

**Suyambu Vs. State, Rep.by**

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**SooperKanoon Citation :** [sooperkanoon.com/965605](http://sooperkanoon.com/965605)

**Court :** Chennai

**Decided On :** Jan-08-2013

**Judge :** M.Jaichandren

**Appellant :** Suyambu

**Respondent :** State, Rep.by

**Judgement :**

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

08. 01/2013 CORAM THE HONOURABLE MR.JUSTICE M.JAICHANDREN and THE HONOURABLE MR.JUSTICE S.NAGAMUTHU Criminal Appeal (MD).No.214 of 2012 Suyambu .. Appellant vs. State, rep.by The Inspector of Police, Kulasekarapattinam Police Station, Thoothukudi District. .. Respondent Criminal appeal is filed under Section 374 of Criminal Procedure Code to call for the records in S.C.No.266/2011 on the file of the Additional Sessions Judge, not II, Thoothukudi and set aside the sentence and conviction passed by the learned Judge on 23.08.2012 and acquit the appellant. !For appellant ... Mr.G.R.Edmund ^For respondent... Mr.C.Ramesh Additional Public Prosecutor :JUDGMENT (Judgment of the Court was delivered by S.NAGAMUTHU, J) The appellant is the first accused in S.C.No.266 of 2011 on the file of the learned II Additional Sessions Judge, Thoothukudi. Altogether, there are two accused. They stood charged for the offences under Sections 302 and 294(b) IPC. By judgment, dated 23.08.2012, the trial Court convicted both the accused under Section 302 IPC and sentenced them to undergo imprisonment for life and to pay a fine of Rs.500/- in default to

undergo rigorous imprisonment for one year. The trial Court acquitted both the accused from the charge under Section 294(b) IPC. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

2. The case of the prosecution in brief is as follows;- The deceased in this case was one Mohan. PW1 is his wife and PW2 is his father. PW3 is a neighbour. All of them were residing at Theriyur Village, Tiruchendur Taluk. The accused also belonged to the same village and they are close relatives. The brother of the deceased is one Sundar and he is mentally retarded. On 13.09.2010 at 12 Noon, it is alleged that these two accused had teased Sundar. Sundar told the same to his parents as well as to the deceased. The deceased along with his mother and PW1 had gone to the house of the first accused/appellant to question the act of the accused. At that time, both the accused were found at the house of the first accused. The deceased questioned them as to why they misbehaved in such a manner with Sundar. This resulted in a quarrel. Suddenly, the first accused went into his house and rushed out with an aruval in his hand. On seeing the first accused coming so with aruval, the deceased, out of fear, started running. But, the first accused chased him and cut him on his head near the right ear. Having received the said injury, the deceased was still running. At that time, the second accused pelted a big stone on the deceased, which hit on the head of the deceased. The deceased fell down. Then, the first accused cut him with aruval repeatedly on his head and other parts of the body. PW1 and her mother-in-law, raised alarm. PWs2 and 3 also rushed towards the place of occurrence. On seeing them, both the accused fled away from the scene of occurrence with the weapons. The deceased was profusely bleeding. Immediately, PWs1 to 3 took the deceased to Government Hospital at Udankudi.

3. PW13, doctor Saraswathi, examined the deceased at 2.30 p.m. on 13.09.2010. At that time, the deceased was conscious. The deceased told PW13 that he was assaulted by one known person and one unknown person on 13.09.2010 at 2.00 p.m. near Ramakrishna Higher Secondary School, Theriyoor, Udankudi, using stone and aruval on his neck, left hand and right leg. PW13, entered the said statement in the accident register (Ex.P19). He noticed the following 9 injuries on the body of the deceased:-

- 1) 5 X 1 X 2 cm lacerated wound forehead
- 2) 7 X 2 X 2 cm lacerated wound right occipital region
- 3) 3 X 1 X 2 cm right occipital region.
- 4) 5 x 2 x 2 'Y' shaped lacerated wound posterior aspect of right ear.
- 5) 3 X 2 X 2 cm lacerated wound right temporal region.
- 6) 5 x 2 x 3 cm lacerated wound left parietal region.
- 7) 5 X 3 cm contusion right hand 5 cm above the right wrist joint.
- 8) Multiple contusion 1 x 1 cm just below left wrist joint.
- 9) 2 cm linear abrasion middle x right leg below (n.c.) Treatment given.

4. After giving first aid, PW13 referred him to Tiruchundur Government Hospital. PW1 and others, took him to Tiruchundur hospital. From there, they took the deceased to Tirunelveli Medical College Hospital at 5.45 p.m. On the way, the deceased breathed his last. PW11, doctor Sudalaimuthu, at Tirunelveli Medical College Hospital, on examining, declared him dead. Thereafter, PW1 proceeded to Kulasekarapattinam police station and made a complaint at 02.00 a.m. on 14.09.2010 to PW10, the then Special Sub Inspector of Police. On receiving the said complaint, he registered a case in Cr.No.159 of 2010 under Sections 294(b) and 302 IPC. Ex.P.14, is the First Information Report. Then, he forwarded Ex.P1 (complaint) and Ex.P14 (First Information Report) to the jurisdictional Magistrate, which was received by the learned Judicial Magistrate at 07.00 a.m. on 14.09.2010. PW10, handed over the case diary to PW12 for investigation.

5. Taking up the case for investigation, PW12, the then Inspector of Police attached to Kulasekaranpattinam Police Station proceeded to the place of occurrence and prepared an Observation Mahazar (Ex.P2) and a Rough Sketch (Ex.P17) in the presence of PW4 and another witness. Then, he recovered bloodstained earth (MO3) and sample earth (MO4) from the place of occurrence under a mahazar in the presence of the same witnesses. Then, he conducted

inquest on the body of the deceased between 09.00 a.m. and 11.30 a.m. and prepared Ex.P18, inquest report. During inquest, he examined PWs.1 to 3 and few more witnesses. Then, he forwarded the body for postmortem.

6. PW11, Doctor Sudalaimuthu, was an Assistant Professor of Forensic Medicine attached to Tirunelveli Medical College and Hospital. On 14.09.2010 at 11.50 a.m. he commenced autopsy. He found the following injuries:- "1. Laceration 3 cm x 1 cm x skull bone deep seen on the left forehead. It is 5 cm above left eyebrow. Underlying left side of frontal bone found fractured in a length of 2 cms.

2. 3 cm x 1 cm x skull bone deep stellite shaped laceration seen on middle of upper part of back of head.

3. Laceration 3 cm x 2 cm x scalp seen on the left parietal region, 10 cm above from left ear lobe.

4. 2 cm x 1 cm x scalp deep laceration seen on the right parietal region, 12 cm above from right ear lobe.

5. 2 cm X 0.5 cm x scalp deep laceration seen on the right frontal region, 10 cm above from right ear lobe.

6. 3 cm x 1 cm x scalp deep horizontal laceration seen on the right temporal region, 2 cm above from right ear lobe.

7. 5 cm x 2 cm x scalp deep laceration seen on the right temporo occipital region 1 cm behind right ear.

8. 3 cm x 0.5 cm x scalp deep oblique laceration seen on the right parietal region, 5 cm above behind right ear lobe.

9. 7 cm x 1 cm x scalp deep vertical laceration seen on the right occipital region, 6 cm behind right ear.

10. 3 cm x 0.5 cm x scalp deep laceration seen on the right occipital region, 2 cm behind injury No.9.

11. Abrasions seen on the following areas :

3. X 2 cm - back of left elbow, 4 X 1 cm - back of middle of right forearm, 8 x 5 cm - back of right hand, 2 x 2 cm - left upper cheek and 3 x 2 cm - front of left upper leg. Ex.P16 is the postmortem report. He opined that the deceased would appear to have died of multiple injuries and time of death is 16 to 24 hours prior to postmortem examinations.

7. Continuing the investigation, PW12 examined few more witnesses including the doctor. On 14.09.2010, both the accused surrendered before the learned Judicial Magistrate, at Nagercoil. On a request made by PW12, the learned Judicial Magistrate ordered for police custody of both accused. Accordingly, on 23.09.2010 at 04.00 p.m., he took both the accused into his custody and brought them to the police station. On 24.09.2010 at 07.00 am. in the presence of PW5 and another witness, the first accused made a voluntary confession which was reduced into writing. In the said confession he disclosed the place where he had hidden the aruval. The second accused had also given a voluntary confession in the presence of the same witnesses, in which he disclosed the place where he had hidden a stone. In pursuance of the said confession, the first accused took the police and witnesses at 12.30 p.m. to Thisianvillai Road, E.B. Office, and from a bush near the said place, he produced the aruval (MO1). The same was recovered under a mahazar. Similarly, the second accused took the police and the witnesses to a different place near EB Office and produced the stone (MO2) from a bush. That was also recovered.

8. On returning to the police station, PW12 sent the accused to the Court and handed over the material objects to the jurisdictional magistrate. On 26.10.2010 he examined the Doctor, who conducted autopsy and collected the material objects. He forwarded the material objects for chemical examination. It needs to be mentioned that MO-1(aruval) was not sent for chemical analysis. As per the analysis report, human blood was found on stone and other materials. On completing the investigation, PW12 laid charge sheet against both the accused.

9. Based on the same, the trial Court framed charges under Sections 294(b) and 302 IPC. The first accused pleaded innocence. In order to prove the charges, on

the side of the prosecution, 13 witnesses were examined and 20 documents were exhibited besides 5 material objects.

10. Out of the said witnesses PWs1 to 3 are the eyewitness to the occurrence, who have stated about the overt acts of both the accused. PW5 is the Village Assistant, in whose presence, while in police custody, the accused confessed to the guilt and on their confession, the material objects 1 and 2 were recovered as detailed above. The others are official witnesses. When the above 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 witness on their side or to exhibit any document.

11. Having considered the above, the trial Court found them guilty only under Section 302 IPC and accordingly punished. So far as the charge under Section 294(b) IPC is concerned, the trial Court has acquitted both the accused. That is how the appellant is before this Court with this appeal.

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

13. In this appeal, the first and foremost contention of the learned counsel for the appellant is, that the medical evidence does not corroborate the eyewitness account of PWs1 to 3, and so the evidence of PWs1 to 3 should be disbelieved. In order to substantiate the said contention, the learned counsel for the appellant would submit that as per the evidence of PW11, doctor, there were as many as 10 external injuries found on the body of deceased and all the said injuries are only lacerated injuries. The learned counsel would further point out, not even a single cut injury was found on the body of the deceased. The learned counsel would further refer to the evidence of PW11, wherein he has stated in chief examination that these injuries would have been caused by hit with blunt side of a weapon like MO1 aruval or MO2 black stone. The learned counsel would further point out that it has been not elicited at all from PW11 that atleast some of the injuries would have been caused by cut with aruval. Thus, according to the learned counsel, the medical evidence, does not corroborate the eyewitness account of PWs1 to 3.

14. Secondly, the learned counsel for the appellant would submit that there is inordinate delay in preferring the complaint which has not been explained away. Thirdly, the learned counsel would contend that MO1 aruval was not sent for chemical examination and there is no reason stated as to why it was not sent. From these materials, according to the learned counsel, the evidences of PWs1 to 3, deserve only to be rejected, as they would not have been present at all at the place of occurrence. The learned counsel would thus contend that the prosecution has failed to prove the complicity of this accused in the alleged crime.

15. The learned Additional Public Prosecutor would vehemently oppose this appeal. According to him, the delay in preferring the complaint has been duly explained by PW11. He would further submit that injuries found on the deceased would have been caused by MO1. He would nextly contend that though it is a fact that MO1 was not sent for chemical examination, that has not caused any harm to the case of the prosecution.

16. We have considered the above submissions. A close reading of evidence of PWs1 to 3 would clearly go to show that it is the positive case that the deceased was repeatedly and indiscriminately cut by this accused with aruval. It is not their evidence that the deceased was attacked with blunt part of the MO1, aruval, by this accused.

17. Now, turning to the evidence of PW11, he has stated that there were only 11 lacerated injuries on the body of the deceased and he had not noticed even a single cut injury on the body of the deceased. Even in chief examination, he has opined that these injuries would have been caused by the blunt side of the weapon like (MO1), Not even an attempt made by the prosecution to elicit anything from PW11 that atleast some of the injuries found on the body of the deceased would have been caused by MO1. Thus, absolutely, there is no evidence on the side of the prosecution that some of the injuries would have been caused, by cutting with MO1, aruval.

18. In this regard, we may refer to the judgment of a Division Bench of this Court reported in 1982 LW 9.(Soundarapandi V. The State), wherein the Division Bench of this Court has held that it is the bounden duty of the prosecution to prove

through the medical expert that there is possibility that the injuries would have been caused in the manner alleged by the prosecution witnesses. For any reason, if the expert was unable to give any opinion in favour of the prosecution, it is for the prosecution to examine a better expert and to get opinion, from him so as to cull out the truth.

19. The prosecution has failed to elicit any opinion either from PW11 or from any other expert to the effect that at least it is possible that the injuries on the deceased would have been caused by cutting with aruval. As has been held by this Court in the above-said Division Bench Judgment, here in this case also the prosecution has miserably failed to prove that the injuries found on the deceased would have been caused by MO1, aruval. Thus, as rightly pointed out by the learned counsel for the appellant, the prosecution has failed to prove that the injuries were caused by this accused by cutting with aruval, MO1. We find that the medical evidence itself is not in support of the prosecution case at all.

20. The learned Additional Public Prosecutor would contend that the evidence of doctor should not be given much importance when the eyewitness account PWs1 to 3 is believable. Though attractive, we do not find any force in the said argument. In the instance case, since it is highly improbable that lacerated injuries would have been caused, when he was cut with aruval. In our considered view, at least one or two injuries would have been clean cut injuries. Curiously not even a single cut injury was found on the body of the deceased. PW11 is an expert having specialisation in Forensic medicine. As we are able to see from the deposition of PW11, he was a Assistant Professor in Forensic Medicine having PG degree in Forensic Medicine. When he has given such a definite opinion that all the injuries were lacerated injuries, we do not find any reason to reject the said opinion of the doctor.

21. Apart from that, PW13, doctor Saraswathi, who examined the deceased at 2.35 p.m., has also mentioned in Ex.P19 that all the injuries were only lacerated injuries. In her evidence also she has stated that these injuries would have been caused by a blunt object. She has also opined that these injuries would have been caused by the blunt portion of MO1 aruval. This opinion is in consonance with the

evidence of PW11. Thus the medical evidence completely contradicts the eyewitness account.

22. Nextly, at 2.35 p.m. on 13.09.2010, when the deceased was enquired by PW13, the deceased told her that he was attacked by one known person and another unknown person. It is not at all the case of the prosecution that out of these two accused one is not a known person to the deceased. It is the positive case of the prosecution that the accused were close friends known to the deceased. When that be so, had it been true that these accused had attacked the deceased, certainly he would have told the doctor that he was attacked by two known persons. This contradiction has not been explained away by the prosecution. The statement made by the deceased to the doctor-PW13, squarely falls within the ambit of Section 32 of the Indian Evidence Act as dying declaration. This also completely contradicts the witness accounts of PWs1 to 3.

23. In the above background, the delay also assumes much importance. Though we find some justification for the delay, since PWs 1 to 3 would have been worried about the health of the deceased and since they had carried the deceased from one hospital to another hospital, they would not have thought of going to the police station immediately. But, the fact remains that the First Information Report was registered at 2.00 a.m. on 14.09.2010 and the same had reached the Court at 07.00 a.m. This delay, in normal course, would not have gained much importance in the mind of this Court. But, in view of the above improbabilities which we have highlighted above from the medical evidence and the dying declaration of the deceased, we have to attach some importance for the delay also.

24. Lastly the learned counsel for the appellant would submit that MO1, aruval, had not been sent for chemical examination and there is no explanation for the same by the prosecution. When it is the case that weapon was stained with blood, it should have been sent for chemical examination to ascertain the connection between MO1 and the crime. That has also not been done. This is yet another circumstance in favour of the accused.

25. Having made a scientific analysis of the materials placed on record, we find it difficult to accept the case of the prosecution that the accused attacked the

deceased by cutting him indiscriminately by MO1 and caused his death. Thus, in our considered view, the prosecution has failed to prove that complicity of this accused in the crime. At the same time, we do not want to express any opinion regarding the alleged complicity of the second accused, because he is not before this Court. In view of the said conclusion, we are impeded to acquit the appellant/accused.

26. In the result, the appeal is allowed and the conviction and sentence imposed by the learned II Additional Sessions Judge, Thoothukudi, in S.C.No.266 of 2011, dated 23.08.2012 are set aside in respect of the appellant alone and the appellant is acquitted from the charge. jkr To 1.The Additional Sessions Judge, not II, Thoothukudi. 2.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

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