Arumugam vs State Rep.By Inspector Of ... on 13 October, 2008

Equivalent citations: AIR 2009 SUPREME COURT 331, 2008 AIR SCW 7354, (2008) 2 CRILR(RAJ) 876, 2008 (3) ALLCRIR 3395, 2008 (4) CURCRIR 520, 2008 (13) SCALE 487, 2008 CRILR(SC&MP) 876, 2008 (15) SCC 590, (2009) 1 MAD LJ(CRI) 48, 2009 (3) SCC (CRI) 1130, 2008 CRILR(SC MAH GUJ) 876, (2008) 13 SCALE 487, (2009) 65 ALLCRIC 294, (2009) 1 CHANDCRIC 93

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Bench: Mukundakam Sharma, Arijit Pasayat

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICITON

CRIMINAL APPEAL NO.967 OF 2001

Arumugam ...Appellant

Versus

State Rep. by Inspector of Police,
Tamil Nadu ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of the learned Single Judge of the Madras High Court upholding the conviction of the appellants for the offence punishable under Section 302 of the Indian Penal Code, 1860 (in short `IPC') so far accused A1 is concerned, and the co-accused for the offence punishable under Section 302 read with Section 34 IPC. Learned District and Sessions Judge, Tirunvelveli, has held the appellant and the co-accused guilty and as aforenoted by judgment dated 20.10.1989 in Sessions Case No.140 of 1987. Another person Subbiah-A3 was charged for commission of offence punishable under Section 323 IPC. A3 did not prefer appeal before the High Court and A2 has also not filed any appeal before this Court.

2. Background facts in a nutshell are as follows:

> According to the prosecution appellant herein along with Shanmugavel A2 and Subbiah-A3 the father of A2 caused the death of one Vairamuthu (hereinafter referred to as `deceased') at 2.30 p.m. on 22.4.1986 at Villam village, Tenkasi Taluk. The first accused Arumugam and the third accused Subbiah are brothers. The deceased is none other than the brother of first and third accused. The accused, the deceased as well as PWs 1 and 2 - the brothers of A1 and A3 and the deceased were living as joint family in Palayampattu Street, Vallam village.

During the panchayat election in 1986, in Ward No.II, three persons contested i.e. A1, the deceased Vairamuthu and one Murthi (PW4). The first accused requested the deceased to withdraw his nomination. The deceased refused to do so. The first accused had withdrawn himself from contesting in the election. The deceased was elected as a member of the Ward No.II. After two weeks, there was an election for the President of the Panchayat Board. On 21.4.1986 at 9 p.m. the third accused Subbiah came to the house and questioned the deceased as to how he received money to exercise his right to vote in the President election. The deceased refuted the said charge and also beat A3 who also beat the deceased. PW 4 and others separated the deceased and A3. While returning, A3 shouted that by any means, he will kill the deceased.

On the fateful day i.e. on 22.4.1986, the deceased was returning from his mango grove at 2.30 p.m. At that time, A1 armed with spike (MO1), A2 armed with aruval (MO2) and A3 armed with stick (MO3), came to his house. A3 entered into the house and dragged the deceased by holding the shirt and challenged saying "yesterday, you beat me, now you beat me". There was exchange of hot words. Immediately, A1 stabbed the deceased on his right neck with the spike, which pierced through the neck of the deceased and came out on the left side as stated by PW1. The second accused cut the deceased on his leg with the aruval as stated by PW1. The second accused questioned the third accused as to why the deceased was not yet killed. So saying, the second accused cut the deceased twice on his head. The deceased swooned and fell down. When PW1 tried to intervene, the third accused beat him with the stick on his right index finger, left thigh and on the back. When A3 attempted to beat PW1 again, he avoided the same by bending and the blow fell on the head of A1 who fell down. Thereafter, A1 tried to pull out the spike MO1 from the neck of the deceased and the spike broke into two pieces. A2 and A3, along with the weapons, ran away. The spike was identified by PW1. The death was instantaneous. The occurrence was witnessed by PW1 and PW2, who are the brothers and PW3 the sister of the deceased as well as accused 1 and 3.

Pichai Kannu (PW1) and Ramakrishnan (PW2) went to Kutralam Police Station and gave the complaint. PW13, the Sub Inspector of Police, Kutralam Police Station recorded the statement of PW1 at 3.30 p.m., which is Ex.P1 as attested by PW2. He also prepared the first information report on the basis of which investigation was undertaken.

3. After completion of investigation charge sheet was filed. Since the accused persons pleaded innocence, trial was held. Primarily relying on the evidence of PWs 1 and 2 the trial Court found the accused guilty. As noted above, the accused persons pleaded innocence. Two appeals were preferred

before the High Court and the present appeal is related to Criminal appeal no.854 of 1989 while other appeal was numbered as Criminal appeal no.4 of 1992. Before the High Court stand was that evidence of PWs 1 and 2 should have been discarded as they are related to the deceased. In any event, it was submitted that Exception 4 to Section 300 IPC applies as the occurrence took place in the course of sudden quarrel and, therefore, Section 302 IPC is ruled out.

4. The High Court did not find any substance in the aforesaid plea and dismissed the appeal.

5. In support of the appeal, learned counsel for the appellant reiterated the stand taken before the High Court. Learned counsel for the respondent-State on the other hand supported the judgments of the trial Court and the High Court.

6. The plea relating to interested witness is a regular feature in almost every criminal trial.

7. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

8. In Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364) it has been laid down as under:-

> "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.
>
> However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

9. The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan (1974 (3) SCC 698) in which Vadivelu Thevar v. State of Madras (AIR 1957 SC 614) was also relied upon.

10. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not

independent witnesses. Speaking through Vivian Bose, J. it was observed:

> "We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - `Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

11. Again in Masalti and Ors. v. State of U.P. (AIR 1965 SC 202) this Court observed: (p. 209-210 para 14):

> "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

12. To the same effect is the decision in State of Punjab v. Jagir Singh (AIR 1973 SC 2407), Lehna v. State of Haryana (2002 (3) SCC 76) and Gangadhar Behera and Ors. v. State of Orissa (2002 (8) SCC 381). As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi and Ors. v. State of Bihar etc. (JT 2002 (4) SC 186).

13. The substantive plea relates to the applicability of Exception 4 of Section 300 IPC.

14. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

15. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of

self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A `sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the `fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression `undue advantage' as used in the provision means `unfair advantage'.

16. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In Kikar Singh v. State of Rajasthan (AIR 1993 SC 2426) it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that using the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

17. When the factual background is considered in the touchstone of the legal position set out above, the inevitable conclusion is that the appropriate conviction would be under Section 304 Part I IPC instead of Section 302 IPC. Custodial sentence of 10 years would meet the ends of justice. Appellant who is on bail pursuant to the order dated 21.1.2001 shall surrender to custody forthwith to serve remainder of sentence, if any.

18. The appeal is allowed to the aforesaid extent.

.....J. (DR. ARIJIT PASAYAT) .....J. (DR. MUKUNDAKAM SHARMA) New Delhi:

October 13, 2008