

(2009) 10 MAD CK 0209
In the Madras High Court
Case No : Criminal A. No. 87 of 2009

Saleem and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 07-10-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 147, 294, 302, 323, 341

Citation : (2009) 10 MAD CK 0209

Hon'ble Judges : M. Jeyapaul, J; C. Nagappan, J

Bench : Division Bench

Advocate : R. Vijayakumar, for the Appellant; Hassan Mohamed Jinnah, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

C. Nagappan, J.—The appellants herein are the accused Nos. 1 to 6 in Sessions Case No. 60 of 2008 on the file of the Additional District and Sessions Judge, Fast Track Court No. I, Chengalpattu and they have preferred this appeal challenging the conviction and sentence imposed on them by judgment dated 27.1.2009 in the case. For the sake of convenience, in this Judgment, the appellants will be referred to as A1 to A6.

2. Charges under Sections 147, 294(b), 341 and 302 IPC were framed against A1 Saleem, A2 Manikandan alias Mani, A3 Mohan, A4 Viji, A5 Appu alias Karthick and A6 Arumugham. The learned Additional Sessions Judge found A1 to A6 guilty of the charges under Sections 302, 147 and 341 IPC and convicted and sentenced them to undergo Life Imprisonment each and to pay a fine of Rs. 9000/- each, in default, to undergo Rigorous Imprisonment for six months each for the charge u/s 302 IPC; convicted and sentenced them to pay a fine of Rs. 500/- each, in default, to undergo Simple Imprisonment for two weeks each for the charge u/s 147 IPC and convicted and sentenced them to pay a fine of Rs. 500/- each, in default, to undergo Simple Imprisonment for one week each for

the charge u/s 341 IPC and at the same time, found the Accused Nos. 1 to 6 not guilty for the charge u/s 294(b) IPC and acquitted them of that charge.

3. To prove its case, the prosecution examined P.Ws.1 to 13 and marked Exs. 1 to P13.

4. The case of the prosecution, as could be discerned from oral and documentary evidence, can be briefly summarised as follows.

P.W.5 Muniammal is the mother of the deceased Venkatesan and PW. 6 Bhuvaneswari is his wife. PW. 1 Siva is the brother-in-law of the deceased. PW. 4 Minor Karthikeyan is the nephew of the deceased. Venkatesan was an Auto Driver and was residing in K.K. Street, Chengalpattu.

Ezhumalai, a resident of K.K.Street died on 10.5.2007. At 4.30 pm on that day, a wordy quarrel arose with regard to garlanding the body between Auto Driver PW. 7 Veera and A4 Viji. The body of Ezhumalai was taken in procession and A1 Saleem, A2 Manikandan alias Mani, A4 Viji were dancing in the procession. Venkatesan objected to the same. A1 Saleem beat Venkatesan on the head with hands; A4 Viji kicked Venkatesan on the chest; A2 Mani, A3 Mohan, A5 Appu alias Karthik also beat Venkatesan with hands and legs and A6 Arumugham fisted Venkatesan with hands on the stomach and chest and dragged and pushed him into the water tub situated in front of the house of Subramani and A1 to A6 kicked and beat Venkatesan with hands and legs indiscriminately. PW4 Karthikeyan and PW. 6 Bhuvaneswari witnessed the same and PW4 Karthikeyan ran and informed his grandmother PW. 5 Muniammal and she came crying and saw all the accused beating and kicking her son Venkatesan with hands and legs. All the accused ran away and PW. 5 Muniammal caught hold of the shirt of A1 Saleem and he gave a punch on her mouth and fled the scene.

PW.5 Muniammal and PW. 1 Siva took Venkatesan in an Auto to Chengalpattu Government Hospital where he was pronounced already dead. Ex.P7 is the Accident Register issued by Dr.Sitrarasu stating that Venkatesan was brought dead to the hospital.

PW.1 Siva went to Chengalpattu Town Police Station at 6 pm on 10.5.2007 and gave Ex.P1 Complaint and PW. 11 Sub Inspector Gnanasambandam received the same and registered a case in Crime No. 148 of 2007 under Sections 294(b), 341, 323 and 302 IPC and prepared Ex.P11 First Information Report and despatched the same to the Court and higher officers.

P.W. 12 Inspector Incharge, Mr. Subramanian took up the investigation and reached the occurrence place at 6.30 pm on 10.5.2007 and prepared Ex.P2 Observation Mahazar in the presence of P.W. 8 Garudasamy and another and Ex.P12 is the Rough sketch drawn by him. He examined PW. 1 Siva, PW. 2 Chelladurai, PW. 3 Mohanraj, PW. 4 Karthikeyan, PW. 5 Muniammal, PW. 6 Bhuvaneswari, PW. 8 Garudasamy and recorded their statements. In the morning of 11.5.2007, he conducted inquest on the body of Venkatesan in the presence of

panchayatars and witnesses and prepared Ex.P13 Inquest Report. He sent the body for post-mortem by giving Requisition.

P.W. 6 Dr.Parasakthi conducted post-mortem on the body of Venkatesan at 10.30 am on 11.5.2007 and found the following ante mortem injuries.

(1) Abrasions seen on right mastoid 2 cm x 1 cm, back of left ear 3 cm x 2 cm.

(2) Diffuse contusion with swelling seen on front of left side of neck. O/D. Underlying skin and soft tissues found contused. Complete fracture seen on left horn of hyoid bone, fracture ends found irregular.

(3) Diffuse contusion seen on right parieto temporal bone. Fissure fracture seen on right parieto temporal bone. Diffuse subdural and sub arachnoid haemorrhage seen. CSF blood stained, Intracranial haemorrhages seen on both cerebral hemispheres.

(4) Fracture dislocation seen on C3, C4, C5 Cervical vertebra with surrounding areas of contusions. Stomach contained 300 ml of watery fluid with fruity odour. MUCOSA-NAD. All other internal organs "NAD. C/s. Pale."

She expressed opinion that the deceased died of shock due to multiple injuries, 18-22 hours prior to post-mortem and issued Ex.P6 Post-mortem Certificate.

P.W.12 Inspector Incharge Subramanian arrested A1 Saleem, A2 Mani and A3 Mohan at 8 am on 15.5.2007 near Pazhaveri Vaigai Hotel situated in the National Highway at Chengalpattu and he sent them to judicial remand. At 8 pm on the same day, he arrested A4 Viji in front of Raghavendra Kalyana Mandapam in Mahalakshmi Nagar, Thimmavaram and sent him to judicial remand on the next day. He handed over the investigation to the regular Inspector.

PW.13 Inspector Mohan further examined PW. 5 Muniammal and PW. 6 Bhuvaneswari on 21.5.2007 and recorded their statements. On the same day, he examined PW. 10 Dr.Parasakthi and Dr.Sitrarasu and recorded their statements. On 26.6.2007 at 11 am, he arrested A5 Appu alias Karthik in Chengalpattu New Bus Stand and sent him to judicial remand. On 27.6.2007 at 1 pm, he arrested A6 Arumugham near Chengalpattu Bypass road and sent him to judicial remand. On 24.7.2007, he gave Ex.P3 Requisition to record the statements of P.Ws.1 to 6. PW. 9 Judicial Magistrate Tmt.Revathi recorded their statements in Ex.P5 (series). On 3.8.2007, PW. 13 Inspector Mohan further examined PW. 1 Siva, PW. 2 Chelladurai, PW. 3 Mohanraj, PW. 4 Karthikeyan and recorded their statements. He examined some more witnesses and recorded their statements. He completed the investigation on the same day and filed Final Report against all the accused.

5. All the accused were examined u/s 313 CrPC and they denied complicity. No witness was examined and no document was marked on their side.

6. The Trial Court found the accused guilty of the charges under Sections 147, 341 and 302 IPC and sentenced them as stated earlier. Challenging the conviction and sentence, the Accused Nos. 1 to 6 have preferred the present

appeal.

7. Venkatesan died of homicidal violence is established by the testimony of post-mortem doctor. PW. 10 Dr.Parasakthi conducted autopsy on the body and she has testified that she found the following ante mortem injuries; Abrasions on right mastoid; diffuse contusion with swelling on the front of left side of neck; diffuse contusion on right parieto temporal bone and on internal examination of the head, she had found fissure fracture on right parieto temporal bone with diffuse subdural and sub arachnoid haemorrhage and intracranial haemorrhages on both cerebral hemispheres and on internal examination of the neck, she had found fracture of left horn of hyoid bone; fracture dislocation of C3, C4, C5 cervical vertebra with surrounding areas of contusions. She has expressed opinion that Venkatesan died of shock due to multiple injuries, 18-22 hours prior to post-mortem. Ex.P6 is the post-mortem certificate issued by her. Accepting the medical evidence, it is clear that Venkatesan died of injuries sustained during the occurrence.

8. The prosecution case is that A1 Saleem, A2 Mani, A3 Mohan, A4 Viji, A5 Appu and A6 Arumugham as members of unlawful assembly, in furtherance of their common object, attacked Venkatesan with hands and legs resulting in his death.

9. To prove the occurrence, the prosecution examined P.Ws.1 to 7 as having witnessed the occurrence. P.Ws.1, 2, 3 and 7 did not support the prosecution case and were declared as hostile. PW. 4 Karthikeyan is aged 15 and he is the nephew of the deceased Venkatesan; PW. 5 Muniammal is the mother of Venkatesan; PW. 6 Bhuvaneswari is his wife and all of them have testified that the Accused Nos. 1 to 6 attacked Venkatesan with hands and legs at the time of occurrence.

10. The learned Counsel for the appellants submits that the testimonies of P.Ws.4 to 6 are not reliable on account of the improvements and embellishments made by them in their statements even during the course of investigation and there are material contradictions in their testimonies given before the Investigation Officer and in the trial and they could not have witnessed the occurrence and they are interested and partisan witnesses and it is dangerous to rely on their testimonies and the occurrence could not have happened the way in which spoken to by them in trial and the names of P.Ws.5 and 6 do not find a place in the complaint which is the earliest in point of time and it is not safe to rely on their testimonies for sustaining the conviction and the judgment of the Trial Court is liable to be set aside.

11. Per contra, the learned Additional Public Prosecutor submits that the presence of PW. 4 Karthikeyan during the occurrence is mentioned in the complaint itself and his testimony cannot be discarded and the other eye witnesses in their further statements have spoken to about the overt acts of each and every accused in the attack made on the deceased and the prosecution has proved the charges through the ocular testimonies.

12. PW. 2 Chelladurai, PW. 3 Mohanraj and PW. 7 Veera have testified that they had not witnessed the occurrence and they were treated as hostile. PW. 1 Siva is the brother-in-law of the deceased Venkatesan and in his testimony, he has stated that he did not see the occurrence and PW. 4 Karthikeyan informed him about the occurrence and he reduced it into writing as Ex.P1 complaint and lodged the same in the Police Station. In the complaint as well as in his statement before the Investigation Officer, he has stated that he witnessed the occurrence and since he did not say so in the trial of the case, he was treated as hostile.

13. The learned Counsel for the appellants submits that PW. 1 Siva in his testimony before the trial Court has admitted that he is the author of Ex.P1 Complaint and in the complaint he has stated that A1 Saleem, A2 Mani and Murali attacked Venkatesan during the occurrence and whereas in his earliest statement before the Doctor who had examined Venkatesan he has stated that Venkatesan was assaulted by unknown persons and the number of persons not known and the above statement would affect the foundation of the prosecution case.

14. It is admitted by PW. 1 Siva in his chief-examination that he took Venkatesan to hospital. Venkatesan was examined by Dr.Sitrarasu in Government Hospital, Chengalpattu and Ex.P7 is the Accident Register issued by him. It is mentioned in Ex.P7 Accident Register that Venkatesan was brought by his brother-in-law Siva and Venkatesan was alleged to have been assaulted by unknown persons and the number of persons not known. The occurrence took place at about 4.30 pm on 10.5.2007 and Dr.Sitrarasu had examined Venkatesan at 4.45 pm on the same day in the hospital and declared that he was brought dead. Within 15 minutes after the occurrence, PW. 1 Siva had informed Dr.Sitrarasu that Venkatesan was assaulted by unknown persons. At 6 pm on the same day, PW. 1 Siva had lodged Ex.P1 Complaint stating that A1 Saleem, A2 Mani and Murali attacked Venkatesan during the occurrence. In such circumstances, the above submission of the learned Counsel for the appellants cannot be brushed aside.

15. PW. 4 Karthikeyan is the nephew of the deceased Venkatesan and he is aged 15 years studying ninth standard in school. In his testimony before the Court, he has stated that he participated in the funeral procession of Ezhumalai on 10.5.2007 and A1 Saleem, A4 Viji and PW. 7 Veera were in the procession and A1 Saleem and A4 Viji beat PW. 7 Veera over a tussle and Venkatesan questioned the same and at that time A1 Saleem beat Venkatesan on the head and A4 Viji beat him on the chest and chin and kicked him and A2 Mani, A5 Appu and A6 Arumugham indiscriminately beat Venkatesan with hands and legs and dragged and put him in the water tub in front of the house of Subramani and Accused Nos. 1 to 6 thrashed and kicked Venkatesan in the tub and PW. 4 Karthikeyan got scared and went and brought his grandmother and the accused ran away from the scene.

16. The occurrence took place on 10.5.2007 at 4.30 pm and the case came to be

registered at 6 pm and PW. 12 Inspector Subramanian examined PW. 4 Karthikeyan on 10.5.2007 itself and recorded his statement and in that statement, PW. 4 Karthikeyan has stated that A1 Saleem, A2 Mani and Murali fisted and attacked Venkatesan with hands and legs. He never mentioned the names of A3 to A6 as assailants and did not attribute any overt act to them. Further in that statement, he did not state that A1 Saleem beat Venkatesan on the head. PW. 4 Karthikeyan was further examined on 3.8.2007 by the Investigation Officer PW. 13 Inspector Mohan and in that statement, for the first time, PW. 4 Karthikeyan has stated that A3 to A6 also attacked Venkatesan attributing overt acts to them. The further examination was done after a period of two and half months and there is no explanation for the same. P.Ws.1 to 7 and Accused Nos. 1 to 6 are all residing in K.K.Street, Chengalpattu and from the evidence it is clear that they know each other very well. If really PW. 4 Karthikeyan had seen the attack launched by all the accused on Venkatesan, he would not have omitted to mention the names of the known persons in his earliest statement given before the Investigation Officer on 10.5.2007. That is not stated. On the other hand, PW. 4 Karthikeyan has developed his version in his subsequent statement after a period of two and half months by implicating A3 to A6 attributing overt acts in the attack made on the deceased. In this context, it is relevant to note that even in the subsequent statement PW. 4 Karthikeyan has stated that A1 Saleem and A2 Manikandan attacked Venkatesan only on the chest and stomach and in his testimony before the Court, he has improved his version. In such circumstances, PW. 4 Karthikeyan does not appear to be truth speaking witness and it is highly unsafe to rely on his testimony.

17. PW. 5 Muniammal is 65 year old and mother of deceased Venkatesan and in her testimony, she has stated that on the date of occurrence her son Venkatesan went to participate in funeral procession of Ezhumalai and she was sleeping in the house and PW. 4 Karthikeyan came crying and she ran with him and found all the accused beating Venkatesan having rounded him off and she caught hold of the shirt of A1 Saleem and he gave him a punch on her mouth and fled away along with other accused.

18. It is not in dispute that PW. 5 Muniammal was residing at Door No. 13/32B, K.K.Street, Chengalpattu. The occurrence took place in front of house bearing Door No. 13/9, K.K.Street belonging to Subramani. Ex.P12 is the Rough Sketch showing the place of occurrence and eleven houses on both sides of the street were shown in it. The house of PW. 5 Muniammal bearing Door No. 13/32B is not shown in the Rough Sketch. It is also not found mentioned in Ex.P2 Observation Mahazar. Hence her house must be little away from the occurrence place. It is also not in dispute that PW. 5 Muniammal was informed about the occurrence by PW. 4 Karthikeyan when she was asleep and she rushed to the occurrence place. As already seen, PW. 4 Karthikeyan in his testimony has stated that he witnessed the entire occurrence and ran and informed the same to his grandmother and brought her to the occurrence place. Even according to PW. 5 Muniammal, it is only her grandson PW. 4 Karthikeyan who brought her to the occurrence place. If

that is so, PW. 5 Muniammal could not have witnessed the occurrence. It is not the case of the prosecution that PW. 4 Karthikeyan having partly witnessed the occurrence, rushed and brought his grandmother to the occurrence place. It is not mentioned in Ex.P1 Complaint that PW. 5 Muniammal saw the occurrence. In such circumstances, it is doubtful as to whether PW. 5 Muniammal would have witnessed the occurrence. She was examined on 10.5.2007 itself and in her statement, she has stated that A.1 Saleem, A2 Mani and Murali attacked Venkatesan at the time of occurrence on the chest and stomach. In the cross-examination, PW. 5 Muniammal has stated that she was examined on the date of occurrence and thereafter she was not examined in the case. According to Investigation Officer PW. 13 Inspector Mohan, he further examined PW. 5 Muniammal on 21.5.2007 and recorded her statement. It is not known as to whether she was further examined at all in the case. Even in her statement recorded on 10.5.2007, PW. 5 Muniammal had only stated that A1 Saleem, A2 Mani and Murali attacked Venkatesan and she did not whisper about the Accused Nos. 3 to 6 as having participated in the attack. In such circumstances, the contention of the learned Counsel for the appellants that PW. 5 Muniammal is an interested and partisan witness, cannot be ignored and her testimony about witnessing the occurrence is highly doubtful.

19. PW. 6 Bhuvaneswari is the wife of deceased Venkatesan and she has testified in the trial that she was standing in the street and viewing the funeral procession and she saw all the accused dragging her husband Venkatesan and pushing him in the water tub in front of the house of Subramani and A2 Mani kicked Venkatesan on the neck and A1 Saleem kicked Venkatesan on the chest and neck and dashed the head of her husband on the parapet wall of the water tub and A6 Arumugham fisted him on the stomach and chest and A4 Viji also caught hold of Venkatesan and hit his head on the parapet wall of the tub along with A5 Appu and A6 Arumugham kicked him on the stomach and chest and A3 Mohan kicked on the penis and when PW. 5 Muniammal arrived in the scene crying, they all ran away. P.Ws.4 and 5 in their testimonies before the Court have not stated that PW. 6 Bhuvaneswari witnessed the occurrence and in the averments in Ex.P1 Complaint also it is not stated that PW. 6 Bhuvaneswari was an eye witness to the occurrence. It is not in dispute that PW. 6 Bhuvaneswari resides at Door No. 13/32B, K.K.Street, Chengalpattu and as already seen that house is not shown either in the observation mahazar or in the Rough Sketch prepared in the case and it lies little away from the occurrence place in the same street. It is highly doubtful as to whether PW. 6 Bhuvaneswari could have witnessed the occurrence standing in front of the house. She was examined in the case on 10.5.2007 and in that statement, she has told that A1 Saleem, A2 Mani and Murali attacked her husband Venkatesan during the occurrence. She was further examined on 21.5.2007 and in that statement, she has stated about the attack made by A3 to A6 on her husband during the occurrence. She also gave statement u/s 164 Cr.P.C before PW. 9 Judicial Magistrate Tmt.Revathi, which is found in Ex.P5 (series) and in that statement, PW. 6 Bhuvaneswari has stated that she was in

her house on 10.5.2007 and PW. 4 Karthikeyan came running to her house and informed her about the occurrence and she rushed to the occurrence place. If that is so, she could not have witnessed the occurrence. Moreover, in the statement given on 10.5.2007, she has not stated that the accused dashed the head of her husband on the parapet wall of the water tub whereas in her subsequent statement given on 21.5.2007, she improved her version and has stated so. In such circumstances, the testimony of PW. 6 Bhuvaneswari does not inspire confidence.

20. As already seen, P.Ws.4 to 6, who have claimed to have seen the occurrence, have improved their version at every stage during the investigation and there are embellishments, material contradictions and inconsistencies in their statements and testimonies affecting the credibility. In short, the testimonies of the above witnesses do not inspire confidence and it is highly unsafe to rely on their testimonies to sustain the conviction.

21. We are unhappy over the investigation done in the present case. In Ex.P1 Complaint as well as in the statements recorded by the Investigation Officer on the occurrence day itself, it is stated that A1 Saleem, A2 Mani and Murali attacked Venkatesan and in Ex.P11 First Information Report, the names of A1 Saleem, A2 Mani and Murali are found mentioned. In the final report, accused Murali was deleted. No reason is stated as to why Murali came to be deleted in spite of the consistent statements of all the eye witnesses recorded on the occurrence day viz., on 10.5.2007. The prosecution did not explain the above omission and it affects the entire fabric of the prosecution case. The substratum of the prosecution case is mixed up with falsehood and it is difficult to shift the truth from falsehood. There was not only the deletion of the accused as referred above but there was addition in the array of the accused belatedly without any valid reason. There was a drunken brawl at the time of occurrence which led to the death of Venkatesan but the prosecution has miserably failed to establish that the accused caused his death. The Trial Court has failed to appreciate the material evidence in proper perspective and the finding that the prosecution has proved the charges and the accused are guilty of the charges is erroneous and cannot be sustained. The conviction and sentence imposed on the accused are liable to be set aside.

22. In the result, the Criminal Appeal is allowed and the conviction and sentence imposed on the appellants/Accused Nos. 1 to 6 in Sessions Case No. 60 of 2008 on the file of Additional District and Sessions Judge, Fast Track Court No. I, Chengalpattu are set aside and the appellants/Accused Nos. 1 to 6 are acquitted of the charges and the fine amount paid, if any, is to be refunded to them. The Bail bond executed by Accused Nos. 3 to 6 shall stand cancelled. The appellants 1 and 2/Accused Nos. 1 and 2 are directed to be released forthwith if their custody is not required in any other case.