

(2014) 10 MAD CK 0323

Madras High Court

Case No: Crl.A. No. 301 of 2007

Mani

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Oct. 14, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 294(b), 302, 324, 325, 326

Citation: (2014) 4 MLJ(Cri) 583**Hon'ble Judges:** R.S. Ramanathan, J**Bench:** Single Bench

Judgement

R.S. Ramanathan, J.

The appellant was convicted for an offence under Section 325 IPC and sentenced to undergo five years rigorous imprisonment and to pay a fine of Rs. 10,000/-, in default, to undergo three months simple imprisonment, by the Principal Sessions Judge, Vellore in S.C. No. 277 of 2006 dated 7.3.2007. This appeal is filed against the said conviction and sentence. The case of the prosecution is that the deceased gave money to the accused for buying a cellphone. On 4.1.2006, at about 2.30 p.m, the deceased was brought in an auto to his house and the auto driver informed that the deceased was attacked by some persons near Chelliamman Temple. The deceased had sustained some injuries on the head and legs and he was unconscious and therefore, the mother of the deceased took him to the Government Hospital at Vellore on 4.1.2006 and he was given treatment there and he was advised to go to CMC Hospital at Vellore or Government General Hospital at Chennai and therefore, the deceased was taken to Government General Hospital at Chennai where he was operated and he was taking treatment for one and half months and he was discharged on 14.2.2006 and thereafter, he stayed in his sister's house and came to Vellore on 20.02.2006. On 21.02.2006, he appeared before the respondent police and gave a complaint stating that on 4.1.2006, he was asked by the accused to come

to Dhanabackiyam Marriage Hall at Gandhi Nagar and he went there and from there, he was taken by the accused in a TVS 50 vehicle under the Palar Bridge and the accused scolded him and attacked him with a wooden log on the backside of the head and he fell unconscious and some body took him in an auto and left him in his house and his mother took him to the Government Hospital, Vellore at about 3.30 p.m., and from there, he was taken to the Government General Hospital at Chennai on the next day, and he was discharged on 14.2.2006 and after going to his sister's house, he came to Vellore on 20.2.2006 and on 21.02.2006, he have a complaint before the police. On that basis, FIR was registered in Crime No. 132/2006 against the appellant for offence under Sections 294(b) and 324 of IPC and later, investigation was conducted and charge sheet was filed for offence under Section 294(b) and 326 IPC and the deceased died on 28.5.2006 and therefore, the case was altered into one under Section 302 IPC and a final report was filed for the offence under Section 302 IPC. It is the further case of the prosecution that P.W. 1 father of the deceased, though not an eye-witness gave evidence regarding the fact that the deceased was brought to his house by an auto driver and thereafter, he was admitted in the Government Hospital at Vellore and later, he was taken to the Government General Hospital at Chennai. P.W.2 was examined as an eye-witness. He deposed the manner in which the incident had taken place and he also deposed that the appellant attacked the deceased with a wooden log and pushed him from the bridge and thereafter, he engaged an auto and directed the auto driver to drop the deceased at his house and he came to know the address of the deceased from his visiting card found in the deceased's pocket. PWs.4 and 5 are Observation Mahazar Witnesses and they were treated as hostile witnesses and P.W.3 did not said anything about the incident. P.W.6 is the Doctor who treated the injured on 28.5.2006 and on the same day, the deceased died and he also intimated the death of the deceased to the police. P.W.7 was the Doctor who treated the injured on 4.1.2006, namely, the date of occurrence. P.W.8 is the Post-Mortem Doctor. P.W.9 is the Head Constable who handed over Express FIR to the Judicial Magistrate IV, Vellore on 29.5.2006. P.W.10 is the Doctor who treated the deceased at Government General Hospital at Chennai and also spoke about the discharge of the deceased on 14.02.2006. P.W.11 is the Sub Inspector of Police who registered FIR on the complaint given by the deceased on 21.2.2006 and registered a case for offence under Sections 294(b) and 324 IPC and examined witnesses P.W.1, mother of the deceased, one Anbu P.W.2, P.W.4 and P.W.5 and inspected the place of occurrence and recovered the material object. P.W.12 is the Sub Inspector of Police who conducted further investigation and filed a final report for offence under Sections 294(b) and 326 IPC against the appellant and examined P.W. 10. After the death of the deceased, further investigation was taken over by the Inspector of Police P.W. 13 and the case was also altered into one for the offence under Sections 294(b) and 302 IPC. He also examined P.W.1, P.W.2 and one Rajammal and Anbarasi. P.W.14 conducted further investigation and also examined P.W.4 and P.W.5 and also P.W.9 Head Constable Annadurai, and further investigation was conducted by P.W. 15 who

examined the Post Mortem Doctor and filed a charge sheet against the appellant for offence under Section 302 IPC.

2. During trial, the prosecution examined PWs. 1 to 15 and marked Exs. P.1 to 19 and the Wooden Log as MO.1.

3. The accused was questioned under section 313 Cr.P.C., regarding the incriminating circumstances found in the evidence against him and he denied the guilt.

4. The learned Principal Sessions Judge, Vellore, on the basis of the evidence adduced, convicted the appellant for offence under Section 325 IPC and sentenced to undergo five years rigorous imprisonment and to pay a fine of Rs. 10,000/-, in default, to undergo three months simple imprisonment and aggrieved by the same, the present Appeal is filed.

5. It is submitted by the learned counsel for the appellant, Mr. K.S. Rajagopalan, that the learned Principal Sessions Judge, Vellore, without properly appreciating the discrepancies which are patent in the prosecution case, simply, believed the evidence of P.W. 1 and P.W.2 and convicted the appellant for offence under Section 325 IPC. He submitted that even as per Ex. P.13, the FIR given by the deceased on 21.2.2006, he was taken to the Government Hospital at Vellore on 4.1.2006 by his mother and mother was not examined in the trial Court and father of the deceased P.W. 1 came to the hospital later. As per the evidence of P.W. 1, the deceased was brought by an auto driver in his auto and he informed that the deceased was found lying in the place of occurrence after he was attacked by unknown persons and no one spoke about the presence of P.W.2 and P.W.2 was also not examined during the inquest and that was also admitted by the Investigating Officer and it was a mystery how the prosecution was able to identify P.W.2 as an eye-witness when his presence was not spoken to by any witnesses. He further submitted that no attempt was made by the prosecution to examine the auto driver who brought the deceased to his house and strangely, the police were able to identify P.W.2 whose presence was not spoken to by any one. The evidence of P.W.2 cannot also be relied upon as he was only a chance witness and he had no occasion or opportunity to witness the alleged incident. He therefore submitted that the learned Principal Sessions Judge without properly appreciating the improbabilities appearing in the prosecution case, namely, the non-examination of the mother, the auto driver, believed the evidence of P.W. 1 and P.W.2 to hold that it was the appellant who attacked the deceased on 4.1.2006. He further submitted that the evidence of P.W.1 and P.W.2 was also falsified by the testimony of P.W.7, the Doctor who treated the deceased on 4.1.2006. As per Ex. P.7 Accident Register, the deceased told the Doctor P.W.7 that he was attacked by unknown persons whereas as per the evidence of P.W.10 who treated the deceased at Government General Hospital at Chennai, the deceased had fallen from a height and that the deceased was conscious enough to give information about the incident to Doctor on 4.1.2006. No explanation was given by

the prosecution for not giving any complaint till 21.02.2006 by the deceased and there was no evidence adduced by the prosecution that the deceased was not able to speak during that period. On the other hand, P.W.7 deposed in chief examination that the deceased informed him that he was attacked by unknown persons. P.W.10 Doctor who treated the deceased at Government General Hospital, Chennai on 5.1.2006 to 14.2.2006 admitted in the cross-examination that the deceased was capable of giving statement. Further, the deceased was discharged on 14.02.2006 and he gave the complaint only on 21.02.2006 and in that complaint, he has not given any details regarding P.W.2 and he admitted that he was taken in an auto to his house and his mother took him to the Government Hospital. P.W.1 would state that he took the deceased to the Government Hospital and the deceased was brought in an auto and the auto driver informed that the deceased was found lying at the place of occurrence. He further submitted that the conduct of P.W.2 would also prove that his evidence cannot be believed. According to P.W.2, he saw the appellant attacking the deceased and he was standing under the bridge at the place of occurrence and after the deceased had fallen from the bridge, he came to know about the identity of the deceased from the visiting card found in his pocket and thereafter, engaged an auto and asked the auto driver to drop the deceased at his residence. According to P.W. 1, the auto driver who dropped the deceased at his residence informed him that the deceased was found lying in the place of occurrence and he took him to his house. Further, P.W.2 did not inform anybody about the occurrence till he was examined on 21.2.2006 and it was a mystery how the police were able to identify P.W.2 on 21.02.2006 itself immediately after FIR was registered when his presence was not spoken by any anybody. He also submitted that as per Inquest Report Ex. P.19, the deceased was attacked by the appellant and people standing thereby took him to his house and thereafter, the mother took the deceased to the hospital on that date. There was no reference to the deceased taken in the auto and thus, the evidence would falsify the evidence of P.W.2. Therefore, the Court below erred in believing the evidence of P.W.1 and P.W.2 for arriving at the conclusion that the deceased was attacked by the appellant. He therefore submitted that the judgment of conviction and sentence of the trial Court is liable to be set aside.

6. Learned Additional Public Prosecutor submitted that the Court below rightly believed the evidence of P.W. 1 and P.W.2 and considering the nature of injuries and the manner in which the occurrence had taken place rightly convicted the accused for an offence under Section 325 IPC. He submitted that P.W.1 spoke about the motive for the appellant who attacked the deceased and that was not controverted or denied in evidence. He further submitted that P.W.2 cannot be termed as a chance witness and he is a natural witness and according to him, he was washing his car under the bridge and as per the evidence of P.W.3, any person under the bridge can see the occurrence on the bridge and according to the evidence of P.W.2, the appellant attacked the deceased and pushed him from the bridge and as he fell,

P.W.2 immediately went near the deceased and found his address from the visiting card and he engaged an auto and thus, the evidence of P.W.2 was very natural and that was believed by the trial Court. He also submitted that there is no need to examine mother of the deceased as father was examined as P.W.1 and admittedly, mother was not an eye-witness and father was examined to prove the motive. He also submitted that the deceased was not able to speak. Though a strange answer was obtained from P.W.7, P.W.10 who would state that the deceased was capable of giving statement. Considering the nature of the injuries and treatment given to the deceased, the trial Court rightly believed the evidence of P.W.7 and P.W.10 and accepted Ex. P.13 FIR. He further submitted that Ex. P.13 FIR given by the deceased can be taken as Dying Declaration and in Ex. P.13, he clearly narrated the incident and therefore, based upon the evidence of P.W.1 and P.W.2 and the FIR given by the deceased, the trial Court rightly convicted the appellant for an offence under Section 325 IPC and therefore, there is no necessity for this Court to interfere with the judgment of the trial Court.

7. On the basis of the above pleadings, it has to be seen whether the prosecution proved the case beyond a reasonable doubt.

8. According to the prosecution, the occurrence took place on 4.1.2006 at about 2.30 p.m., on the bridge and the deceased had given money to the appellant for the purpose of buying a cell phone for him and the appellant was evading and the deceased was pressing the same. The appellant asked him to come to his place and from there, the appellant took the deceased in his TVS 50 and went to the place of occurrence and at that place, he abused and attacked the deceased with a wooden log and also pushed him from the bridge. To prove this, P.W.2 was examined by the prosecution. P.W.2 in his evidence deposed that, on that date, at about 2.30 p.m., he was washing his car under the bridge and he saw the deceased and the appellant having a wordy altercation and the appellant attacked the deceased with a wooden log and pushed him and he came to know the address of the deceased from the visiting card found in the shirt pocket of the deceased and engaged an auto to drop the deceased at his residence. P.W.1 was examined to speak about the motive.

9. Therefore, we will have to see whether P.W.2 can be believed to sustain the conviction and sentence imposed on the appellant.

10. Admittedly, P.W.2 is a stranger to the deceased and even according to him, he got the address of the deceased from the visiting card found in the shirt pocket of the deceased. He further deposed that he engaged an auto to drop the deceased at his residence. The evidence of P.W. 1 is contrary to that. According to P.W. 1, the deceased was dropped at his residence by the auto driver and the auto driver informed him that the deceased was found lying in the place of occurrence and some one had attacked and he did not say that the auto driver informed that he was directed by a taxi driver to drop the deceased at the residence of the deceased. Therefore, the case of the prosecution that P.W.2 was an eye-witness and he came

to know the address of the deceased from the visiting card found in the shirt pocket of the deceased and he engaged the auto falls to the ground. Further, as rightly submitted by the learned counsel for the appellant, it was a mystery how the prosecution was able to identify P.W.2 after 45 days from the date of occurrence. It is not the case of the prosecution that P.W.2 gave information to the police about the occurrence and as per the evidence of P.W.11 and P.W.12, P.W.2 was examined on 21.2.2006, the date on which FIR was registered and in the FIR, the presence of P.W.2 was not spoken to, and how the prosecution was able to identify P.W.2 on the same day of registration of the case was a mystery. It is further surprising that when the prosecution was able to identify P.W.2 on the very same day of registration of crime, no attempt was made by the prosecution to identify the auto driver who admittedly dropped the deceased at his residence from the place of occurrence. P.W.2 deposed that he engaged an auto to drop the deceased at his house and P.W. 1 also admitted that the deceased was dropped by the auto driver. No explanation was given by the prosecution for not identifying the auto driver or examining P.W.2 regarding the identity of the auto driver.

11. Further, the presence of P.W.2 is also obviously doubtful. Admittedly, he was not examined during the inquest and according to the prosecution, P.W.2 was an eye-witness and therefore, he ought to have been examined during the inquest. Surprisingly, during the inquest it was stated that the deceased was taken by the people who were standing at the place of occurrence to his residence and that statement falsifies the case of P.W. 1 and P.W.2. Therefore, the fact that P.W.2 was not examined during the inquest and as per the inquest report people standing nearby the place of occurrence took the deceased to his house and the non-examination of the auto driver who brought the deceased would only lead to the conclusion that the prosecution has not come out with clean hands.

12. It is admitted by P.W.10 Doctor that the deceased has given a categorical statement that on the date of occurrence i.e. 4.1.2006 he was admitted in the Government Hospital, Vellore by his mother and P.W.7 Doctor noted in the Accident Register Ex. P.7 that the injured was attacked by unknown persons. Ex. P.7 is the document which was recorded at the earliest point of time and according to P.W.7 Doctor, the injured person gave information about the nature of attack. Therefore, on 4.1.2006, the deceased informed the Doctor that he was attacked by unknown persons. Thereafter, the deceased was taken to Government General Hospital at Chennai on 5.1.2006. He was given treatment in the Government General Hospital, Chennai, from 5.1.2006 to 14.2.2006. It was not the case of the prosecution that he was not able to give any statement during that period. On the other hand, P.W.10 deposed that the deceased was capable of giving any statement and no information was forthcoming for not giving any complaint till 21.2.2006 by the deceased and no explanation was given for not registering the case when it was stated by P.W.7 that the injured informed him that he was attacked by unknown persons. The FIR was lodged after 45 days. Though in the FIR, the name of the appellant was mentioned

as the assailant, having regard to the evidence of P.W.7 Doctor and delay in lodging the FIR, no importance can be given to the statement of the deceased given before the police on 21.2.2006.

13. Unfortunately, these aspects were not properly appreciated by the trial Court and the trial Court simply believed the evidence of P.W. 1 and P.W.2 without properly appreciating the evidence of P.W.7 and P.W.10 and the trial Court also did not consider the evidence of P.W.2 in a proper perspective when his presence was not spoken to by any one and he was examined on the date of registration of the crime. Therefore, in the light of the reasons stated above, I hold that the prosecution has failed in establishing the guilt of the accused beyond reasonable doubt that it was the accused who attacked the deceased. In the result, the criminal appeal is allowed and the impugned judgment of conviction and sentence imposed on the appellant is set aside and the appellant is acquitted of the charge levelled against him. The bail bond, if any, executed by him shall stand terminated and the fine amount, if any, paid by him shall be refunded to him.