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Thalava Vs. the State

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Court : Chennai

Decided On : Dec-01-2011

Judge : M.Jaichandren; S.Nagamuthu, Jj.

Acts : Indian Penal Code (IPC) - Section 302, 294(b), 506(ii), 304(i); Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : CRIMINAL APPEAL (MD).No.258 of 2010

Appellant : Thalava

Respondent : The State

Advocate for Def. : Mr.C.Ramesh, Adv.

Advocate for Pet/Ap. : Mr.P.Ramasamy, Adv.

Judgement :

1. The appellant is the sole accused in S.C.No.272 of 2008, on the file of the learned First Additional Sessions Judge, Tirunelveli. By Judgment dated 21.07.2010, the learned Sessions Judge has convicted the appellant for offences under Sections 294(b), 302 and 506(ii) of the Indian Penal Code. For offence under Section 294(b) of the Indian Penal Code, the learned Sessions Judge has sentenced him to pay a fine of Rs.500/- [no default sentence], for offence under Section 506(ii) of the Indian Penal Code, has sentenced him to undergo simple imprisonment for six months and for offence under Section 302 of the Indian Penal

Code, has sentenced him to undergo imprisonment for life and to pay a fine of Rs.1,000/- [no default sentence]. Challenging the said conviction and sentence, the appellant has come up with this Criminal Appeal.

2. The case of the prosecution, in brief, is as follows:- PW-3 is the wife of the deceased Jebasingh. The deceased was doing sand and gravel business. The accused was working under the deceased to carry sand in his bullock cart to the customers. Since sufficient sand was not available, the business was not progressive. As a result, the accused had also last his income. However, the accused was a need of money to purchase a pair of bullocks for his cart. For the said purpose, he requested the deceased to lend a sum of Rs.5,000/-, but the deceased declined. Enraged over the same, the accused challenged him. Thereafter, on 27.06.2008, at about 3.00 PM, PW-1 and one Suresh [now deceased] had gone to the business place of the deceased for the purpose of purchasing sand. One Ponnusamy was a co-business man of the deceased. Both were present. But, since sand had not come from the quarry, PW-1 and Suresh were waiting. At that time, the accused came, developed quarrel with the deceased, demanding a sum of Rs.5,000/-, challenged him and then left the place. PW-1 and Suresh were still waiting. At about 03.45 PM, the accused again returned to the place of the occurrence with an aruval. Suddenly he attacked the deceased with aruval on his neck, twice. The deceased fell down. PW-1, Suresh and Ponnusamy attempted to prevent him. But, the accused brandished the aruval against them and fled away from the scene of occurrence. PW-2, who was proceeding to the Palai John's College, witnessed the occurrence. On hearing the alarm raised, when he proceeded to the place of occurrence, he found the accused fleeing away from the scene of occurrence with MO-1 aruval. PW-1 and Ponnusamy, and thereafter, proceeded to the Palayamkottai Police Station in the Motorcycle of PW-1. Mr.Ponnusamy [since died], preferred oral complaint to the police in respect of the occurrence. The same was reduced into writing by PW-7, the Sub - Inspector of Police, under Ex-P-1. Based on the same, PW-7 registered a case in Crime No.922 of 2008 under Sections 294(b), 302 and 506(ii) of the Indian Penal Code. Ex-P8 is the First Information Report. Then he forwarded the First Information Report and the complaint to the Court, which were received by the jurisdictional Magistrate at 06.00 PM on the same day. Then he handed over

the case diary to PW-9, the then Inspector of Police, attached to the Palayamkottai Police Station for investigation. Taking up for investigation, PW-9 proceeded to the place of occurrence at 05.45 PM and prepared Ex-P4 - Observation Mahazar in the presence of PW-5 and another witness. He also prepared a Rough Sketch under Ex-P10. During inquest, he examined Ponnusamy, Suresh, PW-1 and few more witnesses and recorded their statements. Ex-P11 is the Inquest Report. Then, he forwarded the body for autopsy.

3. PW-6 was a Professor of Forensic Medicine, Medical College, Tirnelveli. He conducted autopsy on the body of the deceased on 28.06.2008 at about 10.15 AM. He found the following injuries:-

“1). Multiple irregular gaping heavy cut injuries seen at the level of root of neck on the right side severing the right side of mandible, maxilla, lips, foodpipe and windpipe upper part, greater vessels of the neck, cervical vertebrae and occipital bone of skull. The head found attached to the left side of neck with a flap of skin only. Peritoneal and pleural cavities: Empty.Heart: Normal. Coronaries: Patent. Lungs: Pale. Hyoid bone: intact. Stomach: Contains 300 gms of partially digested cooked rice food particles with nil specific smell. Mucosa: Pale. Liver, spleen and kidneys: Pale. Small intestine: Contains 20 ml of bile-stained fluid with nil specific smell. Mucosa: pale. Bladder: Empty. Brain: pale.”

4. He opined that the deceased would appear to have died of complications of heavy cut injuries in the region of neck. Ex-P7 is the Post-mortem Certificate. Continuing the investigation, PW-9 recovered the blood stained earth, blood stained chappel and blood stained card board from the place of occurrence under Mahazar in the presence of the witnesses. He examined PW-4, Suresh and few more witnesses and recorded their statements. On 28.06.2008, at about 06.30 PM, he arrested the accused near Ariyakulam Vilakku in the presence of PW-4 and another witness. On such arrest, he gave a voluntary confession statement which was reduced into writing. In the said confession, he disclosed that he had hidden the aruval, a dhoti and a shirt in a bush near Saratha College Bus Stop. In pursuance of the said disclosure statement, he took PW-9, PW-4 and another witness to the said place and produced the said Material Objects. Ex-P2 is the

said disclosure statement and Ex-P5 is the Mahazar for recovery. Then he examined the Doctor, who conducted autopsy and recorded his statement. He collected the Post-mortem Certificate. Earlier, he made arrangements for taking photograh of the place of occurrence. PW-9 recovered the photo negatives with photo under Ex-MO-12 series from the photographer and examined him. He made a request to the Court to send the weapon and the blood stained articles for chemical analysis. Ex-P15 is the Serology Report dated 03.07.2008 and Ex-P16 and Ex-P17 are the Chemical Analysis Reports dated 01.07.2008. On completing the investigation, he laid charge sheet against the accused under Sections 294(b), 302 and 506(ii) of the Indian Penal Code.

5. When the Trial Court examined the accused under Section 313 of the Code of Criminal Procedure in respect of incriminating evidences available against the accused, he denied the same as false. However, he did not choose to examine any witness on his side nor to exhibit any document in his defence. Having considered the above materials, the Trial Court found him guilty under all the charges and accordingly, punished him. That is how, the appellant is now before this Court with this Criminal Appeal.

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

7. As we have already stated, at the time of occurrence, according to the case of prosecution, apart from PW-1, two more witnesses, by names Ponnusamy and Suresh, were also present. Admittedly, Ponnususamy and Suresh died even before the trial could commence. Therefore, the prosecution has examined PW-1 alone as the sole eye - witness.

8. The learned counsel for the appellant would submit that it is not safe to sustain the conviction, solely based on the evidence of PW-1, who is enimical towards the accused. In our considered view, it is not so. A perusal of the evidence of PW-1 would go to show that he was very much present at the time occurrence and he witnessed the whole occurrence. He was the one, who took Mr.Ponnusamy to the Police Station to prefer complaint. Though he has been cross-examined at length, nothing has been brought out on record to disbelieve his evidence. The learned

counsel for the appellant is not in a position to point out any infirmity in his evidence. PW-2 is a person, who rushed to the place of occurrence on hearing the alarm raised by PW-1 and Ponnusamy. He has categorically stated that when he rushed to the place of occurrence, he found the accused brandishing the aruval towards others and making attempt to flee away from the scene of occurrence. On seeing the crowded people, who rushed towards the place of occurrence, the accused took to his heels with aruval. PW-2 has categorically stated to a specific query made by the Trial Court that when he saw, the accused fleeing away from the scene of occurrence, he was holding the aruval, stained with blood, in his hand. He has further stated that he came to know about the full facts of the occurrence from Suresh. He has also spoken to about the presence of the accused. It has been suggested to him that with a view to show his loyalty to the police, PW-1 has deposed falsely against the accused. Except making such a bald suggestion, nothing has been brought on record to discard the evidence of PW-2. Even the learned counsel for the appellant, during the course of arguments, could not point out any infirmity in the evidence of PW-2. Thus, from the evidences of PW-1 and PW-2, the prosecution has clearly established that it was the accused, who cut the deceased twice on his neck.

9. The learned counsel for the appellant would submit that Ex-P1, complaint, dated 27.06.2008, cannot be believed, as the same is a result of concoction. In order to substantiate the said contention, he would submit that though the occurrence was at 04.00 PM, and the complaint was preferred at 04.30 PM, the complaint had reached the learned Judicial Magistrate only at 06.00 PM. According to him, there is no explanation for the above delay. In our considered view, the time gap, which is pointed out by the learned counsel for the appellant, is not at all a delay. To the contrary, in our considered view, the complaint was lodged within a very reasonable time and the same has reached the learned Judicial Magistrate quickly. This guarantees the genuineness in the contents of the complaint.

10. Nextly, the learned counsel for the appellant would contend that the place of occurrence has not been properly proved by the prosecution. The learned counsel for the appellant would point out that though it is stated in the First Information Report that the occurrence was in front of Mariamman Temple, according to the

Observation Mahazar and the Rough Sketch, the occurrence was on the main road. In our considered view, such a statement found in the First Information Report cannot be treated as a substantive evidence. A perusal of the Observation Mahazar would go to show that the occurrence had taken place in the place of business of the deceased and there is a road and just on the road, the body of the deceased was found. Thus, there is no material contradiction in the case of the prosecution, as it is sought to be projected by the learned counsel for the appellant.

11. The learned counsel for the appellant would, nextly, contend that according to the witnesses, the dead body was placed on a card board, whereas in the inquest, there is nothing mentioned. This argument of the learned counsel for the appellant deserves only to be rejected, because such a card board with bloodstain was recovered from the place of occurrence by PW-9, during inquest and the same has also been exhibited as a material object. The Chemical Analysis Report states that it contained human bloodstain.

12. The learned counsel for the appellant would, nextly, contend that Aruval [MO-1] was not sent to the Court forthwith. According to the case of the prosecution, the accused was arrested on the same same day by PW-9 at about 06.30 PM in the presence of PW-4. On his disclosure statement, the aruval was recovered and the same was sent for Chemical Analysis. According to the Chemical Analysis Report, it contained human blood of 'O' Group. The cloth found on the body of the deceased also contained 'O' Blood Group. This clearly establishes that this weapon had nexus with the crime. PW-1 and PW-2 have identified the same as the one, which was used by the accused at the time of occurrence to cause injury. Thus the prosecution has clearly established that MO-1 weapon was the one which was used by the accused to cause injury. The very fact that it was discovered from the hidden place at the instance of the accused would also go to show that the accused is the perpetrator of the crime.

13. Nextly, the shirt and dhoti, belonging to the accused, were not recovered at the instance of the accused. According to the Chemical Analysis Report, they were found with 'O' Group human blood and they were also identified by PW-1. Thus,

the presence of 'O' blood group on the dress of the accused, which he was wearing at the time of occurrence would also go to strengthen the case of the prosecution. We do not find any reason to reject the evidence of PW- 4 in this regard.

14. The learned counsel for the appellant would submit that yet another register, in which the entries were made during the Post-mortem Certificate, has not been produced by the prosecution. In our considered view, it is not at all necessary. The Post-mortem Certificate itself, in law, is not a substantive evidence. The substantive evidence is that of the oral evidence of the doctor, who conducted autopsy. The substantive evidence of the doctor is only corroborated by the Post-mortem Certificate. Thus, when the post-mortem certificate itself has got no substantive value, non - production of the registers, as it is stated by the learned counsel for the appellant is highly immaterial. Even the said document is not relevant. Therefore, this argument of the learned counsel for the appellant deserves only to be rejected.

15. Nextly, the learned counsel for the appellant would submit that the manner of the occurrence has not been established by the prosecution clearly. But, the learned counsel for the appellant has not pointed out as to how the narration of the events by PW-1 and PW-2 can be stated to be defective. A perusal of the evidence of PW-1 and PW-2 would go to show that they have vividly narrated the entire occurrence. This argument is, therefore, rejected.

16. Now, turning to the medical evidence, the doctor has clearly stated that the death was due to the cut injuries found on the neck. We have already concluded that the said injuries were caused only by the accused. Thus, by causing injuries, the accused alone has caused death of the deceased, in which there can be no doubt at all.

17. The learned counsel for the appellant would nextly contend that there was no fair trial afforded to the appellant. For this, the learned counsel would submit that PW-1 to PW-5 were examined by the Trial Court on 07.06.2010 and on that day, there was no counsel representing the accused. The State Brief Counsel was, thereafter, appointed, who conducted the case only from 17.06.2010 onwards.

Thus, according to the learned counsel, the evidence recorded in the absence of the counsel and without legal aid assistance, is non est in the eye of law. To substantiate the said contention, the learned counsel for the appellant would rely on a Judgment of the Hon'ble Supreme Court in Md.Sukur Ali v. State of Assam reported in 2011 Crl.LJ.1690, wherein the in Paragraph Nos.7 and 22, the Hon'ble Supreme Court has held as follows:-

“7. We are of the opinion that even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the Court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the Court should appoint another counsel as amicus curiae to defend the accused. This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the 'heart and soul' of the fundamental rights.

22. We reiterate that in the absence of a counsel, for whatever reasons, the case should not be decided forthwith against the accused but in such a situation the Court should appoint a counsel who is practising on the criminal side as amicus curiae and decide the case after fixing another date and hearing him.”

18. In this regard, we may state, as held in the Judgment, cited supra, that the accused in every criminal case has got indefeasible right to have the assistance of an advocate to defend himself. Engaging a counsel for the accused at the cost of the state is a part of the process of fair trial. No doubt, fair trial is a part of right to life guaranteed Article 21 of the Constitution of India. Therefore, the Higher Judiciary has been repeatedly insisting upon the trial Courts to ensure that there is a counsel to defend the accused at his choice from the beginning. If only the accused himself wants to defend the case, then there may be no requirement to appoint the State Brief Counsel at the cost of the State. But, in this case, obviously, on the date, when PW-1 to PW-5 were examined, there was no counsel on record on his side. De hors the same, the Trial Court examined PW-1 to PW-5

in chief examination. The records, however, reveal that the learned Sessions Judge deferred the cross-examination of the witnesses to a future date. In the meanwhile, a counsel at the cost of the State was engaged. The same witnesses were produced again on 17.06.2010, on which date, they were all cross-examined by the defence counsel. Thus, between 07.06.2010 and 17.06.2010, there were ten days intervening. Thus, the accused as well as the defence counsel had enough time to prepare the defence and to cross- examine the witnesses on 17.06.2010. Accordingly, without raising any objection regarding chief examination, which had already been recorded, the defence counsel proceeded to the cross - examination witnesses. The trial went on smoothly thereafter. Even when the accused was questioned under Section 313 of the Code of Criminal Procedure, he did not raise any objection regarding the examination of PW-1 to PW-5 in chief examination in the absence of his counsel. For the first time, only before this Court, such a plea is taken. In our considered view, since the accused had not raised any plea in this regard before the Trial Court, it is too late in the day for him to raise such a plea for the first time before this Court. Further, from the narration of the above facts, we are of the firm view that there was no prejudice caused to the accused. Thus, we are satisfied that a fair trial was afforded to him. Therefore, the argument of the learned counsel, in this regard, is only to be rejected.

19. Nextly, the learned counsel would contend that the offence said to have been committed by the accused will fall only under Section 304(i) of the Indian Penal Code, since the accused had acted as a result of the sustained provocation. We find no force in the said argument. From the evidence of PW-1, it could be seen that initially there was a quarrel between the accused and the deceased at 03.00 PM. At that time, he had no weapon. Thereafter, the accused went away. After 45 minutes, when he returned to the place of occurrence, he was armed with an aruval. This shows that there was an intention to do away with the deceased. Then, with aruval, suddenly, he started to attack the deceased on his neck. The place of the body chosen by the accused to cause injury is of vital importance. The weapon used by the appellant and the fact that there was no immediate provocation for him would all go to show that the accused came with pre-determination to do away with the deceased, and therefore, the argument of the

learned counsel that he acted out of the sustained provocation is only to be rejected. We hold that the act of the accused clearly falls within the first limb of Section 302 of the Indian Penal Code, and therefore, he is liable to be punished under Section 302 of the Indian Penal Code. Similarly, the offences under Sections 294(b) and 506(ii) of the Indian Penal Code also stand proved beyond reasonable doubts.

20. Now, coming to the quantum of punishment, the Trial Court has imposed only the minimum punishment of life imprisonment for offence under Section 302 of the Indian Penal Code, which cannot be interfered with at all. Thus, we do not find any reason to interfere with the sentences for offences under Sections 506(ii) and 294(b) of the Indian Penal Code, as they are just and reasonable. Thus, this Criminal Appeal is devoid of merits and the same deserves to be dismissed.

In the result, the Criminal Appeal is dismissed and the conviction and sentence imposed on the appellant is confirmed.

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