

Kosal and Others Vs. the State and Etc.

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Court : Chennai

Decided On : Feb-29-1996

Reported in : 1996CriLJ3800

Judge : Janarthanam and ;Rengasamy, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 109, 147, 148, 149, 302, 323, 324, and 326; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 107, 161(3), 173(2) and 313

Appeal No. : Criminal Appeals Nos. 246 and 972 of 1987 and 417 of 1989

Appellant : Kosal and Others

Respondent : The State and Etc.

Advocate for Def. : R. Ragupathi, Additional Public Prosecutor

Advocate for Pet/Ap. : N.T. Vanamamalai, Sr. Counsel for ;S. Palanivelayutham and ;K. Mohan Ram, Advs.

Judgement :

Janarthanam, J.

1. In respect of a transaction that took place on 1-5-1986 at about 6.30 a.m., at the coconut tope situate at Thirumoolanagar, belonging to one Thyagarajan, one

Dhasan was done to death, giving rise to the registration of a case in Crime No. 77/86 on the file of Anjugramam Police Station for the alleged offences under Ss. 147, 148, 323, 324, 326 and 302 read with S. 109, IPC and culminating, on investigation, in the filing of a final report under S. 173(2), Cri.P.C. against the following eight accused, namely, Kosal (accused 1), Mannar alias Rajamannar (accused 2), Durai alias Rajagopal (accused 3), Thiraviyam (accused 4), Kannan (accused 5), Bhaskar (accused 6), Ayyakutti alias Kurus Mariyan (accused 7) and Thomas (accused 8) before the Judicial Second Class Magistrate, Nagercoil (Taluk) for the alleged offences under Ss. 147, 148 and 302 read with S. 149, IPC.

2. The final report so filed had been taken as PRC No. 24 of 1986, as against the adult accused (accused 1 to 4 and 6 to 8) and P.R.C. No. 37 of 1986, as against the juvenile accused (accused 5) on the file of the said learned Magistrate's Court. All the accused were committed to Court of Session, Kanniyakumari Division at Nagercoil.

3. After committal, the case against the adult accused, namely, accused 1 to 4 and 6 to 8 was taken on file as S.C. No. 88 of 1986 arraying them as accused 1 to 7, while the case against the juvenile accused namely accused 5 was taken on file as S.C. No. 89 of 1986.

4. The trial, as against the adult accused in S.C. No. 88 of 1986 and the trial as against the juvenile accused in S.C. No. 89 of 1986 took place separately and the requisite procedure had been adopted in the trial of those cases.

5. On trial of the adult accused, accused 1, was found guilty under S. 302 read with S. 34, IPC, convicted thereunder and sentenced to rigorous imprisonment for seven years. Accused 2 to 4 were likewise found guilty under S. 302, IPC, convicted thereunder and each of them was sentenced to imprisonment for life. However, the rest of the accused, namely, accused 5 to 7 were found not guilty of the offences, with which they stood charged and they were acquitted thereof.

6. Likewise, on trial, the juvenile accused was found not guilty of the accusations levelled against him and he was acquitted thereof.

7. The adult accused 1 to 4, aggrieved by their conviction and sentence, preferred C.A. No. 246 of 1987. The State filed an appeal against the acquittal of accused 5 in C.A. No. 417 of 1987. No appeal against the acquittal, had, however, been preferred by the State against the acquittal of accused 6 and 7.

8. The State also preferred an appeal against the acquittal of the juvenile accused in C.A. No. 972 of 1987.

9. Desirable it is to pen down a common judgment in all these appeals, in as much as the evidence recorded in separate trials against the adult accused and the juvenile accused is one and the same and no prejudice is likely to be caused by rendering a common judgment in these appeals, in as much as we are going to consider the evidence already recorded and give finding thereon.

10. Brief facts are :

(a) The scene of occurrence, namely, Thirumoolanagar is situate within the jurisdictional limits of Anjugramam Police Station, five kms. away. The deceased Dasan, as well as the adult accused and the juvenile accused hail from the Seene village. PWs 1 and 4 are respectively the daughter and son, while PW 3 is the wife of the deceased. PWs 1, 3, 4 and the deceased, it is said, were living as members of the joint family.

(b) The deceased and his son, PW 4, it is said, were engaged in the illicit distillation of arrack under accused 6. It appears that sometime prior to the occurrence, which event happened, as already stated, on 1-5-1986, there appears to be some went of cordial atmosphere between the deceased and his son, PW 4 on the one hand and accused 6 on the other, as a consequence of accused 6 not effecting payment of due wages to the deceased and his son, PW 4 for the services they rendered, in the sense of distillation of arrack for the benefit of accused 6. Thereafter, it appears that went of cordial atmosphere that existed between the two families developed further and embittered relationship came to prevail between the two families.

(c) Accused 6 was stated to have foisted cases against the deceased as well as his son, PW 4. Apart from the said case, security proceedings under S. 107, Cr.P.C. appeared to have been initiated between the members of the family of the deceased on the one hand and the accused put together on the other hand.

(d) PW 2 is also a resident of Thirumoolanagar. When PW 2 and one Varuvel were returning home on the early morning hours of the day of the occurrence, they happened to see the assemblage of all the accused in front of the house of accused 6 and at that juncture, accused 6 and 7, after discussion with the other accused present there, appeared to have issued directions to the rest of the accused, namely, accused 1 to 5 and the juvenile accused Kannan to finish off the deceased Dhasan, in prosecution of their common object by handing over the lethal weapons to them. Immediately thereafter PW 2 was stated to have gone to the house of the deceased and intimated to PW 3 about the design of the accused to commit the murder of the deceased.

e) In the meantime, the deceased and his daughter, PW 1 went to the coconut tope of one Thyagarajan for taking drinking water from the pumpshed therein. They, in fact, procured drinking water. Once again, they went to the said tope for procuring the drinking water and while so going, the deceased as well as PW 1 were each in possession of a vessel for procuring water. While the deceased and his daughter PW 1 were returning home, taking water from the pumpshed, along the ridge of a channel, PW 1, going ahead of the deceased and the deceased coming behind her, all the accused inclusive of the juvenile accused, came from behind the deceased and were stated to have proclaimed, 'don't allow the deceased to go from there and finish him off'. On hearing the same, PW 1 turned and saw what was happening. Accused 1 was wielding then a stick in his hand. With the aid of that, he aimed a hit on the head of the deceased and the hit so aimed fell on the utensil (MO 1) filled with water carried on by the deceased on his head and after the receipt of the hit so given, the deceased fell down on the left side of the ridge, on which he was treading on and the vessel he was carrying on his head also fell down. Accused 2, with the aid of spear he was having in his hand, inflicted a stab on the left upper arm of the deceased. Accused 3, on his part, with the aid of an aruval he was having in his hand, inflicted a cut on the

backside of the head of the deceased. Accused 4, who was then stated to be possessing a spear, was stated to have inflicted a stab on the back of the left thigh of the deceased. Accused 5, with the aid of a stick he was having in his hand, inflicted a beating on the left upper portion of the hand of the deceased. The juvenile accused, with the aid of stick, he was having in his hand, was stated to have given a beating on the left thigh of the deceased. PW 1, who was stated to be standing, was raising a hue and cry stating that her father was being done to death. On receipt of the injuries on the person of the deceased by the overt act of all the accused, he was stated to be rolling on the ground. Thereafter, all the accused, inclusive of the juvenile accused, ran towards east carrying the weapons of offence along with them.

(f) While all the accused were escaping from the scene, along with the bloodstained weapons of offence in their hands, all of them were seen with such weapons of offence in their hands, by PWs 5 and 6 near Kailasapuram pathway.

(g) Thereafter, PW 1 came near the victim-deceased and at that time, the victim-deceased was stated to have divulged to his daughter, PW 1 that accused 6 and 7, pursuant to a conspiracy they had hatched with the other accused, had inflicted injuries on his person with a view to murder him. Then PW 1 was stated to have run to her home and informed the same to her mother, PW 3. PW 3, along with PW 1 rushed to the scene and by the time they reached there, the victim-deceased breathed his last.

(h) PW 3, along with PW 1, went to Alagappapuram to inform her son PW 4 about the occurrence. From there, they went to Anjugramam Police Station for lodging an information respecting the occurrence. They reached the police station at 8.30 a.m.

(i) PW 10, then Head Constable bearing registration number 1225 was then in charge of the police station. To him, PW 1 gave a statement. The statement so given was reduced into writing by him. Thereafter, he read over the same to PW 1 and when PW 1 accepted the same to be correct, her signature had been taken in the said statement. PW 3, her mother also attested the statement. On the strength of the statement, PW 10 registered a case, as stated earlier. He prepared express

reports and sent the same to the concerned officials, through PW 11 Constable and he, in turn, took the express FIR and handed over the same to the Judicial Second Class Magistrate, Nagercoil Taluk at 12.30 p.m., besides handing over the other express reports to the concerned officials. PW 10 also intimated the same to the Inspector of Police over phone. Exhibits P2 is the printed F.I.R.

(j) PW 13 was the then Inspector of Police. On receipt of the telephone information at 8.30 a.m., he rushed and reached the police station at 9.15 a.m. and got a copy of the express FIR from the station and he took up further investigation in the case. He immediately rushed and reached the scene of occurrence at 10 a.m. After inspecting the scene, he prepared the observation mahazar, Exhibit P.11. He drew a rough sketch of the scene, Exhibit P.12. He caused photographs to be taken of the scene of occurrence from different angles, utilising the services of PW 9, photographer attached to the Mobile Forensic Laboratory. PW 9, in turn, took photographs from different angles. Exhibit P.9 series are the photographs and Exhibit P.10 series are the negatives.

(k) Between 11.30 a.m. and 2.30 p.m., he held inquest over the body of the deceased. Exhibit P.13 is the inquest report. During inquest, he examined PWs 1 to 5 and others. After the inquest was over, he handed over the body of the deceased to the Constable, PW 12, along with Exhibit P.3 requisition for the purpose of autopsy. He also seized from the scene, M.O. 1 brass vessel, M.O. 4 bloodstained earth, M.O. 5 sample earth and M.O. 6 stem of coconut leave under Exhibit P.14 mahazar.

(l) PW 7 was the then Civil Assistant Surgeon attached to the Government Headquarters Hospital, Nagercoil. On receipt of Exhibit P.3 requisition, he commenced autopsy over the body of the deceased at 4.30 p.m. Exhibit P.4 is the post-mortem certificate, he issued. He would opine that the fracture of the skull corresponds to the external injury No. 1 and the said injury could have been caused by a cut with an aruval from behind. He would also opine that the external injury No. 1, together with internal injury is necessarily fatal. He would further opine that injuries Nos. 2 and 5 could have been caused by stabbing with spear and injuries Nos. 3 and 4 could have been caused by beating with sticks.

(m) After the autopsy was over, the Constable PW 12 seized from the body, M.O. 2 lungi and M.O. 3 jatti and handed over them at the police station.

(n) The further investigation of the case was taken up by the successor Inspector, PW 14 on 5-5-1986 and on the same day, he examined the doctor PW 7, besides sending Exhibit P.5 requisition to the Judicial Second Class Magistrate's Court, Nagercoil (Taluk) for the purpose of sending the incriminating material objects to the Chemical Examiner for the purpose of analysis.

(o) PW 8 was the then Headclerk attached to the Judicial Second Class Magistrate's Court, Nagercoil (Taluk) and on receipt of Exhibit P.5 requisition, pursuant to the directions of learned Magistrate, he separately packed and sent the incriminating material objects to the Chemical Examiner for the purpose of examination, under the original of Exhibit P.6, office copy of the letter. Exhibits P.7 and P.8 are respectively the reports of the Chemical Examiner and the Serologist.

(p) On 11-6-1986, PW 14 was stated to have examined some more witnesses. On 24-6-1986, he examined PWs 10 to 12 and on that date itself, he filed the final report under S. 173(2), Cr.P.C. against all the accused, inclusive of the juvenile accused, as stated earlier.

11. (a) When questioned as respects the charges framed against each of the adult accused 1 and 5 under Ss. 147 and 302 read with 149, IPC; each of accused 2 to 4 under Ss. 148 and 302, IPC and each of accused 6 and 7 under Ss. 302 read with 149, IPC (in S.C. No. 88 of 1986), they denied the same and claimed to be tried.

(b) Likewise, when the accusations against the juvenile accused (in S.C.No. 89 of 1986) under Ss. 147 and 302 read with 149, IPC, were explained to him, he denied the same and claimed to be tried.

12(a) The prosecution, in proof of the charges so framed against the adult accused (in S.C. No. 88 of 1986) examined P.Ws. 1 to 14, filed Exhibits P.1 to P.14 and marked Mos. 1 to 6.

(b) In the trial of the juvenile accused (in S.C. No. 89 of 1986) conducted separately the same set of witnesses had been examined, besides the same set of exhibits and material objects had been marked.

13. The accused in the respective cases, when examined under S. 313, Cr.P.C. as respects the incriminating circumstances appearing in evidence against them, denied their complicity in the crime. They did not choose to examine any witness on their behalf.

14. Learned Sessions Judge, after taking into consideration the materials available on record and after hearing the arguments of learned counsel for the respective accused in both the cases and learned Public Prosecutor, rendered the verdict, as stated above.

15. Mr. N. T. Vanamamalai, learned senior counsel representing Mr. S. Palanivelayutham, learned counsel appearing for accused 1 to 5 (appellants in C.A. No. 236 of 1987 and respondent in C.A. No. 417 of 1987) and Mr. K. Mohanram, learned counsel for the respondent (juvenile accused) in C.A. No. 972 of 1987, would with all vehemence and force, submit that the colossal superstructure of the case of the prosecution rests upon such a weak and shaky foundation, in the shape of the sole and lone testimony of PW 1 which is not satisfying the rule of probability as is unable to bear its weight, the consequences of which is that the superstructure has to crumble down with a heavy thud in the sense of throwing the case of the prosecution lock, stock and barrel.

16. Mr. R. Raghupathi, learned Additional Public Prosecutor representing the State would, however, repel such submission.

17. The case of the prosecution is that on the early morning of the day of the occurrence, accused 6 and 7 were found in the company of the rest of the accused, namely, accused 1 to 5 and the juvenile accused in front of the house of accused 6 and that at that juncture, they were conspiring together to finish off the deceased Dhasan and in prosecution of such a design, accused 6 was stated to have rendered all assistance to the rest of the accused 1 to 5 and the juvenile accused, by giving the requisite and necessary arms and they in turn, went away

from there. In order to project such a case, the prosecution examined, during the course of trial, PW 2. PW 2 when examined in Court, however, turned hostile wholesale and the prosecution, however, utilising the requisite provisions of the Evidence Act, brought his evidence on record. The evidentiary value of such a hostile witness, though brought on record in the manner allowed by law, is hardly 'nil' and therefore, such evidence of PW 2 cannot at all be stated to advance the case of the prosecution to any extent whatever, as relatable to the design plan, on conspiracy the accused had sometime prior to the occurrence.

18. Similarly, the prosecution, gathered materials, during the course of investigation, in the shape of S. 161(3), Cr.P.C. statements of PWs 5 and 6 as to the factum of their seeing the accused carrying with them the bloodstained weapons. Unfortunately for the prosecution when they were examined in Court, they turned hostile wholesale, like PW 2. The prosecution adopting the same requisite procedure, of course, brought on record, their earlier version, as projected by them. As earlier stated, their evidentiary value is also practically 'nil' and therefore it is, we eschew their evidence out of consideration for any purpose whatever.

19. What remains for consideration is the lone and sole direct testimony of P.W. 1 who is none else than the daughter of the deceased. It is the case of the prosecution that on the morning of the day of the occurrence, at about 6 a.m., the deceased and his daughter P.W. 1 went to the coconut tope of one Thyagarajan for fetching water from the pumpshed there. It is the further case of the prosecution that the drinking water had been procured once and when the deceased and his daughter P.W. 1 were returning after taking water for the second time, each one of them carrying a vessel on their respective heads, by P.W. 1 proceeding ahead of the deceased, all of a sudden, accused 1 to 5 and the juvenile accused came there behind the deceased, arming themselves with the weapons in the same ridge, in which the deceased and P.W. 1 were proceeding.

20. On nearing the deceased, accused 1, with the aid of a stick, which he was having in his hand, was stated to have given a hit on MO 1 Vessel, which the deceased was carrying on his head, with the result, the deceased fell on the left

side of the ridge, allowing the vessel MO 1 on his head to fall aside. Accused 1 was stated to be rest content without making further attempt to inflict any beating on the person of the deceased. Accused 2 was stated to have inflicted a stab on the left upper arm of the deceased. Then he was stated to have inflicted a stab on the left upper arm of the deceased. Then he was stated to have allowed accused 3 to inflict a cut by means of an arruval on the backside of the head of the deceased. He would also give way for accused 4 to play his part and accused 4, in turn, was stated to have inflicted a stab with the aid of a spear on the back portion of the left thigh of the deceased. Accused 4 also would move away for a part to be played by accused 5, who, in turn, was stated to have beaten on the left upper arm of the deceased by means of a stick. He was also stated to get satisfied with his part and he would allow the juvenile accused Kannan to play his own part and he, in turn, was stated to have beaten the deceased by a stick on his left thigh and thereafter, all the accused ran away from the scene with the weapons, which they wielded at the time of occurrence.

21. P.W. 1 was stated to be standing there and had the fortuitous opportunity of witnessing the occurrence. P.W. 1, as already stated was the blossoming young girl of 14 years then. Her age was, at the relevant point of time, such as to do anything for the vindication of truth and in such a process, even to render sacrifice. The person assaulted being none else than her father and going by the adage, 'blood is thicker than water', it is but natural for a girl, like P.W. 1, to have rushed to the rescue of her father, when he was racing perilous consequences at the hands of the accused, as stated above. She had not gone to his rescue. Further, it is quite unnatural for a person like her, if she had not gone to the rescue of her father, not to have been allowed to be peresent there by the accused and the imminent threat would have emanated to her, the consequence of which was that she, daunted by the instinct of self-preservation, would have run away from the scene of occurrence. Even that she has not done. No doubt this may not be visualised in every case of this nature.

22. In such a situation can we take it for granted, that P.W. 1 could have been present there and had the fortuitous opportunity of witnessing the occurrence We are rather constrained to feel that she would not have been present in the scene

and had the fortuitous opportunity of witnessing the occurrence. Further, when all the accused, as stated above, arming with all sorts of weapons came to the scene of occurrence, to finish off the deceased, it is also quite unnatural for those accused to play a minimal part, as if players in a drama enact their respective role and go away for others to enact their part. The evidence, as narrated above points out that each one of those accused was rest content to play a minimal part, by either beating or stabbing or cutting the accused only once. Can such a thing could be expected to have happened in the normal course of human affairs An air of un-naturalness in the evidence of P.W. 1 is built in, when we see that she has chosen to implicate, each one of the accused with a minimal part, to play.

23. Further, the subsequent conduct of P.W. 1 in reporting the occurrence to her mother, P.W. 3 raises a serious doubt as to her having been present in the scene and had the fortuitous opportunity of witnessing the occurrence. She would not demur or whisper anything to her mother, P.W. 3 as to the presence and participation of accused 1 to 5 and the juvenile accused and what all she would state to her mother, P.W. 3 was that accused 6 engaged people and cut her father, the deceased, as is getting revealed from the evidence of P.W. 3.

24. This apart, as relatable to the part played by accused 5 and the juvenile accused, P.W. 1 prevaricates in her evidence. P.W. 1 would ascribe an overt act to accused 5 in her chief examination, as if he was responsible for inflicting a beating on the left hand of the deceased and the juvenile accused was responsible for inflicting a beating on the left leg of the deceased. During the course of cross-examination, she would change the respective overt acts of accused 5 and the juvenile accused and give an answer contrary to what she has stated in the chief-examination. This sort of prevarication as to the overt acts relatable to accused 5 and the juvenile accused is a positive indication that the possibility or probability of her being tutored to implicate the accused in a particular manner cannot be ruled out of consideration and obviously such a tutoring was unable to be withstood by the onslaught of questions put to her in cross-examination.

25. Apart from the inherent improbability, attaching to the evidence of P.W. 1, the medical testimony available on record does not appear to lend any sort of

corroborative support to the lone and sole testimony of P.W. 1 an interested witness. The postmortem certificate, Exhibit P. 4 reveals the presence of the following five injuries only.

1) 4' X 2' bone deep incised wound in the left fronto parietal region longitudinal fashion present.

2) 1/4' X 1/2' stab injury present over outer aspect of left arm.

3) Clinically fracture lower half of left humerus present.

4) Clinically fractured lower half left femur present.

5) Stab injury 1/2' X 1/4' in size present over lateral side of left thigh.

Injuries Nos. 1 to 5, as described above respectively, are attributable to the overt acts of various accused -

accused 3, 2, 5 juvenile accused and accused 4, according to the evidence of P.W. 1. She would not at all demur any sort of a further injury being caused to the deceased. The doctor P.W. 7 during the course of autopsy found on internal examination, fractures of ribs and sternum and collection of blood in the thoracic cavity due to fractures of ribs and sternum. What is puzzling is that the said doctor did not find any external injuries corresponding to the fractures of the ribs and the sternum. He would also state that if those fractures were caused by beating with sticks, there could have been some stick mark and that he did not find the presence of any such stick mark. Pertinent it is to note at this juncture that the doctor would state that the collection of blood in the thoracic cavity was due to the fractures of ribs and sternum and those injuries are necessarily fatal. No explanation, however forthcame from the side of the prosecution as to how the fractures of ribs and sternum had been caused to the deceased. It is not at all the case of the prosecution that the deceased, after his having fallen on the ground, had been either repeatedly beaten with sticks or trampled, which resulted in the fracture of his ribs and sternum. The absence of any evidence emerging from the mouth of P.W. 1 as relatable to the causation of fractures of the ribs and sternum also creates a doubt in our mind as to her having been present in the scene and

had the fortuitous opportunity of witnessing the occurrence.

26. Taking into consideration the preponderance of probabilities and the medical evidence available on record, we are not prepared to place any safe reliance on the evidence of P.W. 1 for fastening or mulcting criminal liability upon any of the accused, inclusive of the juvenile accused. In that view of the matter, the conviction and sentence of accused 1 to 4, as had been imposed upon them by the Court below cannot at all be stated to be sustainable and the same deserves to be set aside. Likewise, the acquittal of accused 5 and the juvenile accused cannot at all also be interfered with.

27. Before parting with the case, we have to point out the grievous error committed by learned Sessions Judge in awarding a sentence of rigorous imprisonment for seven years to accused 1, on his being found guilty under Section 302 read with Section 34, I.P.C. We are unable to understand as to how learned Sessions Judge found accused 1 guilty under Section 302 read with Section 34, I.P.C. when especially, the overt act attributable to him was that he did inflict a hit on MO 1 vessel, which the deceased was carrying at the relevant point of time. There is no evidence at all that he did any act, other than the act, as stated above. There could have been no need for us to have referred to this aspect of the matter, if learned Sessions Judge had not committed the serious grievous error in imposing the punishment of rigorous imprisonment for seven years only, which is far less than the minimum penalty of imprisonment for life, for an offence punishable under Section 302 read with Section 34, I.P.C., when especially, we recorded a finding that the evidence of P.W. 1 is not above reproach and beyond suspicion, so that safe reliance could be placed on her testimony for fastening or mulcting criminal liability upon anyone of the accused.

28. For the reasons, as above, C.A. No. 246 of 1987 is allowed, the conviction and sentence, as had been imposed upon each of the appellants-accused 2 to 4 under Sections 148 and 302, I.P.C. and the appellant-accused 1 under Sections 147 and 302 read with Section 34, I.P.C. are set aside and they are acquitted. The bail bonds, if any, executed by them shall stand cancelled.

29. C.A. Nos. 417 and 972 of 1987 shall stand dismissed.

30. Order accordingly.

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