
(1994) 07 MAD CK 0031
In the Madras High Court
Case No : Criminal Appeal No. 473 of 1987

Muthusamy

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 27-07-1994

Acts Referred:

Arms Act, 1959 — Section 26(A)
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 307, 342

Citation : (1995) 1 LW(Cri) 67

Hon'ble Judges : Rengasamy, J

Bench : Single Bench

Advocate : Balaguru, for T. Susindran and S.Y. Massor, for the Appellant; P. Govindarajan, Government Advocate, for the Respondent

Judgement

Rengasamy, J.—This appeal arises from the conviction and sentence imposed by the learned Sessions Judge, West Thanjavur at Thanjavur,

in S.C. No. 59/86 for the offence u/s 304 Part II Indian Penal Code and Section 4 read with Section 26(A) of the Indian Arms Act, to undergo

rigorous imprisonment for 5 years of the first offence and one year rigorous imprisonment for the next offence.

2. The case of the prosecution is as follows:

The deceased Muthusamy and the deceased Vellaichamy belong to Thirunellore Village of Pattukkottai Taluk in Thanjavur District. On 12.8.1985,

dispute arose between them in watering their lands. Therefore, the deceased Muthusamy had complained about Vellaichamy to the Village

Panchayatar Krishna Vijaya Devar, who agreed to mediate the dispute between them. In spite of that, there was quarrel between them. On

16.8.85 at about 06:00 p.m., deceased Muthusamy, after taking bath in his well,

situated in his garden land, about 200 feet away from his house on the northern side, was returning to his house towards south. His sons P. Ws.1 and 3 and his brother P.W.2 were chatting by standing outside their house. P.Ws.4 to 6 also were coming from the northern side at that time. This Appellant, along his father in law late Vellaichamy and two others namely accused 1 and 3 in the lower Court, who were acquitted, way-laid Muthusamy and deceased Vellaichamy, who was having a stick in his hand, beat Muthusamy on his back. He instigated others to stab and kill Muthusamy. The Appellant, herein, who was having a velstick M.O.1 in his hand, stabbed Muthusamy on his back, the first accused in the lower court, who also was having a velstick in his hand, stabbed on the forehead of Muthusamy and the third accused in the lower court beat him on his right shoulder with a stick. Deceased Muthusamy fell down and on seeing this, P.Ws. 1 to 3 ran to him and when P.W.1 lifted his father, this Appellant stabbed P.W. 1 on his left flank. P.Ws.4 to 6, who were coming from the northern side, also saw this incident. As people began to gather there, this Appellant and others made their escape with the weapons in their hands. P.W.1 to P.W.3 carried deceased Muthusamy to his house for sending to a doctor for treatment, but they found him dead. As there was no bus to go to the police station immediately and P.W.1 also was afraid of these assailants, only by 11:00 p.m, P.W.1 was able to reach Pappanad Police Station, where he gave the complaint Ex.P-1 to the police constable P.W.9, who registered the same in Crime No. 273/85 under Sections 302, 342, 324, 323 and 307 Indian Penal Code and prepared the express First Information Report Ex.P-6, which was forwarded immediately to the Court and higher officials. On the same night at about 10:00 p.m., the first accused appeared before P.W.9 with the complaint alleging that he and others were beaten and that was registered in Crime No. 272/85 under Sections 147, 448, 323, 427 and 380 Indian Penal Code, for which the First Information Report Ex.P-7 was prepared. The first accused was immediately sent to Doctor, P.W.1 also was sent to the Doctor at Pattukkottai, but as there was no transport facilities in that night, P.W. 1 went on the next day morning to the Doctor P.W.11, who examined his injury namely a laceration measuring 3 cm in length on the back and pain on his right thigh and issued the wound certificate Ex.P-8.

Meanwhile, the Inspector of Police, who received the express First Information Report by 03:00 a.m. on 17.8.85, proceeded to the scene of

occurrence and prepared the observation mahazar Ex.P-2 in the presence of P.W.7 and seized blood stained earth M.O.3 and the sample earth

M.O.4 under Ex.P-3 mahazar. He also prepared the rough sketch Ex.P-16 for the scene of occurrence and conducted the inquest in the presence

of the panchayatars under Ex.P-17. On 18.8.85, he arrested accused Vellaichamy near a bridge in Sankaranathankudikadu in the presence of

P.W.8. On his confession, a portion of which is marked as Ex.P-4, he recovered M.O.1, velkathi, and stick M.O.2, from brick kiln in Thirunellore

under the mahazar Ex.P-5. As he had injuries, he was sent to Orathanad Government Hospital on 19.8.1985 and P.W.14, the Medical Officer, on

examination, issued the wound certificate Ex.P-15. He sent the body of the deceased for post-mortem to P.W. 10 and P.W.12 the medical officer

in Orathanad Government Hospital, conducted the post-mortem on 18.8.85. He found contusion 3cm x 1cm over the frontal bone, another

contusion 5cm x 3cm over the right shoulder, a third contusion measuring 1cm x 1cm over the left parietal area, a stab injury 3cm x 1cm x 15cm at

the junction of the rib with the vertebra on the right side over the 7th rib and the penetration of this wound extended causing punctured wound to

the right lobe of the liver and posterior aspect of the lower lobe of the right lung. He opined that the death was due to shock and hemorrhage due

to the injuries on the vital organs namely liver and lungs. Ex.P-10 is post-mortem certificate issued by him. On the request of the Inspector of

Police P.W. 15 under Ex.P-11, the Judicial Magistrate, Orathanad, forwarded the bloodstained articles M. Os. 1 to 6 to the Forensic Laboratory

and received the report Ex.P-13. Ex.P-14 is the Serologist's report. The Inspector of Police completed the investigation and charge-sheeted this

Appellant, accused 1 and 3, who were acquitted in the lower Court, and late Vellaichamy. The complaint given by the first accused was referred

as mistake of law. As Vellaichamy died subsequent to the filing of the charge-sheet, the charges against him abated.

3. The Appellant was questioned u/s 313 Code of Criminal Procedure to explain the incriminating circumstances found against him in the evidence

of the prosecution witnesses. He denied his complicity in the offence. The learned Sessions Judge, after scrutinising the evidence, acquitted the

accused 1 and 3 and convicted this Appellant alone for the above mentioned offences in the manner stated above.

4. The point for determination is whether the prosecution has brought home, the guilt of this Appellant.

5. The place of occurrence as shown in the sketch Ex.P-16 is in a mud road opposite to the gate of the garden land of the deceased Muthusamy.

It is brought out from the evidence that the house of the deceased Muthusamy are his brother P.W.2 is situated on the southern side of the

abovesaid garden and the houses are having the live fences on all four sides. Ex.P-2 the observation mahazar reads that the house of the deceased

is situated about 200 feet away from the scene of occurrence. P.Ws.1 to 3 would state that as the occurrence took place at about 06:00 p.m. in

day-light, they were able to see the assailants when they were standing in front of their houses and they know the identity of the assailants. P.Ws.4

to 6 who are residents of the western street at some distance away from the place of occurrence, say that they were returning to their house after

attending some work on the northern side. P.Ws.4 to 6 are chance witnesses because their residence is in the western street and unless they had

reasons to come near the scene of occurrence, they had no occasion to witness this occurrence.

6. Even though the occurrence is said to have taken place at 06:00 p.m., the complaint Ex.P-1 was given only by 11:00 p.m. in Pappanad Police

Station. According to P.W.1, if they go by bus, the distance to Pappanad is 16 kms. or if they go by cycle, they will reach Pappanad in 1 1/2

hours. P.W.1, the author of the First Information Report, would state that as there was no bus from his village to Pappanad and he was also afraid

of going out, he could reach Police Station by walk only by 11:00 p.m. But he has admitted in his evidence that his village is connected by town

bus and the last bus had left the village by 09:30 p.m. He also admits that buses are frequently plying from Thanjavur to Pattukkottai through

Pappanad and his village is at a distance of 1 1/2 kms. away from Pattukkottai-Thanjavur Road. Therefore, had he reached Pattukkottai-

Thanjavur road, which is only about 1 1/2 kms. from his village, he could have gone to Pappanad Police Station, within half an hour after the

occurrence. However, P.W.1 would say that he was afraid of the accused to move out. This is hard to believe because the evidence of P.W.15

shows that the house of the first accused and late Vellaichamy were damaged by breaking the tiles and according to P.W. 15, the Inspector, the

relations of the deceased Muthusamy, who got angered, damaged the houses of the accused and none was present in those houses when the

Inspector visited the houses of the Appellant. It is not as if the family of the deceased was segregated from the village and they had no support of

anyone in the village. On the other hand, the evidence discloses that the accused and the deceased all belong to same community and the deceased

also has left his brother, P.W.2, his two sons, P. Ws.1 and 3, and the other relations, who caused damage to the houses of the accused.

Therefore, when so many people were available to P. W.1, it is difficult to accept that he was not able to move out from his house for nearly five

hours after the occurrence, being afraid of the assailants.

7. Therefore, it is patent that the real reason for the delay is suppressed. As said earlier, as the occurrence had taken place opposite to the gate of

the garden land of the deceased and if the real assailants were not known to the family of P.W.1, there might have been delay in launching the

complaint as it would have been difficult for him to ascertain the identity of the assailants. It has been considered in series of decisions that the delay

in setting the law in motion gives opportunity to implicate the suspects also. Therefore, in this case, the delay in launching the complaint Ex.P-1 has

created considerable doubt in my mind as to the truth of the prosecution case.

8. The learned Counsel Mr. Balaguru contended that when P. Ws.1 and 2 have stated that the misunderstanding with Vellaichamy in watering the

lands had been told to the Village Panchayatar, who also had offered to mediate, there was no other provocative event on 16.8.85 for this

Appellant and others to come all of a sudden with dangerous weapons to attack deceased Muthusamy. P.Ws.1 and 2, no doubt, have mentioned

about the quarrel between their family and deceased Vellaichamy in connection with watering their lands on 12.8.85. As the matter was referred to

the Panchayat, unless there was subsequent quarrel aggravating the situation, there was no possibility for the Appellant and others coming all of a

sudden with deadly weapons to attack the deceased. Therefore, there must be some other cause for the incident, which the prosecution witnesses

have not revealed.

9. Now, coming to the ocular testimony of six witnesses, all of them have uniformly said that the deceased Vellaichamy beat deceased Muthusamy on his back with a stick, the Appellant herein stabbed him with Velstick M.O.1 on his back, the first accused in the lower Court stabbed him on his forehead with a velstick and the third accused in the lower Court beat him with a stick on his right shoulder. Therefore, according to these witnesses, each of these persons had restricted to a single blow or stab. As all these witnesses would state that they were watching the incident even from the beginning when deceased Muthusamy was obstructed, their version must tally with the medical evidence. Even though all these witnesses would state that deceased Muthusamy was beaten with a stick on his back by deceased Vellaichamy, there was no corresponding injury on his back. The weapon used by the first accused is said to be a vel, which is a sharp-edged weapon and which should have caused only a punctured wound or incised wound if stabbed. But in the forehead of the deceased Muthusamy, there were two contusions only and there is no possibility for causing these two contusions with a sharp-edged weapon like vel (spear). Further, all these prosecution witnesses have spoken that the first accused alone stabbed once on the forehead of the deceased. But there are two contusions in the forehead of the deceased and the prosecution has not explained how these two contusions were caused on the forehead of the deceased. If really these witnesses had occasion to see this occurrence, they could have explained how these contusions were caused on the head of the deceased. But there is no explanation forthcoming from the prosecution. Therefore, the learned Sessions Judge also has rightly disbelieved the evidence of these witnesses with regard to the overt acts alleged against the Appellant and two other accused for causing the injuries on the deceased Muthusamy other than the stab wound on the back.

10. But the learned Government Advocate (Criminal side) would contend that P.W. 1 also had sustained an injury on his back as told by Doctor P.W.11 and therefore, the version of P.W.1 that he was attacked by the accused when he intervened to save his father, can be believed. The injury found on the left back of P.W.1 was only an abrasion to the length of 3 cms. the doctor P.W.11 has stated that this abrasion can be caused

even by the scratch of the nail, On the other hand if the kuthukol like M.O.1 was used by the Appellant to attack P.W. 1, certainly it would have caused a major injury of incised in nature. Therefore, this abrasion to the length of 3 cm can be even a self- inflicted one to make believe that he was present in the place of occurrence. When the learned Sessions Judge discredited the testimony of these six witnesses in so far as the overt attacks against first and third accused and also the attack on P.W.1 by the Appellant, I am unable to understand how the learned Sessions Judge has believed the evidence of these witnesses with regard to the fatal injury on the deceased alleged to have been caused by this Appellant. When all these witnesses have falsely implicated the accused 1 and 3 and also falsely alleged that this Appellant had attacked P.W.1, why not the same false implication could not have extended against this Appellant also connecting him with the fatal injury? As some injuries were found on the body of the deceased Muthusamy, it appears that these witnesses have attributed one injury to each of the accused before the lower Court and the deceased Vellaichamy, to connect them with the occurrence. It is highly artificial to see the evidence that when all these accused persons came armed with deadly weapons like velstick, they had chosen to inflict only one injury by each of them and not more than that when especially the allegation is that the deceased accused Vellaichamy instigated others to do away with Muthusamy. Therefore, as the medical evidence does not support the ocular version in full, I doubt whether these witnesses could have really seen the occurrence. This doubt is further fortified for the non-examination of any witnesses residing close to the scene of occurrence but choosing the witnesses who are residing at some distance. It has been admitted by P.W.5 that there are houses of Sivasamy, immediately east and houses of Susy and Subbian on the south of the place of occurrence. But they have not been examined as witnesses. When P. Ws.1 to 3, who are residing 200" away from the place of occurrence, were able to see this occurrence and rushed to save the deceased, the residents close to the place of occurrence might have seen this occurrence but they have not been examined by the prosecution.

11. At this stage, I have to mention the complaint given by the first accused in the lower Court by 10:00 p.m. on the same night for the injuries he

sustained in the same occurrence. The first accused even by 10:00 p.m. on the same night reached Pappanad Police Station and gave the complaint Ex.P-7, which was registered in Crime No. 272/85 alleging that at 06:00 p.m. on the same evening, the deceased, his brother P.W.2 and his son P.W.3, along with his wife Ramayee, attacked them and their houses on account of the quarrel in watering the land and they also had driven away their cattle and articles from their houses. P.W.9, the police constable attached to Pappanad Police Station, found injuries on the first accused and he was sent to Orathanad Government Hospital for examination. The deceased Vellaichamy also had injuries on him and when he was arrested on 18.8.85, he was sent to the Hospital and P.W.14 examined deceased Vellaichamy on 19.8.85 and found on him an abrasion on his right forehead measuring 5cm x 1/4 cm x 0.1 cm and another abrasion measuring 1/2 cm x 1/4 cm x 0.1cm on his elbow. All the prosecution witnesses have stated that they did not know how the deceased Vellaichamy and the first accused had sustained injuries. As the first accused had given the complaint even earlier to Ex.P-1 at 10.00 itself alleging that at 06:00 p.m., he and his brother were attacked and the police officer P.W.9 had also seen the injuries on the first accused and referred him to the hospital, the prosecution is bound to explain the injuries on the accused person. But the prosecution has not chosen to explain the injuries and even the complaint Ex.P-7 given by first accused was simply referred without examining any witness. In Ex.P-7 complaint, the first accused in the lower Court has stated that the deceased Muthusamy, his sons and others had damaged their houses by breaking the tiles and also the articles inside the house by entering into their houses. P.W.15, the Inspector of Police, who visited the houses of the accused, has found the damage to the houses. However, he admits that he did not record statement from anyone as no one was available in the houses and he came to the conclusion that the tiles of the houses of the accused were broken by the relations of the deceased after the attack on the deceased Muthusamy. In the cross examination, when he was confronted with the question on what basis he came to that conclusion, P.W.15 has answered that it was his inference. When there is a complaint from the first accused that the deceased and his men had caused damage to their houses and articles inside the houses and the investigating officer also had inspected the houses and confirmed

the same to be true, was it not his duty to enquire from anyone of that area as to how damage was caused to the houses of the accused? But the investigating officer has stated that he presumed that the damage might have been caused by the relations of the deceased Muthusamy. This is a perfunctory investigation relating to the complaint of the accused and without examining any person, the investigating officer seems to have referred the complaint of the accused for the reason that there was death of a person relating to the other complaint, given later. As Ex.P-7 also refers to the same time, namely 06:00 p.m., the investigating officer should have enquired the residents of that area relating to the version in Ex.P-7 and as the accused party also had sustained injuries though simple, he should have ascertained who was the aggressor among these two parties. Even if there was genuine threat to the life and property of the accused persons, they were entitled to retaliate for the safety of their person and property. Any how, the prosecution has failed in this case to explain the injuries on the first accused in the lower Court and deceased Vellaichamy against whom the charge-sheet was filed. Therefore, the prosecution has not placed the true facts before the Court to find out the manner in which the occurrence took place and who were the aggressors.

12. The Appellant herein is not a resident of the village Thirunellore, where the occurrence took place, and he is a native of Sankaranathankudikadu, a different village and he is a son-in-law of the deceased Vellaichamy. It is the contention of the Appellant that he did not come to the village Thirunellore on 16.8.85 and he has been falsely implicated as he happened to be the son-in-law of one of the accused in this case. Even though M.O.1 bloodstained weapon has been seized, the recovery is not admissible as against this Appellant because M.O.1 has been recovered on the information given by deceased Vellaichamy. The Division Bench of Kerala High Court in Kunnummal Mohammed and Another Vs. State of Kerala, has held that when the recovery of the weapon was effected on the information of another accused not connected with the weapon, the recovery by itself will not connect the other accused with the crime. Therefore the recovery on the information by deceased Vellaichamy itself is not going to help the prosecution. No doubt, P. Ws. 1 to 6 have spoken that this Appellant stabbed deceased Muthusamy

only by M.O.1. The learned Government Advocate (Criminal) also would contend that the Forensic Report Ex. P-13 and P-14 prove the

presence of the bloodstain in M.O.1 and therefore on the evidence of these witnesses, the use of this weapon by this Appellant has to be

accepted. As I have already dealt with the evidence of these witnesses with regard to the use of M.O.1 for causing the injury on the head of the

deceased Muthusamy and also the injury on the back of P.W.1, which was only contusion and a laceration, the probability for the use of this

weapon by the Appellant is very remote.

13. No doubt for the reason that the first and third accused have been acquitted by the Court below, discrediting their testimony in respect of some

part of the occurrence, the Court cannot hold that it will be a ground to reject the testimony of these witnesses in total, but as discussed above, the

testimony of these witnesses, who are related to the family of the deceased, appears to be unreliable as their presence itself is doubtful. Therefore,

the Court below is not right in convicting this Appellant and the conviction and sentence of the Court below has to be set aside.

14. In the result, the conviction and sentence imposed by the Court below is set aside. The Appellant is acquitted. The appeal is allowed.