

Arun @ Arunachalam Vs. State Through

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Court : Chennai

Decided On : Aug-26-2015

Judge : S.Nagamuthu

Appellant : Arun @ Arunachalam

Respondent : State Through

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

26. 08.2015 CORAM THE HONOURABLE MR.JUSTICE S.NAGAMUTHU AND THE HONOURABLE MR.JUSTICE V.S.RAVI CRIMINAL APPEAL (MD).No.89 of 2008 and CRIMINAL APPEAL (MD).No.403 of 2008 Arun @ Arunachalam : Appellant/A2 in C.A.No.89/2008 G.Antony Alias Antony Raj : Appellant/A1 in C.A.No.403/2008 Vs. State through Inspector of Police Central Police Station Tuticorin District. in Crime No.124 of 2004 :Respondent in both appeals PRAYER: Appeals are filed under Section 374(2) of the Code of Criminal Procedure against the judgment passed by the Additional District and Sessions Judge FTC No.1, Tuticorin, in S.C.No.87 of 2005 dated 12.12.2007. !For Appellants : Mr.V.Kathirvelu Senior counsel for Mr.K.Prabhu ^For Respondent : Mr.C.Mayilvahana Rajendran Additional Public Prosecutor :

JUDGMENT

(Judgment of the Court was delivered by S.NAGAMUTHU, J.) The appellants are the accused 1 and 2 in S.C.No.87 of 2005 on the file of the learned Additional Sessions Judge, Fast Track Court No.I, Tuticorin. Including these appellants, altogether there were four accused. The 2nd accused in the case, Mr.Kumar @ Muthukumar absconded, after framing charges and therefore, the case against him was split up and the same is separately dealt with. The 4th accused Jeffry @ Jeffrin was acquitted by the trial Court.

2. The trial Court framed as many as five charges against all the four accused as detailed below: Charge Nos. Accused Under Sections 1 A1 to A3 342 IPC2A1 302 IPC3A2 & A3 302 r/w 34 IPC4A1 to A3 506(ii) IPC5A4 302 r/w 109 IPC The accused denied the charges. The trial Court convicted the appellants herein alone, who are originally the accused Nos.1 and 3. After the case was split up, these two appellants were arrayed as accused Nos.1 and 2 in S.C.No.87 of 2005. They have been convicted. The first accused has been convicted under Section 302 IPC and the 2nd accused (Arun @ Arunachalam)/appellant has been convicted under Sections 342 and 302 read with Section 34 IPC. The trial Court has sentenced the first appellant to undergo imprisonment for life and to pay fine of Rs.2,000/-, in default, to undergo rigorous imprisonment for two months for offence under Section 302 IPC and the 2nd appellant Mr.Arun @ Arunachalam was sentenced to undergo imprisonment for life and to pay a fine of Rs.2,000/-, in default, to undergo rigorous imprisonment for two months for the offence under Section 302 read with Section 34 IPC and to undergo simple imprisonment for one week for the offence under Section 342 IPC. They were acquitted from the other charges. Challenging the said conviction and sentence, they are before this Court with these two appeals.

3. The case of the prosecution in brief is as follows: The deceased in this case was one Mr.Edwin Johnson. P.W.5 is the mother of the deceased. The deceased was residing at Doovipuram 4th street. Some time before the occurrence, it is alleged that the acquitted accused Mr.Jeffry @ Jeffrin, eve teased the girls, who were going to the local school. The deceased questioned the same and attacked the 4th accused. The accused 1 to 3 are the friends of the 4th accused Mr.Jeffrin. This is stated to be the motive for the occurrence. (The accused are referred to in

this order as arrayed originally, while charges were framed against all the four accused before the case was split up). 3.1. It is the further case of the prosecution that on 18.03.2004, P.W.1 and the deceased had gone to Sayarpuram Village to attend a marriage function. At about 10.00 p.m., they returned from the marriage hall. Around 10.30 to 10.45 p.m., when they reached a place known as Naangumukku Sandhu, P.Ws.2 to 4 were sitting and talking among themselves under the street light. On seeing them, the deceased and P.W.1 stopped the motorcycle and started talking to them. At that time, it is alleged that the first accused, the absconding accused Mr.Kumar and the appellant Arun @ Arunachalam suddenly emerged there. The absconding accused and the appellant Arun @ Arunachalam caught hold the deceased. The first accused took out an aruval from his back and cut the deceased on the abdomen. The first accused also told the deceased to die of the injuries. Thus, the first accused intimidated P.Ws.1 to 4 by brandishing the aruval. P.Ws.1 to 4 raised alarm. The people living in that area rushed to the place of occurrence. On seeing them, all the three accused ran away from the scene of occurrence. Immediately, P.Ws.2 and 3 took the deceased in an auto to the Government Hospital at Tuticorin. 3.2. P.W.8 ?. Dr.Matheswaran examined the deceased at 11.10 p.m. on 18.03.2004 at the Tuticorin Government Hospital. At that time, the deceased was fully conscious. He told P.W.8 that he was attacked by two known persons at 10.45 p.m. on the same day with aruval. He further told that the occurrence was at Dhoovipuram 4th street. Then P.W.8 recorded the same under Ex.P7 ?. the accident register. On examination, he found a single injury on the abdomen measuring 30 x 10 x 5 cms. It was a cut injury. The intestine was protruding through the said injury. P.W.8 admitted him as an inpatient. While under treatment, he lost his consciousness. On the next day morning, he breathed his last succumbing to the injuries at 4.20 a.m. 3.3. On receipt of the intimation from the hospital, P.W.14 the then Sub Inspector of Police attached to the Tuticorin Police Station went to the hospital at 11.45 p.m., since the deceased was not in a position to speak, he recorded the statement of P.W.1 under Ex.P1 at 11.45 p.m. On returning to the police station, at 1.00 a.m. on 19.03.2004, he registered a case in Crime No.124 of 2004 under Sections 342, 307 and 506(ii) IPC. Ex.P18 is the FIR. According to him, he forwarded Ex.P1 and Ex.P18 immediately to the learned Judicial Magistrate No.II, Tuticorin and he

handed over the case diary to the Inspector of Police for investigation. 3.4. P.W.15 the then Inspector of Police took up the case for investigation at 2.00 a.m. on 19.03.2004. He proceeded to the place of occurrence and prepared an observation mahazar and a rough sketch at 2.30 a.m. in the presence of P.W.7 and another witness. Ex.P4 is the observation mahazar and Ex.P19 is the rough sketch. He also recovered bloodstained earth and sample earth from the place of occurrence under Ex.P5 mahazar. At 4.20 a.m., he received the intimation that the deceased died in the hospital. Immediately, he altered the case into one under Sections 342, 302 and 506(ii) IPC and sent an alteration report to the learned Judicial Magistrate, under Ex.P20. Then, he conducted inquest on the body of the deceased and prepared Ex.P21 ? inquest report and then, he forwarded the body for postmortem. 3.5. P.W.11 Dr-Selvamurugan conducted autopsy on the body of the deceased on 19.03.2004 at 11.00 a.m. He found the following injuries: A sutured clean cut injury of length 32 cm over the left side of abdomen along the left costal margin. Its anterior and is 10 cm from the anterior x midline and its posterior and is 15 cm from the posterior midline. On removing the suture the wound is found to be gapping of 5 cms. and having a clean cut margin. The injury cuts the underlying 8,9,10 ribs and enters into left side thoracic and abdominal cavity. He opined that the deceased would appear to have died of shock and hemorrhage due to the heavy cutting injury to the left of abdomen. 3.6. P.W.15 continued the investigation till 20.03.2004. Thereafter, he handed over the investigation to P.W.16. 3.7. P.W.16 took up the case for investigation on 21.03.2004. On 22.03.2004, the appellants surrendered before the learned Judicial Magistrate at Srivaikundam. On a request made by him, the learned Judicial Magistrate No.II, Tuticorin, ordered police custody of both the accused. Accordingly on 29.03.2004, he took custody of the first accused and the absconding accused and while in the police station, the first accused gave a voluntary confession, in which, he disclosed the place, where he had hidden the aruval. In pursuance of the same, at 8.00 a.m., he took P.W.15 and P.W.6 and another witness to the said place and produced the aruval. M.O.3 is the aruval. Then, he forwarded both the accused for judicial remand. On 02.05.2004, Jeffry @ Jeffrin was arrested and he was sent to Court for judicial remand. Finally on completing the investigation, he laid charge sheet against the accused. 3.8. Based on the above materials, the trial Court

framed charges as detailed in the first paragraph of this judgment. The accused denied the same. In order to prove the case of the prosecution, on the side of the prosecution, as many as 16 witnesses were examined, 21 documents and 6 material objects were marked. 3.9. Out of the said witnesses, P.Ws.1 to 4 are the eye witnesses to the occurrence. P.W.1 states that he accompanied the deceased in a motorcycle to the place of occurrence, where they found P.Ws.2 to 4 sitting under a light post. They stopped the vehicle and at that time, when they were talking, the accused 1 to 3 emerged there, in which, the accused 2 and 3 caught him hold and the first accused cut him. P.Ws.2 to 4 have also stated so. P.W.5 the mother of the deceased has spoken about the motive. P.W.6 has spoken about the confession made by the first accused and the consequential discovery of the aruval. P.W.7 has spoken about the observation mahazar and rough sketch prepared at the scene of occurrence and the recovery of the bloodstained earth and sample earth from the place of occurrence. P.W.8 ?. Dr.Matheswaran has spoken about the treatment given by him to the deceased at the Government Hospital at Tuticorin and the death of the deceased, while under treatment. P.W.9 ?. the Head Clerk of the Court has spoken about the fact that he forwarded the material objects for chemical examination. P.W.10 is the Police Constable attached to the respondent police, who has stated that he carried the FIR and the complaint to the house of the learned Magistrate and handed over the same at 7.00 a.m. on 19.03.2004. P.W.11 ?. Dr.Selvamurugan has spoken about the postmortem conducted and his final opinion regarding the cause of death. P.W.12 ?. Head Constable, who carried the body from the mortuary for postmortem. P.W.13 has spoken about the death intimation given. P.W.14 is the then Sub Inspector of Police has spoken about the registration of the case by him. P.Ws.15 and 16 about the investigation.

4. When the incriminating materials were put to the accused under Section 313 Cr.P.C., they denied the same as false. However, they did not choose to examine any witnesses nor mark any documents on their side. Their evidence was a total denial. Having considered all the above, the trial Court convicted the appellants and accordingly punished them. That is how, they are before this Court with these appeals.

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

6. The learned senior counsel for the appellants, Mr.V.Kathirvelu, would submit that the alleged occurrence was at about 10.45 p.m. He would further submit that at that odd hour, it is highly impossible that P.Ws.1 to 4 would have been present at the scene of occurrence. He would further submit that P.Ws.1 to 4 did not belong to that area, where the occurrence had taken place, as they belong to a different village. They claimed that they had come there by chance. The learned senior counsel would submit that they have not explained the reasons for their presence at the place of occurrence and thus, their presence is doubtful at the place of occurrence. The learned senior counsel would further submit that the deceased was, of course, taken to the hospital by P.Ws.2 and 3, but to the Doctor, in the presence of P.Ws.2 and 3, the deceased had told that he was attacked by two known persons with aruvals. The learned senior counsel for the appellants would submit that this statement of the deceased would completely destroy the case of the prosecution. According to the case of the prosecution, in the occurrence, three persons participated. The learned counsel would further submit that four people are put up for trial. This creates doubt in the case of the prosecution, the learned senior counsel submitted.

7. Next, the learned senior counsel would submit that the FIR and the complaint had reached the hands of the learned Judicial Magistrate only at 7.00 a.m. on 19.03.2004. In this regard, he would submit that P.W.14 the Constable, who carried the FIR from the police station to the house of the learned Judicial Magistrate has stated that these documents were handed over by him only at 6.00 a.m. Thus, according to the learned senior counsel, the FIR would not have come into being at the time, as it is alleged by the prosecution at 1.00 a.m. The same would have come into being only at 5.00 a.m. after deliberations. Therefore, the FIR is a doubtful document, the learned senior counsel contended. The learned senior counsel would next contend that P.W.2 has stated, during the cross examination, that the deceased was not taken to the Government Hospital straight away and instead, he was taken to the private hospital, namely, Arulraj Hospital.

P.W.4 has stated that when the deceased was still in the private hospital, the police came there and statement of P.W.4 was recorded. The learned senior counsel would submit that the prosecution has completely suppressed this fact, which would go against the prosecution. The learned counsel would further submit that P.W.3, during cross examination, has admitted that he was one of the suspects at the hands of the police in this case. The learned senior counsel would further submit that the conduct of P.Ws.1 to 4 that they did not inform P.W.5 about the occurrence soon after the occurrence itself creates doubt about their presence at the scene of occurrence. Thus, according to the learned senior counsel, the four people have been falsely implicated in this case. The trial Court has disbelieved P.Ws.1 to 4 in respect of atleast one accused. Thus, even according to the lower Court, P.Ws.1 to 4 are not fully believable. The learned counsel would further submit that in the absence of any independent witness, when P.Ws.1 to 4 are highly inimical towards the accused, their evidences cannot be believed. For all these reasons, the learned senior counsel would submit that the accused are entitled for acquittal.

8. The learned Additional Public Prosecutor Mr.C.Mayilvahana Rajendran, would vehemently oppose these appeals. According to him, the presence of P.Ws.1 to 4 is quite natural and they have duly explained away their presence at the scene of occurrence. He would further submit that the very fact that the deceased was taken to the hospital by P.Ws.2 and 3 would go to show that they were very much present at the scene of occurrence. He would further submit that it is true that, to the Doctor, the deceased told that he was attacked by two persons. But it is not known whether the deceased was fully conscious so as to make such a statement at all. Thus, according to the learned Additional Public Prosecutor, much weightage cannot be given to the said statement given by the deceased to the Doctor. So far as the delay in despatching the FIR to the Court, the learned Additional Public Prosecutor would submit that as per the Tamil Nadu Police Standing Order, there are certain classes of cases in respect of which alone, the express FIR is to be prepared and the same should be immediately sent to the Court. As per the Tamil Nadu Police Standing Order No.555, the case of attempt to murder has not been included for the purpose of preparation of express FIR. Thus, according to him, in the instant case, originally the FIR registered was not

an express FIR and so it was not sent forthwith to the Court. After the death of the deceased, the case was altered and the alteration report had reached the hands of the learned Judicial Magistrate without any delay. Therefore, according to the learned Additional Public Prosecutor, there is no delay in despatching the FIR to the Court at all. He would further submit that there is no evidence that the deceased was taken to the private hospital. He would also state that assuming that the deceased was taken to the private hospital, quite naturally, the Doctor in the said hospital would have advised them to rush to the Government Hospital, since the condition of the deceased was serious. Therefore, according to the learned Additional Public Prosecutor, there is no suppression of any facts in the case. The learned Additional Public Prosecutor would further submit that the prosecution has clearly established the case through the eye witnesses, namely P.Ws.1 to 4, whose evidences are duly corroborated by the medical evidence. Thus, the conviction and sentence imposed on the accused does not require any interference at the hands of this Court, the learned Additional Public Prosecutor submitted.

9. We have considered the above submissions.

10. According to the case of the prosecution, the alleged occurrence was at 10.45 p.m. P.Ws.1 to 4 claimed to have been present at the scene of occurrence by chance. It is the settled law that when the witnesses claim to have been present at the scene of occurrence by chance, it is the duty of the prosecution to explain to the satisfaction of the Court the reasons for their presence, at the place of occurrence, at the crucial time. Here, in this case, P.Ws.1 to 4 belong to a different place and they did not belong to the occurrence place. P.W.1 would state that he returned along with the deceased to the place of occurrence in a motorcycle. But the motorcycle has not been recovered by the police. According to the observation mahazar, motorcycle was not even seen at the place of occurrence. Thus, it is doubtful as to whether P.W.1 would have accompanied the deceased to the place of occurrence in the motorcycle. Secondly, P.W.1 did not go to the hospital along with the deceased, though he is an interested person in the welfare of the deceased. Had it been true that he was present at the scene of occurrence, quite naturally, having seen such a serious injury suffered by the deceased, he would

have accompanied the deceased to the hospital in an attempt to save him. But he did not do so. Thus, the conduct of P.W.1 would also make his very presence at the scene of occurrence doubtful.

11. Now, turning to the evidence of P.Ws.2 to 4, they have not explained as to why at the crucial time, they were standing at the place of occurrence. In one voice, they have said that they were standing near the light post at the place of occurrence talking to themselves. When they did not belong to that place at all, what was the necessity or occasion for them to stand at that place should have been explained by them. That has not been done. Therefore, their presence at that crucial point of time that too at 10.45 p.m. is doubtful. Apart from that the house of the deceased is also situated somewhere near the place of occurrence, ie. around 20 feet. The mother of the deceased (P.W.5) was very much in the house. Had it been true, P.Ws.1 to 4 were present at the time of occurrence, some of them would have rushed to the house of the deceased and informed his mother about the occurrence. They have admitted that they did not do this at all. This also creates doubt about the presence of P.Ws.1 to 4 at the place of occurrence.

12. Then comes the FIR. According to P.W.2, the deceased was taken to a private hospital, immediately after the occurrence. P.W.4 has also admitted the same. When they were in the private hospital, police came and recorded the statement from P.W.4. But that statement has not seen the light of the day. As per the case projected by the prosecution, the deceased was not at all taken to the private hospital, no document whatsoever has been produced in respect of the happenings in the hospital. More particularly, the statement made by the deceased to the Doctor and the other relevant facts. The suppression of these facts by the prosecution also creates doubt in the case of the prosecution. Thereafter, according to P.Ws.2 to 4, the deceased was taken to the Government hospital. Admittedly, P.W.1 did not accompany them to the Government Hospital.

13. Ex.P7 ? the accident Register of the Government Hospital shows that the deceased was brought only by P.Ws.2 and 3. When P.W.2 states that the deceased was taken to the private hospital and after admission, he was taken to the Government hospital, we do not find any reason to reject this part of the

evidence of P.W.2. In the Government Hospital, the statement of P.W.1 and Ex.P1 were obtained at 11.45 p.m. and on returning to the police station, FIR was registered by P.W.14 at 1.00 a.m. But the FIR was not immediately despatched to the Court. The explanation offered by the learned Additional Public Prosecutor is that since it was not an express FIR, it was not immediately sent. But the evidence of P.W.14 would go to show that it was immediately despatched to the Court. Quite contrary to the same, P.W.14 the Constable, who have carried the FIR to the house of the Magistrate would say that Ex.P1 and the FIR were handed over to him only at 6.00 a.m. on the next day of the occurrence. Thus, it has been clearly established that the FIR was in the hands of the police still 6.00 a.m.

14. In the meanwhile, at 4.20 a.m., the deceased died in the hospital and the FIR itself was altered at 6.00 a.m. itself. Therefore, there is every possibility that the FIR would have been manipulated, after the demise of the deceased. This doubt is very reasonable and the prosecution is bound to explain away the same, More particularly, when there are more than one accused, this doubt has to be obviated by the prosecution. Above all, when the deceased was taken to the Government Hospital, according to P.W.8, the deceased was fully conscious. When P.W.8 enquired him, the deceased told him that he was attacked only by two persons with aruvals. This statement, in our considered view, would squarely fall within the sweep of Section 32 of the Indian Evidence Act as a dying declaration. At the time when the statement was made, P.Ws.2 and 3 were very much present by the side of the Doctor. If really P.Ws.2 and 3 had seen the occurrence, involving atleast three persons, they would have corrected the deceased to make a proper statement. They did not do that. This would go to show that even P.Ws.2 and 3 would not have been present at the scene of occurrence.

15. Above all, the statement of the deceased made to the Doctor, being a dying declaration requires much weightage, because when this statement was made, there was no possibility for tutoring or prompting of the deceased. Therefore, the earliest statement of the deceased, which is a dying declaration, clearly goes to establish that only two known persons had attacked the deceased, whereas, now, according to the case of the prosecution, three participated in the occurrence and one person induced them. The said dying declaration, thus, destroys the eye

witness account of P.Ws.1 to 4. We do not find any reason to reject the said dying declaration. Thus, the dying declaration also creates doubt about the very presence of P.Ws.1 to 4 and their evidence.

16. In view of the foregoing discussions, though P.Ws.1 to 4 claim to be the eye witnesses, we find it difficult to accept their evidences and to sustain the conviction on account of the doubts, which we have discussed herein above. Thus, we hold that the prosecution has failed to prove the case beyond reasonable doubt and therefore, the appellants are entitled for acquittal.

17. In the result, the criminal appeals are allowed, the conviction and sentence imposed on the appellants are set aside and they are acquitted of all the charges. Fine amount, if any paid by them, shall be refunded to them. Bail bonds shall stand terminated. To 1.The Additional District and Sessions Judge FTC No.1, Tuticorin 2.The Inspector of Police Central Police Station Tuticorin District. 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. .

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