Anver Vs. State, Represented by the Inspector of Police

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Court : Chennai

Decided On : Jul-19-1994

Reported in : 1995CriLJ1703

Judge : Rengasamy, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 302 and 304; Code of Criminal Procedure (CrPC) , 1973 - Sections 21 and 313

Appeal No. : Criminal Appeal No. 143 of 1987

Appellant : Anver

Respondent : State, Represented by the Inspector of Police

Advocate for Def. : P. Govindarajan, Govt. Adv.

Advocate for Pet/Ap. : M. Karpagavinayagam, Adv.

Judgement :

1. This appeal arises from the conviction and sentence of the learned Principal Sessions Judge, Madurai, in C.A. No. 135 of 1986 for the offence under Section 304 Part II Indian Penal Code to undergo rigorous imprisonment for five years.

2. The prosecution case is as follows :

The deceased Mohammed Ali Jinnah and this appellant were brothers living in separate huts in a terraced portion within the compound of Amar Ammal, situated in Attu Mandhai Pottel Street, Madurai. The deceased had three wives viz.

P.Ws. 1 and 2 and Kazim Bibi all living with him in the same hut in the upstairs portion. His sister Mariam Bibi also was living in another hut in the upstairs portion with her sons P.Ws. 3 and 4. The deceased was a drunkard and on the fateful night that is on 21-9-1985, at about 8.00 pm, he came to the house, quarrelled with his sister Mariam Bibi in the drunken state and gone out. He returned by about 11.00 pm. His sister told this appellant to takle the deceased for sending him to bed as he was in the drunken state. When the deceased was climbing over the staircase to reach his hut in the upstairs, the appellant followed him and asked the deceased as to why he was frequently quarrelling with others after consuming liquor and for his such behaviour, it was better for him to leave that area. Immediately, the deceased quarrelled with his brother, the appellant, and slapped him. The appellant, who was having the M.O. 1 knife at his waist whipped it out and though P.Ws. 1 and 2 and Kazim Bibi tried to intervene, they were pushed down and this appellant stabbed the deceased on his left side neck. After inflicting a single stab, he made his escape from there. P.Ws. 3 and 4 saw the appellant running with the knife. The deceased fell down on the staircase and collapsed within a few minutes. P.W. 11, the Sub-Inspector of Police attached to B-1 Police Station, Maddurai, received phone message at 11.45 pm about the quarrel in the house of the deceased and along with the constables, he came to the scene of occurrence and found Mohammed Ali Jinnah dead. He recorded a statement Ex. P-1, from P.W. 1 and registered the same in B-1 Police Station in Crime No. 1364/85 under Section 302 Indian Penal Code and prepared the F.I.R. Ex. P-17, which was forwarded to the Court and his superior officers. The Inspector of Police P.W. 12 received the F.I.R. at about 2.30 am on 22-9-1985 and took up the investigation. He conducted the inquest under Ex. P-19 and also seized the bloodstained cement plastering M.O. 2 and the sample plastering M.O. 3 under Ex. P-3 in the presence of P.W. 5 and after conducting the inquest, sent the body for post-mortem. Kazim Bibi, who sustained injuries when she intervened in the quarrel, was sent to the hospital, where P.W. 7 examined her injuries and issued the wound certificate, Ex. P-8. On 22-9-1985 at 12.45 pm, P.W. 8 conducted the

post-mortem on the body of the deceased and found a signle stab injury on the left side neck penetrating to a depth of 8.8 Cms cutting the left external jugular vein, wind pipe and the right external carotid artery and muscles. He opined that the death was due to the stab injury on the neck. The Inspector of Police arrested the appellant in the presence of P.W.s. 4 and 6 at 7.00 pm on 29-5-1985 near Meenakshi College, Madurai, and he gave a confession under Ex. P-4 leading to the recovery of M.O. 1 knife near the blacksmithy of one Sikkander concealed under a stone, under Ex. P-6. The Inspector of Police seized the M.O. 4 shirt and M.O. 5 Dhoti of this appellant under Ex. P-5 mahazar in the presence of witnesses. Then the Inspector of Police filed the charge-sheet under Section 302 Indian Penal Code. After trial, the appellant was questioned under Sec. 313, Cr. PC and the appellant denied the complicity in the crime.

3. The learned Principal Sessions Judge, having been convinced with the prosecution case, found this appellant guilty under Section 304 Part II Indian Penal Code and convicted him to undergo five years rigorous imprisonment.

4. The learned counsel appearing for the appellant Mr. Karpaga Vinayagam argued that the ocular version portrayed through P.Ws. 1, 2 and 4 bristles with material contradictions and inconsistencies, which will lead to the only conclusion that these witnesses could not have seen the occurrence as it had happened at 11.00 p.m. when they were sleeping and the Court below was not right in acting upon these witnesses to accept the guilt of the appellants. The learned counsel pointed out the inconsistenties in the evidence of the witnesses, which I would refer one by one below.

5. The learned counsel Mr. Karpagavinayagam pointed out that when the appellant quarrelled with the deceased, as he was causing nuisance to others, it is the version of P.W. 1 that this appellant asked the deceased to vacate the house whereas P.W. 2 would say that the deceased had asked this appellant to vacate the house and had these witnesses were present at the time of the quarrel, there is no possibility for this inconsistency as to who asked, whom to vacate the house and this circumstance has to be accepted for the absence of the witnesses in the scene of occurrence. P.Ws. 1 and 2 are the wives of the deceased. No doubt P.W.

2 says that when this appellant asked the deceased as to why he was creating nuisance to others, her husband said that he could vacate the house and go away, if he did not like it. Even though P.W. 1 would state that the appellant asked her husband to vacate the house, as he was causing nuisance, she also adds that this appellant said that he would not vacate the house, as he was having a share. Therefore, the evidence of P.W. 1 also indicates that the deceased had asked this appellant to leave the house for which the appellant had answered that he would not go away as he has a share in the house. Any how, it appears from the evidence that as the deceased was a nuisance to others as he was quarrelling with the neighbours in the drunken state, the appellant should have asked him to leave that area, for which the deceased had replied that he would not leave that area but the appellant might go else where if he did not like his presence there. Therefore, in the quarrel as between the brothers, each was asking the other to leave that building. I find that each and every word that emanated from the quarrelling brothers need not be analysed to say that who asked first to leave the house. Even though they were residing in separate huts, put up in the same terraced portion. Therefore, on account of the acremonious conduct of the deceased, it appears that they were quarrelling with each other on that night, one asking the other to leave that building I do not find any serious inconsistency in the evidence of P.Ws. 1 and 2 with regard to this aspect.

6. The learned counsel next points out the inconsistency as to availability of the light in the staircase. Even though P.W. 1 would state in her evidence in chief that when the deceased was quarrelling with the appellant. Mariam Bibi switched-on the electric light, in the course of the cross-examination, P.W. 1 would state that in the staircase, there was petromax light. P.W. 2 on her part, has stated in the cross examination that there was a chimney light in the staircase. According to the learned counsel Mr. Karpagavinayagam, three lights have been mentioned by these two witnesses. P.W. 1 in the chief examination mentioning electric light and in the cross examination changing it as petromax light, whereas P.W. 2, the other eye-witness, stating that it was only the chimney light that was available there in the staircase and had these witnesses been present at the place of occurrence, there is no possibility for such inconsistent version and this would probabalise that these witnesses could not have seen the occurrence. The learned Sessions Judge

has observed that P.W. 1 who was mentioning electric light in the chief examination has stated that as petromax light in the cross examination only as a slip of the tongue. It can be seen that only in the cross examination it was suggested to one witness that there was petromax light and to the other the chimney light and these two witnesses have stated 'yes'. These illiterate house-wives, when placed in the witness box, could have been in trepidation because they were being watched in open Court by the advocates, staff of the judiciary and naturally they may prone to answer affirmatively for the suggestions put to them as it would be easy for them to say 'yes'. Now, in this case, even assuming that there was no light and the incident had occurred in darkness, it cannot be stated that there was no possibility for identifying the assailant when especially the incident had occurred within the house in the staircase where P.Ws. 1 to 4 are living. It is not as if the incident took place without any noise or sound, when people were fast asleep. The evidence discloses that there was quarrel between the brothers, asking each other to leave the house because of the nuisance the deceased was creating to others and it is also in evidence that when the deceased was approaching the house, it was Mariam Bibi, the sister who asked this appellant to tackle the deceased, who was in the drunken state, for sending him to bed. Therefore, it is not as if, nobody knew the arrival of the deceased or that the incident took place silently without drawing the attention of others. Only after hearing the noisy quarrel between them, some one there had informed the police over phone and P.W. 11 came with his men without knowing the murder of Mohammed Ali Jinnah. It is only in the quarrel between the brothers, in the heat of anger, for the conduct of the deceased, the appellant had stabbed his brother, P.W. 1 would state that she and Kasim Bibi intervened when the appellant attempted to assault the deceased but was pushed down. Therefore, it cannot be taken that the assailant came silently, and causing the stab wound on the neck of the deceased, escaped. On the other hand, as the witnesses would state that this appellant on the request if Mariam Bibi followed the deceased in the upstairs and scolded him for his acrid manners and there was quarrel between brothers, certainly it would have drawn the attention of the residents of that building.

7. When there was quarrel between the deceased and the appellant herein, naturally the voice of the deceased was identifiable for his wives and therefore,

they would have rushed to the staircase. Even if it was dark without any light, the appellant was not a stranger to P.Ws. 1 and 2 and in the quarrel between the brothers, P.Ws. 1 and 2 could have easily identified the appellant herein as he happened to be their husband's brother. Hence, the theory that P.Ws. 1 and 2 could not have seen the offender in the darkness as there was no light in the staircase, does not stand to reason.

8. Another contention raised by the learned counsel for the appellant is that the third wife of the deceased Kazim Bibi is said to have sustained abrasions when she was pushed down by this appellant at the time of her intervention and she was also taken to a doctor P.W. 7 to prove the injury on her body, but she was kept away from the witness box because her evidence would falsify the case of the prosecution and there was no other reason for the non-examination of the injured, Kazim Babi. It is not the defence version that of the three wives of the deceased, Kazim Bibi alone was living with her husband, and P.W. 2 was living elsewhere. On the other hand, all the three were residing in the upstairs portion and the evidence also is that all the three came out on hearing the voice of their husband. As P.Ws. 1 and 2 have been examined, the prosecution did not multiply the ocular evidence by examining the third wife also. No doubt P.W. 7 has certified under Ex. P-8 that Kazim Bibi she had abrasions on her upper lip, which was a simple injury. For this reason, it cannot be stated that the non-examination of the third wife of the deceased, is an infirmity in the prosecution case.

9. It is also contended for the appellant that even though there are number of other families occpying the portions opposite to staircase and the members of such familes would be the independent witnesses, who can be relied upon, but without examining them, the wives of the deceased have been chosen as P.Ws. 1 and 2 to support the prosecution case and this is another suspicious circumstance in the prosecution case. It is not as if P.Ws. 1 and 2 are residing elsewhere or chance witnesses for the occurrence. When P.Ws. 1 and 2 also are residing in the same building and as they came out to see their husband while quarrelling with the appellant herein, they are the proper witnesses to be examined in this case and it is not necessary that everyone occupying that building should be examined to prove the prosecution case.

10. The learned counsel Mr. Karpagavinayagam points out that even though P.W. 1 in her evidence has stated that when the appellant whipped out the knife from his waist, P.W. 2 and Kazim Bibi, intervened and obstructed, whereas P.W. 2 has not spoken that fact in her evidence and had P.W. 2 and Kazim Bibi were there, certainly, they would have intervened in the quarrel and that fct would have been mentioned by also but as she is silent about such instance, it is apparent that P.W. 2 and Kazim Bibi could not have been there. Even though P.W. 2 has not spoken about her intervention, this omission, probably unconsciously, will not lead to the conclusion for the absence of P.W. 2 because in the complaint Ex. P-1 recorded within one hour of the occurrence, P.W. 2 also has attested as a witness. Therefore, her presence in the place of occurrence cannot be doubted.

11. I find that the contradictions pointed out by the learned counsel for the appellant and mentioned above, are not so vital affecting the core of the prosecution, because we cannot except the eye-witnesses to speak in unison repeating the same words as the expressions of the witnesses may differ, appearing as though they are inconsistent. Therefore, the evidence of P.Ws. 1 and 2 cannot be brushed aside.

12. In addition to the evidence of these two witnesses, P.Ws. 3 and 4, who also are closely related to this appellant, have deposed about the incident. P.Ws. 3 and 4 are the sister's son of the deceased and the appellant. Even though P.W. 3 was treated as hostile witness, he admits the occurrence but he was not able to identify the culprit. But his brother P.W. 4 has stated in his evidence that on hearing the noise, he got up and saw this appellant running with the knife. Therefore, there is sufficient ocular evidence to connect this appellant with the crime.

13. According to the learned counsel for the appellant, M.O. 1, said to be the knife used by this appellant, was recovered by the police officer under Section 21, Cr.P.C. on 22-9-85, but the analyst report Ex. P-15 reveals that there was no blood stain in M.O. 1 weapon though P.W. 6 in his evidence would state that when M.O. 1 was seized in his presence, it contained blood stain. As this weapon was seized after 07.00 pm in darkness, even the dark colour of the blade might have appeared to be the blood stain for P.W. 6. No doubt, the forensic report shows that

there was no blood stain in M.O. 1. As the weapon was seized only on the next day, till which time it was in the hands of the appellant, there was ever possibility for washing this weapon, during that interval. Therefore, the absence of blood stain in M.O. 1 cannot rule out the possibility of participation of this appellant in the crime. On the other hand, the shirt and dhoti, M.Os. 4 and 5, respectively, seized from the appellant under Ex. P-5 mahazar, were also sent to chemical analysis and it was found that they contained the blood stain and Ex. P-16 shows that the same blood group of the deceased was found in the shirt of the accused. Even though this is not the conclusive proof for the charge against this appellant, these are the circumstances corroborating the testimony of P.Ws. 1, 2 and 4.

14. One other circumstance pointed out by the learned counsel for the appellant is the presence of the appellant in the scene of occurrence weeping for his deceased brother as spoken by P.W. 5, is running a petty shop near the place of occurrence. He has been examined for the preparation of the observation mahazar and the seizure of the blood stained earth. In the cross examination, it was elicited from him that this appellant along with his mother was crying for the death of Mohammed Ali Jinnah in the place of occurrence. According to the learned counsel Mr. Karpagavinayagam, if this appellant was the assailant who caused the death of his brother and ran away with the knife as spoken by P.Ws. 1 and 2 and 4, he could not have been seen again in the place of occurrence crying for his deceased brother, because his guilty conscience would not have permitted him to come back to see the body of his brother but as the evidence is available before the Court through P.W. 5 for his presence, it would indicate his innocence. He would also argue that as the deceased was a quarrel-some man, always picking up quarrel with the men of that area in the drunken state, he should have been murdered by some of his enemies, and this appellant has been implicated as he had some misunderstanding with his brother for his claim of share in the house. The prosecution side evidence discloses that on the instruction of his sister Mariam Bibi, the appellant approached the deceased, only to pacify him, as he was in the drunken state and to send him to bed. But the deceased slapped him and also provoked him on account of which, the appellant, losing the self-control, stabbed his brother. Therefore, after the death of his brother, on account of his unrestrained foolish act, he, in the mood of penitence, might have been crying

seeing the body of his brother for a while and thereafter realising that he would be incarcerated for the offence, might have fled from there to ccnceal himself elsewhere. The presence of the appellant even after the death of the deceased crying for him. In view of the bondage of relationship between them will not extricate him from the crime. Therefore, this circumstance also is not helping the appellant.

15. On an overall survey of the entire evidence, I find that the evidence, which appears to be natural and cogent, establishing the participation of this appellant in the crime of causing death to his brother cannot be brushed aside for the minor discrepancies. It is certain that he had no motive against his brother but it was only the sudden provocation by which he lost the self-control, has fastened him to the criminal liability, which has been rightly brought under Section 304 Part II Indian Penal Code, by the Courts below. Therefore, I find no error in the conclusion arrived at by the Court in convicting this appellant under the said Section. With regard to the sentence, taking into consideration of the relationship between the deceased and the appellant and the circumstances under which this appellant had lost his self-control, I feel that four years rigorous imprisonment will be an adequate punishment for this offence.

16. In the result, subject to the modification of the sentence from five years rigorous imprisonment to four years rigorous imprisonment, the revision shall stand otherwise dismissed confirming the conviction.

17. The learned counsel for the appellant Mr. M. Karpagavinayagam while pronouncing this Judgment represents that the appellant is dead. In view of this representation for verification by the public prosecutor and for reporting 19-7-1994.

18. Order accordingly.