

SELVARAJ @ CHINNAPAIYAN

v.

STATE REPRESENTED BY INSPECTOR OF POLICE  
(Criminal Appeal No. 892 of 2009)

DECEMBER 09, 2014

[VIKRAMAJIT SEN AND PRAFULLA C. PANT, JJ.]

*Penal Code, 1860 – s. 302 – Prosecution case that appellant-father strangled the child and three days later the child died – Conviction of appellant u/s. 302 by courts below – On appeal, held: On facts, prosecution could not successfully prove homicidal death of the child and the charge of offence punishable u/s. 302 as against the appellant who is in jail for about eight years – Thus, the courts below erred in holding that the charge stood proved against the appellant – Order of conviction and sentence against the appellant set aside.*

**Allowing the appeal, the Court**

**HELD: 1.1. In the instant case, PW 2-mother of the deceased, who is the key witness of the case, though supported the prosecution story in her examination-in-chief, but turned hostile in the cross-examination. PW 3-mother-in-law of the appellant and PW 10-sister of the informant also turned hostile in her cross-in-examination. Even the homicidal death of the child is not clear, particularly, in view of the final opinion of the Medical Officer-PW-12 after receiving the Forensic report. In the autopsy report there is nothing on record suggesting strangulation or asphyxia. PW-5 and PW-6 (both witnesses of recovery memo) did not support the prosecution case even in their examination-in-chief. PW 4-nurse, who could said to be the only independent witness, too turned hostile to the prosecution. There was no evidence on record**

A showing that when the child was admitted in the hospital where she died, her medico legal was got done. It is not at all explained by the prosecution that PW-2, PW-3 and PW-10 who said to have witnessed the accused committing the crime, and the incident had taken place in the parental house of the informant, why not the accused was apprehended then and there. Prosecution tried to develop the story that the accused was strangulating the child with the gunny wire and was simultaneously inserting paddy seeds in the mouth of the infant. Both these modes simultaneously appear to be unnatural. [Para 12-14, 17-22] [235-D-F; 236-E-G; 237-B-E]

1.2. On consideration of all facts, it cannot be said that prosecution successfully proved charge of offence punishable under Section 302 IPC as against the appellant who is languishing in jail for about eight years. The trial court and the High Court erred in law in holding that the charge of offence punishable under Section 302 IPC stood proved against the appellant. Conviction and sentence recorded against the appellant under Section 302 IPC is set aside. [Para 23-25] [237-F-H; 238-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 892 of 2009.

F From the Judgment & Order dated 08.01.2008 of the High Court of Judicature at Madras in Crl. A.No. 337 of 2007.

Jayanth Muthraj, C.K. Sasi for the Appellant.

G M. Yogesh Kanna, Sarth Kumaran, Jananai for the Respondent.

The Judgment of the Court was delivered by

H **PRAFULLA C. PANT, J.** 1. This appeal is directed against judgment and order dated 8.1.2008 passed by the High Court

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BY INSPECTOR OF POLICE [PRAFULLA C. PANT, J.]

of Judicature at Madras in Criminal Appeal No. 337 of 2007 whereby said Court has dismissed the appeal of accused-appellant Selvaraj @ Chinnapaiyan, who was convicted by the trial court under Section 302 of Indian Penal Code, 1860 (IPC), and sentenced to undergo imprisonment for life and directed to pay fine of Rs.1,000/-, in default of payment of which he was directed to undergo rigorous imprisonment for a further period of three months.

2. Heard learned counsel for the parties and perused the papers on record.

3. Prosecution story, in brief, is that accused-appellant Selvaraj @ Chinnapaiyan is husband of PW-2 Selvi. He belongs to Vellala Gounder Community, and PW-2 Selvi belongs to Vanniayar Community. The two developed intimacy. This was not liked by Sundarammal (mother of Selvaraj). As such the accused-appellant Selvaraj and PW-2 Selvi left the village, and started living as husband and wife in Bangalore. From their relationship PW-2 Selvi conceived a baby. Sundarammal, when came to know of it, wanted to get the baby aborted but Selvi declined to do so. On this Sundarammal approached PW-4 Chandra, a nurse, and sought her help to get the baby aborted. Selvaraj also joined his mother in asking Selvi to get the pregnancy terminated. This made Selvi apprehensive of threat to her life and that of her child in the womb. She went to her parents house and stayed there. After sometime, a Panchayat of the villagers was held and marriage was arranged between Selvaraj and Selvi whereafter the accused-appellant (Selvaraj) again left for Bangalore. While he was in Bangalore, Selvi delivered a female child on 27.1.2003 in her parental village about which the appellant and his mother were informed. On 28.2.2003, the appellant Selvaraj came to his village from Bangalore. On 3.3.2003 at about 8.00 p.m., according to the prosecution, the appellant entered inside the house of PW-2 Selvi, raised the volume of radio and closed

A the room. From there he went to thatched shed where the young  
 baby was sleeping. On hearing the cries of the baby, PW-2  
 Selvi, PW-3 Rajammal (mother of Selvi) and PW-10  
 Chinapappa (sister of Selvi), who were standing outside the  
 house, rushed to the thatched shed and saw Selvaraj  
 B administering paddy seeds in the mouth of the child, and  
 strangulating him with a gunny wire. PW-2 Selvi shouted and  
 attempted to save the child. All the three witnesses, i.e., Selvi  
 (PW-2), Rajammal (PW-3) and Chinapappa (PW-10) took the  
 child to PW-4 Chandra (a nurse). She (PW-4) advised above  
 C three eye witnesses to take the child to a doctor at  
 Marandehalli, who, in turn, directed to take the child to  
 Government hospital, Dharmapuri. The baby was admitted in  
 the Government Hospital, Dharmapuri on 6.3.2003 at 10.00  
 a.m., but died at 5.25 p.m. on the same day.

D 4. A First Information Report (Ext. P-15) was lodged by  
 PW-2 Selvi at 11.00 p.m. on the very day (6.3.2003) at Police  
 Station Marandehalli, which was registered as Crime No. 110  
 of 2003 relating to offence punishable under Section 302 IPC  
 E against the two accused, namely, Selvaraj @ Chinnapaiyan and  
 his mother Sundarammal. Crime was investigated by PW-13  
 Inspector Thangavel, who interrogated the witnesses and took  
 the body of the female child in his possession, sealed it and  
 sent for autopsy. PW-1 Dr. Balasubramaniam conducted post  
 mortem examination and prepared the autopsy report (Ext. P-  
 F 4). He observed a linear blackish contusion of size 15mm x  
 1mm extending from left to right side of neck, hyoid bone found  
 intact, ribs were intact, no foreign body found in the lungs, liver  
 congested, stomach empty, bladder empty. PW-1 Dr.  
 G Balasubramaniam preserved a piece of skin from neck for  
 forensic analysis and also took pieces of intestine, liver and  
 kidney and preserved the same for forensic analysis. He  
 recorded opinion on 7.3.2003 (the day on which autopsy was  
 done) that "The deceased would appear to have died about 12-  
 H 24 hrs prior to autopsy. Opinion about the cause of death

reserved pending chemical analysis.” The Forensic Science Laboratory, Vellore reported, after examination of pieces of intestine, liver, kidney and skin that there was no poison found in any of the above articles. After receiving the report of Forensic Science Laboratory, PW-1 Dr. Balasubramaniam gave final opinion on 16.11.2003 endorsing “NO DEFINITE OPINION COULD BE GIVEN FOR THE DEATH. The deceased child might have died due to SUDDEN DEATH SYNDROME, a medical entity.” On completion of investigation, the Investigating Officer submitted charge-sheet against two accused, namely, the appellant Selvaraj @ Chinnapaiyan in respect of offence punishable under Section 302 IPC, and his mother Sundarammal for her trial regarding offence punishable under Section 302 read with Section 109 IPC.

5. After giving necessary copies, as required under Section 207 of Code of Criminal Procedure, and hearing the parties, learned Additional Sessions Judge, Fast Track Court, Dharmapuri, framed charge in respect of offence punishable under Section 302 IPC against the appellant Selvaraj, and the charge under Section 302 read with Section 109 IPC against Sundarammal, both of whom pleaded not guilty and claimed to be tried.

6. Prosecution got examined PW-1 Dr. Balasubramaniam (who conducted post mortem examination), PW-2 Selvi (informant and mother of the deceased), PW-3 Rajammal (mother of the informant), PW-4 Chandra (nurse), PW-5 J. Kuppuraj (witness of recovery memo – gunny wire), PW-6 Murugavel (another witness of the recovery memo), PW-7 Dhotta Pappan, PW-8 Barchulla (Head Constable who took the body for autopsy), PW-9 Thathaki (Deputy Nazir of Munsiff Court, who sent viscera for medical analysis under orders of the Magistrate), PW-10 Chinnapappa (sister of the informant), PW-11 Sub-Inspector Paulraj (who registered Crime No. 110 of 2003 at the Police Station), PW-12 Dr. Vallinayagam

A (Director of the Institute of Forensic Medicine), and PW-13 Inspector Thangavel (who investigated the crime).

7. The oral and documentary evidence appears to have been put to both the accused under Section 313 Cr PC, in reply to which they alleged that the incriminating part of the evidence is false. However, the trial court, after hearing the parties, found both the accused, Selvaraj and his mother Sundarammal, guilty of the charge framed against them and sentenced each of the accused to imprisonment for life and directed to pay fine of Rs.1,000/-, in default of payment of which the defaulter convict was required to undergo further imprisonment for three months.

8. Aggrieved by said judgment and order dated 5.3.2007, passed by the Additional Sessions Judge, Dharmapuri in Sessions Case No. 193 of 2006, both the convicts preferred appeal before the High Court of Judicature at Madras. The High Court, after hearing the parties, found that charge of offence punishable under Section 302 read with Section 109 IPC against co-accused Sundarammal is not proved and, as such, conviction and sentence recorded against her was set aside. However, the High Court found no merit in the appeal of the accused Selvaraj, and dismissed the same. Hence this appeal before us.

9. Before further discussion we think it just and proper to mention the opinion of PW-1 Dr. Balasubramaniam recorded by him in the post mortem report (Ext. P-4). On 7.3.2003 he gave his opinion after autopsy as under: -

"The deceased would appear to have died about 12-24 hrs prior to autopsy. Opinion about the cause of death reserved pending chemical analysis."

On receipt of the report from the Forensic Science Laboratory regarding the preserved items of viscera and the skin, PW-1 Dr. Balasubramaniam gave final opinion on 16.11.2003 which reads as under: -

"NO DEFINITE OPINION COULD BE GIVEN FOR THE DEATH. The deceased child might have died due to SUDDEN DEATH SYNDROME, a medical entity."

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10. As such, on going through the medical evidence and the statement of PW-12 Dr. Vallinayagamai Director, Institute of Forensic Medicine, we are of the view that the above report is not suggestive of homicidal death of the child, though the possibility of such death cannot be ruled out.

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11. Now, we have to see from the oral testimony of the witnesses whether or not it establishes commission of murder by the appellant Selvaraj of his 39 days old female child.

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12. PW-2 Selvi (mother of the deceased), who is the key witness of the case, though supports prosecution story in her examination-in-chief, but in the cross-examination she has said, "The child died due to illness". It is further stated by her that it is correct to state that her husband did not come to her house till the death of her child. As such this key witness turned hostile in the cross-examination.

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13. Similarly, PW-3 Rajammal (mother-in-law of the appellant) has also turned hostile in her cross-examination, and stated that it is correct to state that the child died because of sickness. She also further told that it is correct to state that her son-in-law did not come even after death of the child.

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14. Also PW-10 Chinapappa (sister of the informant) has made similar statement in her cross-examination corroborating that the child died because of illness. As such, all the three alleged eye witnesses took somersault in the cross-examination, and their testimony requires to be scrutinized with great caution.

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15. It is argued on behalf of the State of Tamil Nadu that since the eye witnesses have been won over by the accused, as such, their statements in cross-examination cannot be

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A believed. On the other hand, on behalf of the appellant it is contended that once the key witnesses have turned hostile, their evidence cannot be relied upon to record the conviction.

B 16. It is settled principle of law that benefit of reasonable doubt is required to be given to the accused only if the reasonable doubt emerges out from the evidence on record. Merely for the reason that the witnesses have turned hostile in their cross-examination, the testimony in examination-in-chief cannot be outright discarded provided the same (statement in examination-in-chief supporting prosecution) is corroborated from the other evidence on record. In other words, if the court finds from the two different statements made by the same accused, only one of the two is believable, and what has been stated in the cross-examination is false, even if the witnesses have turned hostile, the conviction can be recorded believing the testimony given by such witnesses in the examination-in-chief. However, such evidence is required to be examined with great caution.

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E 17. In the present case, as discussed above, even the homicidal death of the child is not clear, particularly, in view of the final opinion of the Medical Officer (PW-12) after receiving the Forensic report. Even in the autopsy report there is nothing on record suggesting strangulation or asphyxia.

F 18. Apart from the above, it is relevant to mention here that PW-5 J. Kuppuraj and PW-6 Murugavel (both witnesses of recovery memo) have not supported the prosecution case even in their examination-in-chief.

G 19. Nay, PW-4 Chandra (nurse), who could be said to be only independent witness of this case, too turned hostile to prosecution. It is pertinent to mention here that though PW-2, PW-3 and PW-10 turned hostile after ten days of their examination-in-chief, i.e., for which their cross-examination was deferred, this witness (PW-4) has turned hostile to prosecution

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on the very day (22.1.2007), i.e., date of examination-in-chief of other eye witnesses. A

20. Not only this, there is no evidence on record showing that when the child was admitted in the hospital in Dharmapuri where she died, her medico legal was got done. B

21. Lastly, it is not at all explained by the prosecution that PW-2, PW-3 and PW-10 who said to have witnessed the accused (Selvaraj) committing the crime, and the incident had taken place in the parental house of the informant, why not the accused was apprehended then and there. Not a single witness has stated that the accused succeeded in running away from the place of incident. C

22. We have also considered the prosecution story from the angle of probability. Prosecution has tried to develop the story that the accused (Selvaraj) was strangulating the child with the gunny wire and was simultaneously inserting paddy seeds in the mouth of the infant. In our opinion, both these modes simultaneously appear to be unnatural, particularly, in view of the fact that the incident had occurred on 3.3.2003 and the child died on 6.3.2003, i.e., after a period of three days. PW-4 Chandra (nurse) to whom child was taken after the incident has stated that there was nothing in the mouth of the child when she saw her. She further stated that the child was looking good. D E

23. Consideration of all the above facts takes us to the conclusion that in the present case it cannot be said that prosecution has successfully proved charge of offence punishable under Section 302 IPC as against the appellant who is languishing in jail for about eight years. F G

24. For the reasons, as discussed above, we are of the view that the trial court and the High Court have erred in law in holding that the charge of offence punishable under Section 302 IPC stood proved against the appellant Selvaraj. H

A 25. Therefore, the appeal is allowed. Conviction and sentence recorded against the appellant Selvaraj under Section 302 IPC is hereby set aside. He shall be set at liberty if not required in connection with any other crime.

B Nidhi Jain

Appeal allowed.