

(2012) 12 MAD CK 0088

Madras High Court (Madurai Bench)

Case No: Criminal A. No. 1064 of 2002

Ramesh

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

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**Date of Decision:** Dec. 3, 2012**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 109, 302, 323, 324, 34

**Citation:** (2013) 2 MLJ(Cri) 30**Hon'ble Judges:** S. Nagamuthu, J; M. Jaichandren, J**Bench:** Division Bench**Advocate:** C. Godwin, for the Appellant; K.S. Duraipandian, Additional Public Prosecutor, for the Respondent

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**Judgement**

S. Nagamuthu, J.

The appellant is the third accused in S.C. No. 199 of 2000 on the file of the learned Additional Sessions Judge, Kanyakumari District at Nagercoil. Altogether, there were three accused including the appellant. The first accused stood charged for the offences under Sections 341, 323 and 302 read with 109 of the Indian Penal Code. The second accused stood charged for the offences under Sections 341 and 302 of the Indian Penal Code. The appellant/third accused stood charged for the offences under Sections 341, 323 and 302 read with 109 of the Indian Penal Code. The trial Court found all the accused guilty under all the above charges. So far as the appellant is concerned, for offence u/s 341 of the Indian Penal Code, he was sentenced to pay a fine of Rs. 200/- in default to undergo rigorous imprisonment for one week, for offence u/s 323 of the Indian Penal Code, he was sentenced to pay a fine of Rs. 500/-, in default to undergo rigorous imprisonment for two months, for the offence u/s 302 read with Section 109 of the Indian Penal Code, he was sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/-, in default to undergo rigorous imprisonment for six months. The first accused was

also sentenced like the petitioner. The second accused was sentenced to undergo imprisonment for life, and to pay a fine of Rs. 5,000/-, in default to undergo rigorous imprisonment for six months for the offence u/s 302 of the Indian Penal Code and for the offence u/s 341 of the Indian Penal Code, he was sentenced to pay a fine of Rs. 200/-, in default to undergo rigorous imprisonment for one week. (This Court is informed that the first and second accused have passed away). The appellant/third accused has come up with this Criminal Appeal in C.A. No. 1064 of 2002 challenging the conviction and sentence imposed on him. The first and second accused preferred similar appeals in C.A. Nos. 1081 of 2002 and 1400 of 2003. (Those two appeals have already been dismissed as abated). Thus, now before this Court, the appeal preferred by the present appellant in C.A. No. 1064 of 2002 alone is available for disposal.

2. The case of the prosecution in brief is as follows:

P.W. 1 is a resident of Railway Colony in Kottar at Nagercoil. The deceased was also a resident of the said Colony. Both were employed in Railways. On 22.12.1999, at about 5 p.m., these three accused, who have got nothing to do with the said Colony, came there and were using filthy language against each other. P.W. 1 intercepted them and warned them not to behave in such a disorderly and indecent manner, in that locality, since it was flooded with houses. All the three accused went away. Again on 24.12.1999, at about 3.45 p.m., P.W. 1 was returning to his house in the Railway Colony from his office. He was proceeding from South towards North on the Street. At that time, all the three accused came from the opposite direction. On seeing P.W. 1, all the three accused shouted at him and questioned the authority of P.W. 1 about the happenings on 22.12.1999. They questioned P. W. 1 as to what was his authority to question them. Then, all the three accused pulled the shirt of P.W. 1 and dragged him near to the house of one Leelavathi. At that place, the first accused slapped him on his right cheek. The third accused bite him on his right hand. The first accused again slapped him. Suddenly, the second accused took out a knife from his waist and attempted to stab P.W. 1. The deceased Baskaran, on noticing the same, rushed to the place of occurrence. He separated P.W. 1 from these accused. Then, P.W. 1 went away. At that time, it is alleged that the appellant/third accused again questioned him about his authority to question them regarding the behavior. Suddenly, the second accused took out a knife and stabbed the deceased. The deceased fell down and sustained injury on his chest. All the three accused ran away from the scene of occurrence. The occurrence was witnessed by P.Ws. 3, 5 and 6. (P.W. 6 turned hostile and he has not supported the case of the prosecution).

2.1. Immediately, P.Ws. 1 and 3 took Mr. Baskaran in an auto driven by P.W. 11 to the Government Hospital. P.W. 4, Dr. Ramachandran was the duty Medical Officer at Kottar Government Hospital. At 4.30 p.m., on 24.12.1999, he examined the deceased and found that he was already dead. He forwarded the body to the mortuary and gave intimation (Exhibit P-4) to the police.

2.2. In respect of the injury sustained by P.W. 1, P.W. 15 Dr. Krishnan Kutty examined him at 9.00 p.m., on 24.12.1999. P.W. 1 told Doctor that at 4.00 p.m., on 24.12.1999, he was bitten by a known person at Railway Colony. He found the following injuries on P.W. 1:

Contusion in Right upper anteriorly 3 x 2 cm with tee marks - redness present.

2.3. P.W. 16 was the then Special Sub-Inspector of Police, attached to Kottar Police Station. On receiving intimation from the hospital, at 4.45 p.m., on 24.12.1999, he rushed to the Hospital. At 5.00 p.m., he found P.W. 1 in the hospital and recorded his statement under Exhibit P-1. On returning to the police station, at 5.45 p.m., he registered a case in Crime No. 2016 of 1999 under Sections 341, 324 and 302 of the Indian Penal Code. Exhibit P-14 is the First Information Report. Then, he forwarded Exhibit P-1 and Exhibit P-14 to the learned Judicial Magistrate No. 2, Nagercoil forthwith. Thereafter, he handed over the case diary to the Inspector of Police for investigation.

2.4. P.W. 18, was the then Inspector of Police attached to Kottar Police Station. On 24.12.1999, taking up the case for investigation, he proceeded to the place of occurrence at 6.30 p.m., and prepared an observation mahazar in the presence of P.W. 7 and another witness. Then, he prepared a rough sketch showing the place of occurrence. From the place of occurrence, he recovered bloodstained earth and sample earth under a mahazar. Then, he conducted inquest on the body of the deceased, commencing at 5.30 p.m. on 25.12.1999 and prepared Exhibit P-17, inquest report. Then, he forwarded the body for post-mortem. P.W. 2 Dr. Arumuga Velan was an Assistant Surgeon at Kottar Headquarters Government Hospital. He conducted autopsy on the body of the deceased at 11.15 a.m. on 25.12.1999. During post-mortem, he found the following injuries:

External Examination:

Injury 1) A stab injury - elliptical shape 5 cm length. 1  $\frac{1}{2}$  cm breadth x 10 cm. depth (on probing) on the left side chest close to the sternum. Edges clean cut on dis-Section of the injury. It goes through 4th intercostal space, pleural layers, lung and ends at the heart with a puncture in the heart. V rib on the left side fracture present at the site of injury. 1000 ml of collected blood in the left chest.

Internal Examination:

Throat: Injury to the left lung at the site of stab injury present. Heart punctured wound present in the heart. All chambers empty.

Abdomen: Liver 1500 gms. C/s Pale.

Stomach contain partially digested; rice particles of 250 gms.

Each kidney 150 gms. C/s Pale.

No fracture skull bone. Brain 1300 gms. C/s pale.

2.5. He opined that the deceased would appear to have died of the injury to the chest. He further opined that the said injury would have been caused by a weapon, like M.O. 1 knife.

2.6 Continuing the investigation, P.W. 18 examined P.Ws. 1, 3, 4, 5, 6, 7 and few more witnesses and recorded their statements. On 28.12.1999, at 9.00 a.m., he arrested the second accused at Meenakshipuram Bus Stop in the presence of P.W. 8 and another witness. On such arrest, he gave a voluntary confession. In the said confession, he disclosed the place where he had hidden the knife. In pursuance of the said disclosure statement, the second accused took P.W. 18, P.W. 8 and another witness to Kottar Kuruntheru Poonga and he took out M.O. 1 knife and produced the same. P.W. 18 recovered the same in the presence of P.W. 8 and another witness under a mahazar. Then, he returned to the police station along with the weapon and the accused. Thereafter, he forwarded the accused to Court for judicial remand and also forwarded the material objects collected so far to the Court with a request to the Court to forward the same for chemical examination. Then, he examined few more witnesses including the doctors and collected the medical records. As per the request made by P.W. 18, and on the orders of the Jurisdictional Magistrate, P.W. 10, the then Head Clerk of the learned Judicial Magistrate No. 2, Nagercoil, forwarded the material objects for chemical examination. Exhibit P-11 is the chemical analysis report and Exhibit P-12 is the serology report. As per the chemical analysis report, human blood was found on M.O. 1-knife. As per the serology report, the blood group of the blood found on the knife was "A" group. Similarly, the blood group of the bloodstained found on the dress materials of the deceased as well as the bloodstained earth recovered from the place of occurrence were also of "A" group. Finally, on completing the investigation, P.W. 18 laid charge sheet against all the three accused.

3. Based on the above materials, the trial Court framed appropriate charges against the accused. They denied the same as false and, therefore, they were put on trial. The trial Court examined as many as 18 witnesses on the side of the prosecution and 17 documents were marked, besides 6 material objects.

4. As we have already narrated, P.Ws. 1, 3 and 5 are the eye witnesses to the occurrence, who have spoken to about the entire occurrence. P.W. 6, though examined as eye witness, has turned hostile and he has not supported the case of the prosecution. P.W. 8 has spoken to about the arrest of the second accused and the consequential recovery of the knife. The others are the official witnesses. When the incriminating evidences were put to the accused u/s 313 of the Code of Criminal Procedure, they denied the same as false. However, they did not choose to examine any witness on their side, nor mark any document.

5. Having considered the above, the trial Court found the accused guilty under all the charges and accordingly, punished them. That is how, the appellant/third accused is before this Court with this Criminal Appeal.
6. We have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and also perused the records carefully.
7. As we have already pointed out, the appellant stands convicted for offences under Sections 341, 323 and 302 read with 109 of the Indian Penal Code. So far as the deceased is concerned, he was not even known to these accused prior to the alleged occurrence. The prosecution has not even suggested any motive for these accused to do away with the deceased. According to the positive case of the prosecution, because of the occurrence, which had taken place earlier on 22.12.1999, these three accused came to Railway Colony and developed quarrel with P.W. 1. In that process, it is alleged that the first accused slapped him on his cheek and the appellant herein bite him. While, this was going on, suddenly, the second accused took out a knife from his waist and attempted to stab P.W. 1. This has been clearly spoken to by eye witnesses.
8. The learned counsel for the appellant does not very seriously dispute the evidence of these eye witnesses upto this extent. Thereafter, the deceased suddenly emerged at the place of occurrence on hearing the alarm raised by P.W. 1. He separated P.W. 1 from these accused and accordingly, P.W. 1 had gone to a considerable distance. It was only at that time, according to the positive case of the prosecution, the deceased warned the accused not to behave in such a disorderly manner. Here, according to P.W. 1, the appellant herein questioned his authority regarding the same. Suddenly, the second accused took out a knife and stabbed the deceased. According to the evidence of P.W. 3, this accused did not do anything at all against the deceased. It was only the second accused who questioned the deceased and stabbed him. But the evidence of P.W. 5 is quite contrary. According to her evidence, the first and third accused held the deceased and then, the second accused stabbed him. This evidence of P.W. 5 is quite contrary to the evidence of P.Ws. 1 and 3. As we have already pointed out, even the evidence of P.W. 1 and P.W. 3 are contradicting each other. In any event, even according to the case of the prosecution, this accused did not make any harm to the deceased either oral or physical. It is also not the case that there was any prior conspiracy among the accused to commit any crime. It is also not the case that at the time of occurrence, this accused either instigated, or aided the second accused to stab the deceased.
9. A close scrutiny of the evidence of these eye witnesses would go a long way to show that the second accused suddenly took out a knife and stabbed him. Therefore, it cannot be said that the second accused stabbed the deceased with any prior sharing of intention with these two accused. Since the presence of the deceased at the place of occurrence itself was accidental, one cannot say that this

accused had a common intention to do away with the deceased.

10. Incidentally, we may say that there is no charge u/s 34 of the Indian Penal Code also against any of the accused. The charge is only u/s 302 read with 109 of the Indian Penal Code. To attract an offence u/s 109, the prosecution should prove beyond reasonable doubt that there was either conspiracy among the accused or instigation or aid by the rest of the accused to the accused to cause the death. Absolutely, we find no evidence at all to bring the act of this accused within the ambit of Section 109 of the Indian Penal Code. Therefore, as rightly contended by the learned counsel for the appellant, assuming that the entire occurrence, as spoken to by P.Ws. 1 and 3 is believed, even then, for want of evidence, to attract the abetment, the present appellant cannot be convicted u/s 302 read with 109 of the Indian Penal Code. We want to add that the evidence of P.W. 5 to the effect that the first and third accused held the deceased, so as to enable the second accused to stab him, cannot be believed, in view of the contradictory evidences spoken to by P.Ws. 1 and 3.

11. Thus, in our considered opinion, absolutely, there is no evidence for abetment and, therefore, the conviction of the appellant u/s 302 read with 109 of the Indian Penal Code cannot be sustained. In other words, for the act of the second accused in causing the death of the deceased, the present appellant cannot be held in any manner responsible and so, he is entitled for acquittal under this charge.

12. So far as the other charges, viz., Sections 341 and 323 of the Indian Penal Code are concerned, the evidences of the eye witnesses are so cogent and convincing. The learned counsel for the appellant himself is not in a position to point out any infirmity in respect of the same. Therefore, the conviction and sentence imposed on the appellant, for the offences under Sections 341 and 323 of the Indian Penal Code are liable to be confirmed. In the result, the criminal appeal is partly allowed in the following terms:

The conviction and sentence imposed on the appellant/third accused, by the learned Additional Sessions Judge, Kanyakumari District at Nagercoil, made in S.C. No. 199 of 2000, for the offence u/s 302 read with 109 of the Indian Penal Code are set aside and he is acquitted of the said charge.

The conviction and sentence imposed on the appellant/third accused under Sections 341 and 323 of the Indian Penal Code are confirmed.

The trial Court has imposed only fine for the offences under Sections 341 and 323 of the Indian Penal Code. Thus, the appellant/third accused is directed to be released forthwith, if his detention is not required in connection with any other case, provided he has paid the fine amount imposed for the offences under Sections 341 and 323 of the Indian Penal Code.