(2014) 4 MLJ(Cri) 561

Madras High Court

Case No: Crl.A. No. 718 of 2013

Ramalingam		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Oct. 17, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161(3), 313(1)(b), 374
- Evidence Act, 1872 - Section 101, 102, 103, 105, 106
- Penal Code, 1860 (IPC) - Section 294(b), 302, 324

Citation: (2014) 4 MLJ(Cri) 561

Hon'ble Judges: T. Mathivanan, J; S. Rajeswaran, J

Bench: Division Bench

Judgement

T. Mathivanan, J.
Challenging the judgment of conviction and sentence dated 10.10.2013 and made in the Sessions Case in S.C. No. 200 of 2011 on the file of the learned III Additional District and Sessions Judge, Cuddalore Sessions Division at Vridhachalam, this Memorandum of Criminal Appeal is filed by the appellant/accused, after invoking the provisions of Sections 374 of the Criminal Procedure Code. The appellant herein is the accused, who has been found guilty under Section 302 of the Indian Penal Code, convicted thereunder and sentenced to suffer life imprisonment and also to pay a fine of Rs. 1,000/-, in default, to suffer a further period of one year rigorous imprisonment. The fine amount is paid on receipt by the appellant.

2. Despite the charge sheet is laid by PW-20, Inspector of Police attached to Pennadam Police Station at Cuddalore District, as against the appellant under Section 302 of IPC the learned District Munsif-cum-Judicial Magistrate, Tittagudi, seems to have taken cognizance of the offences under Sections 294(b), 324 and 302 of IPC. However, the learned Additional District and Sessions Judge, Virudhachalam had framed the charge as against the appellant under Section 302 of IPC - a simplicitor charge.

3. When the ingredients of the charge were explained and questioned, the appellant had pleaded innocent and claimed to be tried. Therefore, he was put on trial.

4. Heavily banking on the testimonies of PWs 1 and 2, who are none other than the wife and daughter of the deceased Pandurangan as well as placing reliance upon the testimonies of PWs 14, 19 and 20 who have taken the responsibility of conducting post-mortem examination and investigation, the learned Additional Sessions Judge had proceeded to found the appellant guilty under Section 302 of IPC convicted and sentenced as aforestated.

5. It is significant to note here that PWs 3, 4 and 5 who are said to be the eye-witnesses. But in total negation of their 161(3) Cr.P.C. Statements, given before the Investigating Officer, they have deviated from their original track and given evidence in hostility to the case of prosecution. Similarly, PWs 7, 9, 11 and 12 have also not supported the case of prosecution.

6. Notwithstanding their evidences in hostility, the learned Additional Sessions Judge had concluded that the prosecution had brought home the guilt of the appellant beyond all reasonable doubts, which resulted in conviction under Section 302 of IPC.

The Phrase "Beyond All Reasonable Doubts ":

7. "Beyond Reasonable Doubt", the well known principle of Common Law has acted like a saviour for the guilty. Anybody who is capable of hiring a witty lawyer can go scot-free just by raising a smallest possible doubt.

8. Man is a rational being. Due to this "Rationality" everyone differs drastically from others. It may be true that the reasonability of his thoughts and consequently his decisions cannot be measured as there is non-availability of standard scale. Maximum Criminal Justice Systems of the world follow the principle that the guilt of an accused should be proved beyond reasonable doubt. Indian Criminal Justice System also works on the same lines and it is for the prosecution to prove beyond reasonable doubt that the accused has committed an offence with requisite mens rea.

9. There is no straight jacket formula on the basis of which the guilt of the accused is said to be proved beyond reasonable doubt. It is, therefore, depending solely on the Judge to say as to whether he is convinced by the arguments of the prosecution or that there still remains a degree of reasonable doubt, so as to impart the judgment in favour of the defence.

10. No doubt in a criminal appeal the burden of proof is always on the prosecution and the benefit of reasonable doubt is belonged to the accused.

11. In Vijayee Singh and others Vs. State of U.P., , it has been pointed out that "the phrase "burden of proof is not defined in the Act. In respect of criminal cases, it is an

accepted principle of criminal jurisprudence that the burden is always on the prosecution and never shifts. This flows from the cardinal principle that the accused is presumed to be innocent unless proved guilty by the prosecution and the accused is entitled to the benefit of every reasonable doubt."

11a. With reference to Sections 101 to 103 of the Indian Evidence Act, 1872, the Apex Court in Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another, has made a distinction between the phrase "burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In paragraph-12, it has been observed as under:

"12.....

.....

There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence."

12. Similarly, in Abdulla Mohammed Pagarkar etc. Vs. State (Union Territory of Goa, Daman and Diu), and Criminal Appeal No. 268 of 1977, Moreshwar Hari Mahatme v. State (Union Territory of Goa, Daman and Diu), while speaking on behalf of a Division Bench, Hon''ble Mr. Justice A.D. Koshal, in paragraph 19, has observed as under:

"19. Now this is hardly a proper approach to the requirements of proof in relation to a criminal charge. The onus of proof of the existence of every ingredient of the charge always rests on the prosecution and never shifts."

13. The burden always lies on the prosecution to prove that the offence is committed by the accused alone beyond reasonable doubt.

14. It is only when the evidence led by the prosecution, if believed, will sustain a conviction or at least makes out a prima facie case, that the question of accused discharging the burden under Section 106 of the Evidence Act, arises, (see Nagireddi Siva and Another Vs. The State of Andhra Pradesh,

15. On the same line, a Three Judges Bench of the Hon''ble Supreme Court of India in Bhikari Vs. State of Uttar Pradesh, with reference to Section 302 of IPC and 105 of the Evidence Act, 1872, has observed that:

"The burden of proving an offence is always on the prosecution; it never shifts. Intention when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from

circumstances. For example, if a person deliberately strikes another with a deadly weapon, which according to the common experience of mankind is likely to cause an injury and sometimes even a fatal injury depending upon the nature of the weapon and the part of the body on which it is struck, it would be reasonable to infer that what the accused did was accompanied by the intention to cause a kind of injury which in fact resulted from the act. In such a case, the prosecution must be deemed to have discharged the burden resting upon it to establish an essential ingredient of the offence, namely the intention of the accused inflicting a blow with a deadly weapon."

16. In the given case on hand, PW-1 Maragadham and PW-2 Sumathy are the wife and daughter of the deceased Pandurangan. The appellant Ramalingam his younger brother. They are all the residents of Venkarumbur village. A previous enmity was prevailing in between the deceased Pandurangan and the appellant Ramalingam with regard to their family partition. A dispute was also in existence between them in respect of sharing the thrash field where the alleged occurrence is said to have been taken place.

17. That on 22.2.2011 at about 9.00 A.M., the deceased Pandurangan, his wife Maragadham (PW-1) and his daughter Sumathy (PW-2) were engaged in piling up of haystack in the said thrash field. PW-3 Paranthaman was on the haystack and forming the haystack. While-so, the appellant came there and scolded the deceased saying . On hearing this, PW-1 Maragadham had reacted and told her husband that it could be settled in the village. At that time, the appellant had stated that "" "saying so he had taken out an Eucalyptus Wooden Log" (MO-1) and assaulted the deceased Pandurangan. When the deceased had turned around, that blow was fallen on his occipital region. After receiving the blow, Pandurangan had slided down and on seeing this, PWs 1 and 2 had raised hue and cry. Immediately, PWs 1 and 2 with the help of PW-4 (Ganesan), who is the adjacent land owner, had lifted the deceased and made him to drink butter milk.

18. After assaulting the deceased, the appellant had fled away from the scene of occurrence towards Pudukkudi Aandavar Temple.

19. Then the deceased was taken to Murugankudi hospital by PW-8 Baskaran in his TVS-50 moped along with PW-7 Ramachandran. Since the injured was not admitted in Murugankudi Hospital, he was taken to Vridhachalam Government Hospital in 108 Ambulance. At about 12.20 P.M., he was brought to the Government Hospital, Vridhachalam where he was examined by PW-17 Dr. R. Subramanian. While-so, he had found a contusion on the left occipital region measuring 8 x 6 cm. Excepting this injury, no other injuries were found.

20. For further treatment, the deceased was referred to Cuddalore Government Hospital by PW-17 and thereafter he had also given an intimation to the concerned police. In this connection, he had issued an Accident Register and the copy of the same was marked under Ex. P-12.

21. Thereafter, the deceased was brought to Cuddalore Government Hospital in a private car at 2.00 P.M. At about 2.30 P.M., PW-16, Dr. Sai Leela had examined him and declared "brought dead". In this connection, she had given an intimation to the police under Ex. P-11. The copy of the Accident Register issued by her was marked as Ex. P-10.

22. At about 3.30 P.M., as it is seen from the evidence of PW-18, Sub Inspector of Police attached to Pennadam Police Station, one Head Constable Subramanian, who was on para duty, had received the death intimation from the Cuddalore Government Hospital and he had passed on the message to PW-18. On receipt of that message, PW-18 had been to Cuddalore Government Hospital at 5.30 P.M., and recorded a statement from PW-1 Maragadham under Ex. P-1 and thereafter came down to Pennadam Police Station and registered the case in Pennadam PS Crime No. 50 of 2011 under Sections 294(b), 324 and 302 of IPC. The printed First Information Report was marked under Ex. P-13. Thereafter, Ex. P-1 and Ex. P-13 were sent to the learned Judicial Magistrate, Tittagudi and the copies of the same were placed before PW-19 Inspector of Police for further proceedings.

23. At about 1.00 A.M., on 22.2.2011/23.2.2011, PW-19 had received Ex. P-1 and Ex. P-13 and at about 6.00 A.M., he had been to the place of occurrence and inspected the same in the presence of PW-10 Velmurugan and one Periyasamy and prepared an observation mahazar (Ex. P-2) and a rough sketch under Ex. P-14. He had also examined the witnesses and recorded their respective statements. At about 11.00 A.M., he went to the Government Hospital, Cuddalore and conducted inquest on the dead body of the deceased Pandurangan in the presence of Panchayatdars and prepared an Inquest Report under Ex. P-15. After the completion of the inquest, the dead body was sent for post-mortem examination.

24. Dr. Balakumaran (PW-14) attached to Government Hospital, Cuddalore had an occasion to conduct the post-mortem examination on the dead body of the deceased. He had started conducting of post-mortem examination at 3.30 P.M. While-so, he had found the following external as well as internal injuries on the dead body:

"External Injury:

A small contusion on the occipital region. Bleeding was found from left ear.

Internal Injury:

Abdominal and peritoneal cavity: no rib fracture. Heart congested. Lung congested, pigmented. Hyoid 14/8513 X-ray taken and preserved. Stomach empty congested, liver spleen and kidney congested. Intestine distended with gas. Skull, no fracture, EDH and SDH present over occipital region. Spine no fracture, bladder viscera were preserved."

25. He had completed the post-mortem examination at 4.30 P.M., and after the completion of his examination, he had issued a Certificate to that effect under Ex. P-8.

26. After getting clinical analysis report, he had given his final opinion saying that the deceased would appear to have died of head injury. As per the clinical analysis report given by the Assistant Surgeon, Villupuram, with reference to the examination of viscera, neither alcohol nor other poison was detected. Hyoid bone was found intact. The Serology Report to that effect was marked under Ex. P-7.

27. Subsequently, PW-19, the Investigating Officer had arrested the appellant at 6.00 A.M., on 24.2.2011 in the presence of PW-11 Village Administrative Officer and his Village Menial PW-12 and based on his disclosure statement, he had recovered MO-1 (Eucalyptus Wooden Log)under the cover of a seizure mahazer Ex. P-17 and thereafter the accused along with the incriminating object were sent to Court for being remanded. Then the further investigation of the case was taken up by PW-20. After the completion of his investigation, he had laid a final report against the appellant on 31.5.2011 under Section 294(b), 324 and 302 of IPC. With the evidence of PW-20, the prosecution has closed its side.

28. When the incriminating circumstances arising out of the testimonies of the prosecution witnesses were put to the appellant, during the course of the proceedings under Section 313(1)(b) Cr.P.C., while denying their testimonies, he had stated that the case was foisted against him. He had examined only one witness as D.W.1 on his side by way of his defense and during the course of his examination Exs. D.1 and D.2 were marked.

29. On evaluating the evidences both oral and documentary, the learned Additional Sessions Judge, Cuddalore at Vridhachalam, had proceeded to found the appellant guilty under Section 302 of I.P.C. convicted and sentenced him as afore stated.

30. As observed in the opening paragraphs P.Ws. 3 to 6, 7, 9, 11 and 12 have turned hostile. The testimonies of the remaining prosecution witnesses, viz., P.Ws. 1, 2, 6, 8, 10 and 13 to 20 alone are available to extend their support to the case of the prosecution.

31. Of them, P.Ws. 1 and 2, as afore stated, are said to be the eye witnesses. P.W.6 is the circumstantial witness as well as hearsay witness. P.W.8 Baskaran, who is the owner of the TVS-50 Moped being a chance witness has admitted that he had taken the injured Pandurangan to Murugankudi hospital. P.W.10 Velmurugan is the observation mahazar witness whereas the other witnesses are official witnesses. In fact, P.Ws. 6, 8 and 10 have not witnessed the occurrence.

32. As per the case of the prosecution, while P.Ws. 1 and 2 along with the deceased Pandurangan had been gathering the haystack, P.W.3 Parandaman, who was standing on the haystack, had been piling up the same.

The Value attached to the evidences given by P.Ws. 1 and 2 :

33. P.Ws. 1 and 2 have stated that they were present at the time of occurrence. The time of occurrence was 9.00 a.m. on 22.2.2011. When they were piling up the haystack, the appellant Ramalingam had come there and scolded at the deceased and subsequently, he had taken out an eucalyptus wooden log which was found lying there and assaulted the deceased Pandurangan. When the appellant gave a blow on the deceased on his occipital region, he had slided down. But what P.W.3 Parandaman would depose is that he was called by the deceased to pile up the haystack. When he went to the thrash-field ten agricultural workers belonging to his village were working in P.W.5 Paramasivam''s land. But none of them were examined as an independent witness to support the case of the prosecution.

34. P.W.3 would go one step further and depose that P.Ws. 1 and 2 were not at all present in the place of occurrence when the occurrence was taken place. He would further depose that the deceased Pandurangan had asked him to go and bring his wife for piling up the haystack and therefore, he had been to the house of the deceased and asked her to come to pile up the haystack. Thereafter, he would state that he did not know anything about the occurrence. When he was questioned by the learned counsel appearing for the appellant in his cross examination he would state that at the first instance, he had been to the house of the deceased and looking for P.W.1, but she was not found there. However, she was found working in the 100 days National Rural Employment Guarantee Scheme. Therefore, he went there and informed her.

35. P.W.3, according to the case of the prosecution, being an eye witness, has stated that P.Ws. 1 and 2 were not present at the time of occurrence, instead they and found working in 100 days National Rural Employment Guarantee Scheme. His evidence has caused heavy burden on the prosecution to substantiate its case.

36. In order to corroborate the evidence of P.W.3, the appellant had examined D.W.1 Suresh, who was working as Secretary of Venkarumbur Panchayat. He would state that on 22.2.2011 P.W.1 Maragadham was working in their panchayat under 100 days National Rural Employment Guarantee Scheme.

37. He has also produced the Daily Attendance Register pertaining to the workers who were working under the said Scheme, which was marked as Ex. D.1. On scrutinization of this document, it is revealed that under Serial Number 125 P.W.1 Maragadham, wife of Pandurangan, found to have attended the work on the date of the occurrence, i.e., on 22.2.2011. The said entry under Sl. No. 125 is marked as Ex. D2.

38. When it is established by the appellant through D.W.1 as well as through the Exs. D1 and D2 that P.W.1 Maragadham was working in 100 days National Rural Employment Guarantee Scheme, how she could have present and witnessed the occurrence which was said to have been on 22.2.2011. This has also been ratified and substantiated by

P.W.3.

39. Based on the testimonies of D.W.1 as well as Exs. D1 and D2, we find that the presence of PWs. 1 and 2 in the place of occurrence at 9.00 a.m. on 22.2.2011 is found to be suspicious one, which has not been satisfactorily dispelled by the prosecuting agency. Therefore, the testimonies of PWs. 1 and 2 cannot be trusted and no value could be attached to their evidence for the purpose of proving the case of the prosecution.

40. Though P.W.7 Ramachandran has not supported the case of the prosecution in material aspect, in his chief examination, he has stated that on the fateful day, i.e., on 22.2.2011, he had planted sugar cane seeds in his field. At about 6.10 am. when he was present in his field, the deceased Pandurangan came there and handed over the key asking him to irrigate water to his field from his electric motor pump set. Subsequently, he had been irrigating the land and sprinkling the grass in his field and at that time, P.W.3 Parandaman was found piling up the haystack.

41. While so, the appellant Ramalingam came there and asked the deceased, . Thereafter, the appellant Ramalingam came to P.W.7 and was chatting with him for some time, then he had been to his house. According to P.W.7, the deceased Pandurangan came to his field at 6.10 a.m. and handed him over the electric motor pump set key and asked him to irrigate his land and thereafter, the appellant Ramalingam came there, i.e., after 6.10 a.m. and asked the deceased as to whey he had put up the haystack in his place and then the appellant went to his residence.

42. On a careful perusal of the testimonies available on record, viz., the testimonies of PWs. 3, 4 and 5 and other hostile witnesses, we find that no acceptable evidence is available to show that the appellant Ramalingam was present at 9.00 a.m. at the place of occurrence.

43. As adumbrated supra, P.W.3''s evidence is sufficient to substantiate the fact that PWs. 1 and 2 were not at all present in the place of occurrence, when the incident was said to have been taken place and besides this, we also find that the evidence of D.W. 1 and Exs. D1 and D2 would be sufficient to create a reasonable suspicion or a reasonable doubt with regard to the probabilities of the occurrence involving the appellant in the criminality.

Whether the delay in lodging the first information as well as the delay in reaching the first information and the first information report under Exs. P.1 and P. 13 respectively at the hands of the Judicial Magistrate is fatal to the case of the prosecution:

44. P.W.1 says that when she along with her daughter and one Ganesan P.W.4 had lifted her husband and made him to drink buttermilk, P.W.8 Baskaran came there in his TVS -50 Moped and thereafter, her husband was taken in TVS 50 Moped to Murugankudi hospital.

45. P.W.5 was also assisting P.W.8 Baskaran to take the deceased to Murugankudi hospital. Unfortunately, no doctor was examined from Murugankudi hospital. However, the witnesses have stated that the deceased was not admitted in Murugankudi hospital and therefore, they were instructed to take him to the Govt. Hospital, Vridhachalam and therefore, they brought him to Vridhachalam Govt. hospital in 108 Ambulance.

46. In this connection, no reference is available to show that at what time, the deceased was taken to the Murugankudi hospital. However, P.W.17 Dr. Subramaniam would state that at about 12.20 p.m. when he was present at Vridhachalam Govt. hospital the deceased was brought to him and he was informed by P.W. 1 that at about 9.00 a.m. when the deceased was working in his field, and he was assaulted by his brother and therefore, he had become unconscious.

47. As it is revealed from the evidence of P.W. 17, he had given an intimation to the police station, but he has not clarified the position as to which police station he had given the intimation. Ex. P.12 is the copy of the Accident Register issued by P.W.17.

48. On a perusal of this document under Ex. P.12, P.W.17 Dr. Subramaniam has mentioned the time as 12.20 p.m. on 22.2.2011. Therefore, it is clear that at 12.20 p.m. the deceased was brought to the Vridhachalam Govt. hospital and P.W.17 had also examined him and found one contusion over the left occipital region measuring 8 x 6 cm. Even if it is presumed that P. W. 17 had given an intimation with regard to the admission of the deceased in Vridhachalam Govt. hospital, the police officials, who had received the intimation should have registered the case. But nothing is found available on the record. Thereafter, P.W.16 Dr. Saileela attached to Govt. hospital, Cuddalore, has stated that at about 2.30 p.m. on 22.2.2011, the injured Pandurangan was brought to Cuddalore Hospital for further treatment from Vridhachalam Govt. Hospital. She had also examined him and declared him brought dead.

49. In Ex. P.10, Accident Register, P.W.16 Dr. Saiseela has mentioned the time as 2.30 p.m. Ex. P.11 is the intimation to the out police station attached to the Govt. Hospital Cuddalore. This intimation is also seems to have been given to Cuddalore police station at 2.30 p.m.

50. Despite the intimation given to the police station by Dr. Subramaniam attached to the Vridhachalam Govt. Hospital at 12.20 p.m. and Another intimation given by Dr. Saiseela to the out police station attached to Govt. Hospital, Cuddalore, P.W.18 Mageswari would state that one Head Constable Subramanian, who was on para duty at 3.30 p.m. at Pennadam Police Station had received the intimation from the Govt. Hospital, Cuddalore and after receiving that intimation from the Head Constable Subramanian, P.W.18 Sub Inspector of Police attached to the Pennadam police station, had reached the Govt. Hospital, Cuddalore, at 5.30 p.m and recorded a statement from P.W.1 and thereafter, came down to Pennadam Police Station and registered a case in Cr. No. 50 of 2011 for the offences under Sections 294(b), 324 and 302 of I.P.C.

51. On a cursory perusal of Ex. P. 1 statement said to have been recorded by P.W.18, it is revealed that she had recorded the statement of P.W.1 from 5.45 p.m. to 7.00 p.m. on 22.2.2011. Thereafter, at about 9.00 p.m. on the same date she had registered the case in Cr. No. 50 of 2011 on the file of the Pennadam police station at 9.00 p.m.

52. Ex. P.13 printed first information report also discloses that the case was registered at 9.00 p.m. Therefore, it is thus clear that there is a delay of 12.00 hours in lodging the complaint and registering the case.

53. On scrutinization of Ex. P. 1 complaint as well as Ex. P. 13 first information report, it is explicit that the Magistrate appears to have received these two documents at 11.00 p.m. on 22.2.2011. The Judicial Magistrate court is situated at Thittakudi. However, the court seal is found to have affixed both on Exs. P.1 and P. 13 with the date of 24.2.2011.

54. P.W.18 Sub Inspector of Police, in her cross examination has stated that the Head Constable had received the death intimation from Cuddalore Govt. Hospital and informed her through her mobile phone, but the said Head constable had not stated anything about the time at which he had received the intimation from the Cuddalore Govt. Hospital.

55. Even according to her evidence, though she had received the intimation from the Head Constable, who was on para duty at Pennadam police station at 3.30 p.m., she was not able to say as to whether she was present at the police station when she had received the information.

56. She has also stated that to reach the Cuddalore Govt. Hospital from Pennadam police station by their official jeep it took 1.45 Hours. She has also admitted in her evidence that in Ex. P.1 and P. 13 the court seal was affixed with the date of 24.2.2011.

57. However, on careful appreciation of her evidence, we are of firm view that P.W. 18 has not offered proper explanation with regard to the delay in receiving the intimation and registering the case. The delay in reaching the F.I.R. at the hands of the Judicial Magistrate, Thittakudi, has also not been explained.

58. In a heinous crime as in the present case on hand, the first information shall be given without any delay and soon after the registration of the case, the complaint as well as the F.I.R. shall reach at the hands of the Magistrate immediately without any delay and if any delay is found it would lead the court to presume that the first information as well as the first information report could have been fabricated or confabulated.

59. In so far as the present case on hand is concerned, we find that the delay in lodging the complaint as well as in travelling the magisterial court is abnormal, which has not been satisfactorily explained by the prosecution.

60. In this regard, the learned Additional Public Prosecutor has placed reliance upon the decision in Garlapati Krishna Vs. State of A.P. rep. by Public Prosecutor, wherein the

Apex Court has observed that if there are a number of accused and if overt acts are attributed to such accused, one can apprehend that people who have not participated in commission of offence may be arrayed as accused after due deliberations by taking sufficient time. There was only one accused in this case, who was inimical towards the deceased. Under these circumstances, it was held that the delay in preferring complaint by itself is not a ground to reject the prosecution case.

61. On coming to the present case on hand, as already discussed in the opening paragraphs, the presence of P.Ws. 1 and 2 in the place of occurrence, when the alleged occurrence was said to have been taken place is shrouded with suspicion.

62. Further, as rightly argued by Mr. Dinakaran, learned Senior Counsel, no doctor attached to Murugankudi hospital was examined and it is also kept in dark that at what time the injured was taken to Murugankudi hospital.

63. Secondly, despite, an intimation was given to the concerned police station by P.W. 17, the prosecution has not come forward to say as to what happened to that intimation. They have also not clarified the position as to whether any case was registered based on the intimation given by P.W. 17 Dr. Subramaniam.

64. The cumulative effect of lacunae with regard to the explanation for the delay would lead to presume that it is abnormal and fatal to the prosecution case.

Non availability of evidence with regard to mens rea :

65. Though it is revealed from the testimonies of P.Ws. 1 and 2 that there was no previous enmity between the two brothers, viz., the deceased and the appellant, the criminal intention to commit murder as well as the motive for the occurrence have not been brought forth by the prosecuting agency.

66. According to P.Ws. 1 and 2, the appellant had taken out an eucalyptus wooden log and assaulted the deceased on his occipital region and the moment when he had received the blow on the back of his head, he had immediately slided down.

67. P.W.3 has deposed that P.Ws. 1 and 2 were not at all present in the place of occurrence and his evidence has also been supported by the testimonies of D.W.1 and Exs. D1 and D2. The evidence of D.W.1 would go to establish the fact that P.W. 1 was working at the time of occurrence under 100 days National Rural Employment Guarantee Scheme. Even as per the testimonies of P.Ws. 1 and 2, the appellant had not brought the M.O.1 eucalyptus wooden log from his residence.

68. It is the case of the prosecution that after reaching the thrash field he had asked his brother, who is the deceased in this case, as to why he had put up the haystack in his place and he had also allegedly scolded at the deceased and while saying so he had picked up an eucalyptus wooden log which was found lying there, i.e., M.O.1 and

assaulted his brother over his head.

69. Even as per the case of the prosecution, he had given a single blow which was landed on the occipital region. P.W. 17 is the seizure mahazar. As it is revealed from the seizure mahazar, M.O.1 measures 46 1/2 inch in length and the bottom measures 4 1/2 inch and the tip of the eucalyptus measures 4 cm.

70. According to the case of the prosecution, M.O.1 appears to be a stout stick. If any blow is given strongly on the occipital region, definitely, it would have caused fracture over the skull bone.

71. P.W. 14, Dr. Balakrishnan, who had conducted post mortem examination on the dead body would state in his chief examination that if anybody is hit with wooden log like M.O.1, it might be possible to inflict such injury as it is found on the back side head of the deceased. He has ruled out the fracture on the skull bone. During his cross examination he would state that if any person had accidentally fallen down on the ground and his head had hit against the earth surface, there is a chance for causing such injury.

72. He has also stated in his cross examination that he was not examined by the investigating officer by showing M.O.1 when he was examined under Section 161(3) Cr.P.C. He has also deposed that had the deceased been attacked with the wooden log M.O.1 the size of the contusion would be in larger size. The post mortem certificate under Ex. P.8 also reveals that a small contusion was found on the occipital region and blood was found oozing from the ear.

73. P.W.7 has stated in his evidence that he had taken the injured Pandurangan by placing him over his shoulder in TVS 50 Moped which was ridden by P.W. 8 Baskaran to Murugankudi Govt. Hospital. The doctor, who was present in the said hospital had informed him that four days before the injured Pandurangan came to him and when he was examined he had found that he was having low Blood Pressure and therefore, he was advised to go to Cuddalore hospital and he had also administered an injunction. But in this aspect, the doctor who was present in the Murugankudi hospital was not at all examined by the prosecuting agency.

74. From the overall assessment of the testimonies of P.Ws. 1 and 2 along with other available evidences, we find that if the appellant was having criminal intention to eliminate his brother Pandurangan, he would have reached the place of occurrence with the wooden log M.O.1 or any other dangerous weapon from his house. But he came to the place of occurrence with an empty hand and scolded at his brother and he had also asked as to why he had been placing haystack in his place.

75. The appellant, according to the evidence of PWs. 1 and 2, had picked up the wooden log, which was found lying there and assaulted him and according to their evidence, the appellant was not having any criminal intention to commit the murder of the deceased. Therefore, in the absence of Mens rea or in the absence of unassailable evidence on the

part of the prosecuting agency it cannot be construed or concluded that the appellant is the perpetrator of the crime.

Arrest and Recovery:

76. In so far as this case is concerned, we are of the considered view that the investigation is not upto the mark. P.W. 11 is the V.A.O. of Venkarumbur Village, whereas P.W.12 is the village menial and both of them have turned hostile as they have not supported the case of the prosecution.

77. On appreciation of their testimonies, we find that the recovery of M.O.1, viz., eucalyptus wooden log has not been proved and the arrest of the appellant has also not been proved through the evidence of P.W.19 Investigating Officer as P.Ws. 11 and 12 have not supported his evidence.

Non appreciation of the evidences adduced by prosecuting witnesses by the trial Court in a proper perspective:

78. We have thoroughly gone through the judgment of the trial court, and found that the learned counsel, who was appearing on behalf of the appellant before the trial Court had argued on the following grounds:

"a. The F.I.R. was registered belatedly and it is only a concocted one.

b. The intimation given by P.W.17 Doctor attached to the Govt. Hospital Vridhachalam was not given effect to.

c. The first information report which was registered on 22.2.2011 had reached the court only on 24.2.2011 for which there was no proper explanation on the part of the prosecution.

79. Despite it was argued before the lower court on the above said grounds, it was not properly appreciated and considered by the learned trial Judge and therefore, we find that no credible evidence is available to indict the appellant to say that he had committed the heinous crime and further we do not find any probable cause to convict the appellant under Section 302 of I.P.C.

80. Apart from this, we also find that there is no scintilla of truth in the testimonies of P.Ws. 1 and 2. Since there is no plausible reason to believe or to conclude that the appellant is the perpetrator of the crime, we are of the firm view that the judgment of the trial court is absolutely wrong and therefore, conviction and sentence are liable to be set aside after giving the benefits of doubt in favour of the appellant.

81. On overall assessment of the evidences both the oral and documentary we find that the prosecution case is therefore, not free from doubt and suspicion. Undoubtedly the

evidence on record creates a strong suspicion about the involvement of the appellant. But the evidences particularly adduced by P.Ws. 1 and 2 are not sufficient to prove the appellant''s involvement in the murder beyond a reasonable doubt.

82. It is well settled proposition that suspicion, however is strong, cannot take the place of proof. Clear and unimpeachable evidence is necessary to convict a person. We find that such evidence is absent in this case. The evidences of alleged eye witnesses have not been corroborated by the medical evidence as the presence of P.Ws. 1 and 2 in the place of occurrence at the time of occurrence is shrouded with moonshine. In the result, the Criminal Appeal is allowed and the order of conviction and sentence recorded by the trial Court are set aside and the appellant is acquitted of the charge under Section 302 of I.P.C. and he is set at liberty. The fine amount paid, if any, shall have to be refunded and the bail bond executed by and on behalf of the appellant shall stand discharged.