.P1 and P13, the deceased Malaiyarasan has stated the name of A-1. He would further add other three persons, and the other three were not known to him. Thus, it speaks of the truth of the matter at that time. It is true that a discrepancy is found in Ex.P13, the dying declaration, and also in Ex.P1. This discrepancy, in the opinion of this Court, in no way, has affected the truth of the prosecution case.

21. Apart from the above, the earliest document, Ex.P2, was given by P.W.3, wherein he spoke about the assailants four in number. The deceased has also spoken in the dying declaration about the presence of A-1 and the fact that it was he who gave the first cut, and the other three persons also. The subsequent document, Ex.P1, is the statement made by the deceased wherein he has specifically stated the name of A-1 and mentioned three others. Thus, it leaves no doubt that all the four persons before the Court are the accused persons shown. Except A-1, other three persons who were available, were the assailants who attacked the deceased. Now, it has to be looked into who are those three persons. According to P.Ws.1 to 3, A-2 to A-4 were already known to them even before the occurrence. Under the circumstances, the identification parade was

not needed and hence, not conducted. P.Ws.1 to 3 who are the eyewitnesses and who already knew A-2 to A-4, have clearly identified them in the Court. Apart from that, they have also spoken about the attack made by all the four persons at the time of the occurrence. Not even a suggestion was put by the accused to P.Ws.1 to 3 that they did not know A-2 to A-4 already. Thus, the evidence of P.Ws.1 to 3 that they knew A-2 to A-4 already has got to be taken as true version. That apart, P.Ws.1 to 3, who are eyewitnesses, have given a graphic narration of the participation of A-2 to A-4.

22. The learned Senior Counsel for the appellant brought to the notice of the Court that bloodstained clothes were not recovered, and the weapons of crime were not sent for chemical analysis. It is true that they have not been sent. This Court is able to see that there was an irregularity on the part of the investigating agency. But, this irregularity, in the opinion of the Court, will not in any way affect the truth of the prosecution case while the prosecution was able to prove the case by way of dying declaration given by the deceased to the Judicial Magistrate, P.W.17, and also the subsequent document, Ex.P1, on the strength of which the case came to be registered, and also the evidence of the three eyewitnesses who have categorically given a clear narration of the participation of A-1 to A-4. Thus, it leaves no doubt that these appellants/accused are the assailants in the case who have committed the offence. That apart, the testimony of P.Ws.1 to 3 stood fully corroborated by the medical evidence projected through the postmortem Doctor, P.W.10, and his certificate.

23. The contention put forth by the learned Counsel that A-2 to A-4 had no motive; and that their names did not find place in the FIR or in the dying declaration is of no consequence in the case for the simple reason that it is not the case of the prosecution that A-2 to A-4 had any motive. A-2 to A-4 were closely associated to A-1, and it was only A-1, who had motive against the deceased. As far as A-2 to A-4 were concerned, both in the dying declaration and in the F.I.R., their names are not found. Even as per the statement given by the deceased, he did not know the names of the other persons, and hence, it was not mentioned. But, P.Ws.1 to 3 who claimed that they knew A-2 to A-4 already, have spoken to that fact in Court. Under the circumstances, it would be clear that they are the assailants. The other contention that as against A-4, there was a case already pending trial; that the Investigating Officer is the same; that he compelled him to admit the offence; that he refused to do so, and hence, he has been falsely roped in does not require consideration. For the above reasons, all or any of the contentions put forth by the learned Counsel for the appellants do not merit acceptance, and hence, they are discountenanced.

24. The second line of argument advanced by the learned Senior Counsel for the appellants that the accused were already provoked, and due to that provocation, they have committed the act has got to be discountenanced since there is neither provocation nor sudden quarrel as urged by the Counsel. Accordingly, it is rejected.

25. As pointed out above, the case of the prosecution that all these four persons waylaid Malaiyarasan, attacked him with deadly weapons and caused his death remained proved. The occurrence has taken place in a public place at about 10.30 A.M. when all the assailants armed with deadly weapons, came to the spot, waylaid him and caused his death. Thus, it would be indicative of the fact that they planned to commit the crime, and accordingly, caused the death of Malaiyarasan, which has got to be termed only as murder as defined u/s 300 of I.P.C. warranting punishment u/s 302 read with 34 of I.P.C. As regards the charge u/s 341 of I.P.C., the conviction and sentence imposed by the trial Court, have got to be confirmed. Hence, there is nothing to interfere in the judgment of the lower Court. Accordingly, it is sustained.

26. In the result, both these criminal appeals must fail and fail. Accordingly, they are dismissed.