

1.Esakkiammal Vs. The State Rep By,

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Court : Chennai

Decided On : Aug-12-2015

Judge : S.Nagamuthu

Appellant : 1.Esakkiammal

Respondent : The State Rep By,

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

12. 08.2015 CORAM THE HONOURABLE MR.JUSTICE S.NAGAMUTHU AND THE HONOURABLE MR.JUSTICE V.S.RAVI CRL A(MD)No.398 of 2010 1.Esakkiammal 2.P.Balasubramanian : Appellants Vs. The State Rep by, The Inspector of Police, Thachanallur Police Station, Tirunelveli District, [Crime No.831 of 2008].. : Respondents PRAYER Appeal is filed under Section 374 of the Code of Criminal Procedure against the Judgment and conviction dated 01.10.2010 made S.C.No.202 of 2009, on the file of the Additional Sessions Judge, Fast Track Court No.II, Tirunelveli. !For Appellant : Mr.N.Anandakumar ^For Respondent : Mr.C.Ramesh Additional Public Prosecutor :

JUDGMENT

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JUDGMENT

of the Court was delivered by S.NAGAMUTHU, JJ. The appellants are the accused Nos.1 and 2 in S.C.No.202 of 2009, on the file of the learned Additional Sessions Judge, Fast Track Court No.II, Tirunelveli. Altogether, there were four accused in the case. The Trial Court framed as many as seven charges as detailed below.

Charge	Accused	Penal Provisions
1	1,3 and 4	120(B) IPC23 324 IPC34 324 IPC44 302 IPC54 302 r/w 34 IPC61
2	201	IPC74 201 r/w 34 IPC2

By Judgment dated 01.10.2010, the Trial Court convicted the accused Nos.1 and 2, as detailed below:-

Accused No.	Convicted under Sections	Sentence imposed
1	302 r/w 34 IPC201IPC	To undergo imprisonment for life. To undergo rigorous imprisonment for seven years Rs.5,000/- in default to undergo rigorous imprisonment for six months. Rs.1,000/- in default to undergo rigorous imprisonment for six months.
2	201 IPC	To undergo rigorous imprisonment for seven years Rs.1,000/- in default to undergo rigorous imprisonment for six months

Challenging the said conviction and sentence, the appellants have come up with this Criminal Appeal.

3. The case of the prosecution, in brief, is as follows:- The first accused is the wife of the second accused. The first accused had allegedly developed illicit intimacy with the accused Nos.3 and 4. The accused Nos.1 and 2 had a child, aged about 11/2 years, by name, Isakkiyappa Alias Karthick. According to the case of the prosecution, since the child was a hindrance for the accused Nos.1, 3 and 4 for their illicit relationship, the accused Nos.1, 3 and 4 conspired together to commit the murder of the child. Thus, the accused Nos.1, 3 and 4 stood charged for the offence punishable under Section 120(B) of the Indian Penal Code. 3.1. It is further alleged that ten days prior to 11.12.2008, when the first accused was engaged in sexual activities with the third accused, at the house of the first accused, the deceased child cried and it was a disturbance for them to continue their sexual activities. Enraged over the same, it is alleged that the third accused caused a burn injury on the body of the child with lighted cigarette. Thus, according to the case of the prosecution, the third accused had committed offence punishable under Section 324 of the Indian Penal Code. 3.2. It is further alleged that on 11.12.2008, when the first accused was engaged in sexual activities with the fourth accused, at her house, the child again cried. This was a disturbance for them to continue to have their sexual activities. Enraged over the same, it is

alleged that the fourth accused caused burn injury on the child with a heated ever silver tumbler. Thus, the fourth accused, according to the case of the prosecution, committed offence punishable under Section 324 of the Indian Penal Code. 3.3. It is further alleged that on 12.12.2008, at about 09.30 AM, at the house of the first accused, the fourth accused had committed the murder of the child by attacking the child with a long size metal spoon and also by suffocating the child by closing the mouth and nose. It is further alleged that when the fourth accused committed the murder, the first accused aided him to commit the murder. Thus, the first accused is liable for punishment under Section 302 r/w Section 34 of the Indian Penal Code. 3.4. It is further alleged that the accused Nos.1 and 2, with the help of the fourth accused, took the dead body of the child to the house of the father of the first accused and informed him that the child died by an accidental fall. Thus, the accused Nos.1 and 2, according to the case of the prosecution, committed an offence punishable under Section 201 of the Indian Penal Code. It is further alleged that the fourth accused assisted the accused Nos.1 and 2 for taking the dead body of the child to the house of the father of the first accused. Thus, the act of the fourth accused, according to the case of the prosecution, amounts to offence punishable under Section 201 r/w Section 34 of the Indian Penal Code. 3.5. In order to prove the charges, the prosecution examined as many as ten witnesses and exhibited eleven documents, besides two Material Objects. Out of the said ten witnesses, PW-1 to PW-4, who are the neighbours of the accused Nos.1 and 2, have completely turned hostile and they have not stated anything incriminating against any of the accused. PW-5 is the Village Administrative Officer, who has stated that on 12.12.2008, at 08.20 PM, the Inspector of Police prepared an Observation Mahazer, at the house of the first accused in his presence and also the presence of his assistant. He signed the same. He has further stated that on 16.12.2008, at about 12.00 noon, PW-9, the Investigating Officer, arrested the accused Nos.1 and 2 at Thatchanallur Road. On such arrest, it is alleged that they gave independent confession one after the other. In the said confession given by the first accused, he disclosed that he had hidden a long size metal spoon at the house of one Isakkiammal. In pursuance of the same, he went to the said place along with the police and produced the same from the hide out [MO-2]. and he also produced MO-1, tumbler. 3.6. PW-6, Dr.M.Mani, has spoken

about the postmortem conducted on the dead body of the child. He found the following injuries on the dead body. "1. Abrasions seen over the following areas:

6. X2CM back of lower part of forearm and dorsum of hand, 8 X2CM entire lips, 4 X1CM lower part of nose, 1 X1CM inner aspect of right eye, 5 X3CM left cheek, 10 X4CM lower part of left side of abdomen, 4 X3CM left axilla and outer aspect of chest.

2. 4.5 CM diameter size 3 marginal partially healed burns seen 2 on the chest and one on the middle of abdomen.

3. 1 X1CM size burns seen on the upper part of right shoulder, 1 X1CM on the inner aspect of upper part of right thigh.

4. 3 X1CM size burns seen on the middle of left sole, 2 X1X CM left heel, 2 X1CM on the upper part of left gluteal region.

5. Healed burnt scars five in number each measuring 1 X1CM, four on the right upper limb and one on the Left chest. On dissection of scalp:

20. X12CM subscalpal bruising seen on the bi-temporo and bi-parietal region. Marked subdural and subarachnoid hemorrhages seen on both cerebral hemispheres. Other findings:- Peritoneal and Pleural Cavities empty. Heart surface shows Tardieu spots. Coronaries- patent. Lungs - surface shows Tardieu spots. C/S.congested. Liver, Spleen and Kidneys - C/S.congested. Hyoid bone - intact. Stomach - 50 gms of partially digested cooked rice particles. No specific smell. Mucosa - normal. Small intestine. Contains 20 ml of bile stained fluid. No specific smell. Mucosa - normal. Bladder empty. Brain -C/S.described". He gave final opinion that the deceased died due to asphyxia together with burn injuries.

3.7. PW-7 is a Constable, who has stated that he carried the dead body to the hospital for postmortem. PW-8 has spoken about the registration of the case on the complaint of PW-1. PW-9 and PW-10 are the Investigating Officers, who have spoken about the respective investigations done by them.

4. The Trial Court questioned the accused in respect of the evidences of PW-5 to PW-10. The accused denied the same. However, they did not choose to examine

any witness nor to exhibit any document. Having considered all the above materials, the Trial Court acquitted the accused Nos.3 and 4 from all charges, but convicted the accused Nos.1 and 2, as detailed in the first paragraph of this Judgment and punished them accordingly. That is how, the appellants are now before this Court with this Criminal Appeal.

5. We have heard the learned counsel for the appellant, the learned Additional Public Prosecutor for the respondent and also perused the records carefully.

6. The learned counsel for the appellants would submit that this is a case, where, absolutely, there is no evidence incriminating these two accused. But, the Trial Court has erroneously fallen back on Section 106 of the Indian Evidence Act, 1872, [for brevity "the Act"]. and convicted these two accused as though they had failed to discharge their burden to explain as to how the child died. This approach of the Trial Court, according to the learned counsel, is illegal.

7. The learned Additional Public Prosecutor would, however, oppose this Criminal Appeal. But, he is not in a position to place reliance on any evidence on record in support of the conviction.

8. We have considered the above submissions.

9. As we have narrated hereinabove, the first charge related to conspiracy against the accused Nos.1, 3 and 4 that they conspired together to kill the child, because the child was a hindrance to them to continue their illicit relationship. For want of any evidence to prove the said offence, the Trial Court has rightly acquitted all the three accused from the first charge. The second charge was under Section 324 of the Indian Penal Code against the third accused alleging that he voluntarily caused burn injuries on the body of the child ten days prior to 11.12.2008 with the use of burning cigarette. For want of any evidence, the Trial Court has acquitted the third accused from this charge. The third charge was under Section 324 of the Indian Penal Code against the fourth accused alleging that he had voluntarily caused burn injuries on the child with a heated eversilver tumbler on 11.12.2008. For want of any evidence, the Trial Court acquitted the fourth accused from the said charge also.

10. The fourth charge was under Section 302 of the Indian Penal Code against the fourth accused alleging that the fourth accused caused the death of the child by attacking the child with a long size metal spoon by suffocating the child by closing the mouth and nose. For want of any evidence to prove the said offence of murder, the Trial Court acquitted the fourth accused rightly from the said charge.

11. Having acquitted the accused under charge Nos.1 to 4, the Trial Court has, strangely, convicted the first accused under Section 302 r/w Section 34 of the Indian Penal Code. It need not be emphasized that the intention of two or more persons becomes a common intention, as dealt with in Section 34 of the Indian Penal Code, if they share the said intention and make it common among themselves. Here, in this case, there was no charge framed against any other accused under Section 302 r/w Section 34 of the Indian Penal Code along with the first accused. The charge does not speak with whom the first accused had shared the common intention to commit the murder of the child. Assuming that the first accused shared the common intention to commit the murder of the child with the fourth accused, for want of any evidence, the fourth accused has been acquitted. Thus, we are not in a position to understand as to how the Trial Court had chosen to convict the first accused under Section 302 r/w Section 34 of the Indian Penal Code. Absolutely, there is no evidence to prove that the first accused had any role to play in the death of the child. When there is no evidence at all for murder, it is not known as to how the Trial Court convicted the first accused under Section 302 r/w Section 34 of the Indian Penal Code. The Trial Court has relied on EX-P7, the complaint and has made extensive reference to the contents of the same. The Trial Court, in this regard, has committed an illegality in treating the same as a substantive evidence. The one, who made EX-P7, was not even examined and thus, the contents of EX-P7 have not been proved at all. It is common knowledge that the said statement could be used either to corroborate or to contradict the maker of EX-P7. Since, in this case, the maker of EX-P7 was not examined, it has no evidentiary value.

12. A perusal of the Judgment of the Trial Court further shows that the Trial Court made reliance on Section 106 of the Act. Section 106 of the Act speaks of the burden of proving fact especially within knowledge. It states that when any fact is

especially within the knowledge of any person, the burden of proving that fact is upon him.

13. In the instant case, absolutely, there is no evidence that the first accused had any exclusive knowledge as to how the death of the child was caused and by whom. In this regard, we may refer to a Judgment of the Hon'ble Supreme Court in *Sawal Vs. State of Bihar* reported in AIR 1974 SC778 wherein the Supreme Court has held as follows:- "Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused".

14. In the instant case, the prosecution has not discharged the initial burden of establishing the prima facie the guilt of the accused beyond all reasonable doubts. As Section 106 of the Indian Evidence Act, 1872, is an exception to Section 101 of the Evidence Act, it is not attracted, unless the initial burden of the prosecution is discharged.

15. Above all, the burden of an accused to explain the incriminating circumstances cannot be equated to the burden of proof beyond reasonable doubt cast upon the prosecution. Thus, the Trial Court has committed a very serious illegality in relying on Section 106 of the Act to hold the first accused guilty under Section 302 r/w Section 34 of the Indian Penal Code. Assuming that the first accused had failed to discharge her burden under Section 106 of the Act, we do not understand as to how such failure of the first accused would make liable for punishment under Section 302 r/w Section 34 of the Indian Penal Code. Thus, the conviction of the first accused under Section 302 r/w Section 34 of the Indian Penal Code is totally baseless and we are pained to say that it is illegal.

16. The sixth charge is against the accused Nos.1 and 2 alleging that they took the dead body of the child to the house of the father of the first accused and informed him that the child died due to an accidental fall. Absolutely, there is no evidence to show that the accused 1 and 2 had knowledge as to how the child died. When

there is no other evidence that the child died on account of an offence committed by the fourth accused and that these two accused had knowledge, we are again unable to understand as to how the Trial Court convicted these two accused under Section 201 of the Indian Penal Code. It is not at all the case of the prosecution that the second accused [the husband of the first accused]. had knowledge that the first accused had illicit relationship with the accused Nos.3 and 4. It is not their case that he consented for such relationship. It is nowhere in evidence that he had knowledge that the child was killed by somebody. Thus, the conviction of these two accused under Section 201 of the Indian Penal code is also illegal.

17. So far as the seventh charge is concerned, the Trial Court acquitted the fourth accused. According to the case of the prosecution, the accused Nos.1 and 2 took the dead body of the child to the house of the father of the first accused. We are again unable to understand as to how mere help to the co-accused to take the dead body of the child to the house of the father of the first accused would make out any offence at all.

18. Now, turning to the arrest of the first accused and the consequential discovery, it is not as though every discovery of a fact is relevant for the purpose of Section 27 of the Act. To make such a discovery admissible in evidence under Section 27 of the Act, the link between the discovered fact and the crime or the accused should be established by the prosecution. In this case, the link between the crime, MO-1 and MO-2 and the accused has not been established by the prosecution at all. Therefore, the very disclosure statement relating to the irrelevant discovery of fact is not admissible.

19. From the narration of the above facts, it could be noticed that the witnesses to speak about the alleged crime committed by these accused have turned hostile. But, the Trial Court has convicted these two accused only out of surmise that the deceased would have been done to death by someone else with the knowledge of the first accused. Even to draw such a presumption, there are no materials on record. We are sure that the Trial Court was aware of the criminal jurisprudence that the Criminal Courts, in this Country, have been empowered to convict a person on proof of guilt beyond reasonable doubts and not on moral grounds. The

Courts of law have been established only to enforce the law and to convict a person in accordance with law by following the procedure established as guaranteed under Article 21 of the Constitution of India. In our considered view, the Trial Court has committed a serious illegality in convicting these two accused in a very casual manner. We regret that we find it difficult to approve the action of the Trial Court. We hold that the accused are entitled for acquittal.

20. In the result, this Criminal Appeal is allowed; the conviction and sentence imposed on the appellants by Judgment dated 01.10.2010, made S.C.No.202 of 2009, passed by the learned Additional Sessions Judge, Fast Track Court No.II, Tirunelveli, is set aside and the appellants are acquitted. Fine amount, if any, paid by the appellants shall be refunded to them. Bail bond executed by the appellants and the sureties shall stand terminated. To 1.The Inspector of Police, Thachanallur Police Station, Tirunelveli District. 2.The Additional Sessions Judge, Fast Track Court No.II, Tirunelveli. 3.The Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

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