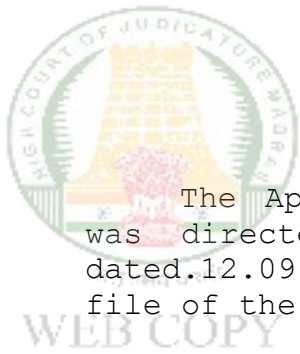


**Bail Slip**

The Appellant/Accused namely Ariharabalan @ Balan (A3) s/o.Mayandi was directed to be released on bail as per order of this court dated.12.09.2013 in MP(MD).2 of 2013 in CRL A(MD).No.143 of 2013 in the file of the Madurai Bench of Madras High Court, Madurai.

The Appellant/Accused namely Murugan, S/o.Azhagumuthu(A4) was directed to be released on bail as per order of this court dated.12.09.2013 in MP(MD).1 of 2013 in CRL A(MD).No.143 of 2013 in the file of the Madurai Bench of Madras High Court, Madurai.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 26.02.2015

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM

and

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

CRIMINAL APPEAL (MD) No.143 of 2013

- 1.Muthulingam
- 2.Suyambulingam
- 3.Ariharabalan @ Balan
- 4.Murugan

.. Appellant/Accused Nos.1 to 4

Vs.

State Rep. By,
The Inspector of Police,
Eral Police Station,
Thoothukudi District.
(Crime No.167 of 2010)

.. Respondent/Complainant

Prayer:- Criminal Appeal filed under Section 374 of the Code of Criminal Procedure, 1973, to call for records from the lower Court and to duly set aside the Judgment datd.15/04/2013 passed by the Principal District and Sessions Court, Thoothukudi in Sessions Case No.5 of 2011 and to pass such further or other orders.

For A1 & A2 : Mr.S.Chandrasekaran
Legal Aid Counsel

For A3 & A4 : Mr.V.Kathirvelu,
Senior Counsel
for Mr.K.Prabhu

For Respondent : Mr.K.S.Durai Pandian
Additional Public Prosecutor

JUDGMENT

(Judgment of the Court was made by **A.SELVAM, J**)

The convictions and sentences, dated 15th day of April, 2013 passed in Sessions Case No.5 of 2011 by the Principal District and Sessions Court, Thoothukudi are being challenged in the present Criminal Appeal.

2. The case of the prosecution is that on 04.07.2010 at about 03.00 p.m in Agaram Village on the Western side of one Narayanasamy Temple, the first accused by name Muthulingam has hurled invectives against the deceased Gnanasundar. The second accused has also done the same. On the same day and at the same time, accused 1 to 4 have attacked the deceased near a manure pit which situates near a newly built house of one Duraiappa Nadar and due to their overtacts the deceased has passed away. On the same day and at the same time, the second accused with intention to murder the witness by name Suyambulingam has attacked on his person by using an Aruval. After occurrence, the said Suyambulingam has been admitted in Government Hospital, Tuticorin where P.W.7, Sub-Inspector of Police has recorded a statement from him and the same has been registered in Crime No.167 of 2010. The statement alleged to have been given by the said Suyambulingam has been marked as Ex.P.1.

3. On receipt of Ex.P.1, P.W.12, Mahimai Veeran, Inspector of Police has taken up investigation, examined connected witnesses and made arrangements to conduct autopsy on the body of the deceased. The Doctor by name Manoharan viz., P.W.9 has conducted autopsy on the body of the deceased and he found the following external and internal injuries:-

"1) An oblique cut wound of size 10 cms X 1 cm X cranial cavity deep extending from right temporal region to occipital region of the scalp.

2) An oblique cut wound of size 20 cms X 2 cms X cranial cavity deep extending from right cheek along the right ear to the mid occipital region of the scalp. It lies 2 cms below the injury No.1.

3) An annular cut injury of size 10 cms X 1 cm X cranial cavity deep seen in the right temporo-occipital regions which intersects the injury No.2.

4) An oblique cut wound of size 5 cms X 1 cm X bone deep seen in the right occipital region which lies 2 cms below injury No.2.

5) A horizontal cut wound of size 15 cms X 1 cm X cranial cavity deep seen extending from right angle of lower jaw to mid occipital region.

6) An oblique cut wound of 4 cms X 1 cm X bone deep seen 2 cms behind the left ear.

7) An oblique cut wound of 2 cms X 1 cm X muscle deep seen in the back of right shoulder.



8) An oblique cut wound of 2 cms X 1 cm X muscle deep seen in the outer aspect of right shoulder.

9) An oblique cut wound of 8 cms X 3 cms X bone deep seen in front of right forearm. It lies 4 cms above the wrist. The underlying both bones found cut.

10) A horizontal cut would of size 7 cms X 2 cms X bone deep seen in the left cheek.

11) An avulsed cut injury of size 17 cms X 4 cms X muscle deep seen in the inner aspect of left elbow.

12) An oblique cut wound of size 10 cms X 4 cms X muscle deep seen in the front of left forearm.

13) An oblique cut wound of size 11 cms X 5 cms X bone deep seen in the lateral aspect of left elbow. The underlying forearm bones found cut and joint dislocated.

14) An incised wound of length 6 cms in the left lower arm.

On dissection of scalp, skull and Dura:-

Dura matter in the right temporal and occipital regions found torn. Multiple cut wounds seen in the cerebellum and right cerebral hemisphere."

The Postmortem Report has been marked as Ex.P.18. On completing investigation, P.W.12 has laid a final report on the file of the Judicial Magistrate's Court, Srivaikundam and the same has been taken on file in P.R.C.No.32 of 2010.

4. The Judicial Magistrate, Srivaikundam after knowing the facts that offences alleged to have been committed by all the accused are triable by Sessions Court, has committed the case to the Court of Sessions, Tuticorin Division and the same has been taken on file in Sessions Case No.5 of 2011.

5. The trial Court, after hearing both sides and upon perusing the relevant records, has framed first charge against accused 1 and 2 under Section 294(b) of the Indian Penal Code, second charge against all the accused under Section 302 read with 34 of the Indian Penal Code and third charge against the second accused under Section 307 of the Indian Penal Code and the same have been read over and explained to them. The accused have denied the charges and claimed to be tried.

6. On the side of the prosecution, P.Ws.1 to 12 have been examined and Exs.P.1 to P.28 and M.Os.1 to 14 have been been marked.

<https://hcservices.ecourts.gov.in/hcservices/>

7. When the accused have been questioned under Section 313 of the Code of Criminal Procedure, 1973 as respects the incriminating materials

available in evidence against them, they denied their complicity in the crime. However no oral and documentary evidence have been adduced on the side of the accused.

8. The trial Court, after evaluating the available evidence on record, has found the first accused guilty under Sections 294(b) and 302 read with 34 of the Indian Penal Code and sentenced him as detailed in the following table:

<i>Conviction</i>	<i>Sentence</i>
294(b) I.P.C.	To pay a fine of Rs.200/- in default to undergo two weeks simple imprisonment.
302 read with 34 I.P.C.	To undergo imprisonment for life and to pay a fine of Rs.1,000/- in default to undergo three months rigorous imprisonment.

9. The trial Court has found the second accused guilty under Sections 294(b), 302 read with 34 and 307 altered into Section 324 of the Indian Penal Code and sentenced him as detailed in the following table:

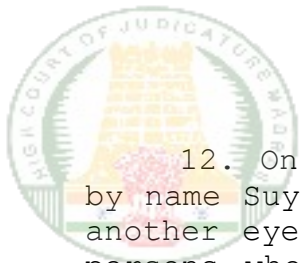
<i>Conviction</i>	<i>Sentence</i>
294(b) I.P.C.	To pay a fine of Rs.200/- in default to undergo two weeks simple imprisonment.
302 read with 34 I.P.C.	To undergo imprisonment for life and to pay a fine of Rs.1,000/- in default to undergo three months rigorous imprisonment.
307 @ 324 I.P.C.	To pay a fine of Rs.300/- in default to undergo three months rigorous imprisonment.

10. The trial Court has also found accused 3 and 4 guilty under Sections 302 read with 34 of the Indian Penal Code and sentenced them as detailed in the following table:

<i>Conviction</i>	<i>Sentence</i>
302 read with 34 I.P.C.	To undergo imprisonment for life and to pay a fine of Rs.1,000/- in default to undergo three months rigorous imprisonment upon each of them.

Against the convictions and sentences passed by the trial Court, the present Criminal Appeal has been preferred at the instance of the accused as appellants.

11. The sum and substance of the case of the prosecution is that on 04.07.2010 at about 03.00 p.m in Agaram Village on the Western side of one Narayanasamy Temple, the accused 1 and 2 have hurled invectives against the deceased Gnanasundar and in pursuance of the said incident, all the accused with common intention have attacked the deceased repeatedly by using deadly weapons and thereby caused fatal injuries and due to their overtacts, he passed away and during the course of occurrence, the second accused has tried to murder the witness by name Suyambulingam by using an Aruval.



12. On the side of the prosecution, the alleged injured eye witness by name Suyambulingam, defacto complainant has been examined as P.W.1 and another eye witness by name Balakrishnan has been examined as P.W.2. The persons who have seen the accused 3 and 4 have been examined as P.Ws.3 and 4.

WEB COPY

13. The trial Court, after considering the allegations made in Ex.P.1, complaint coupled with testimonies of the witnesses referred to supra has invited convictions and sentences against all the accused as noted above.

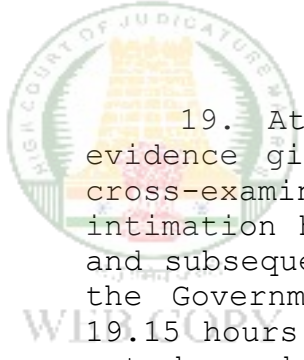
14. The learned Senior Counsel appearing for the appellants/accused 3 and 4 has contended that in Ex.P.1, complaint no mention has been made with regard to accused 3 and 4 and no identification parade has been conducted for the purpose of proving their presence in the place of occurrence. The defacto complainant viz., P.W.1 has given clear evidence that the deceased has had bad antecedents and motive between the deceased and accused has not at all been established. During investigation, sniffer dog has been summoned and with regard to that aspect, the prosecution has wilfully suppressed everything and even on the side of the prosecution place of occurrence has not been properly identified and further Ex.P.1 is nothing but anti-dated and the trial Court, without considering the lot of infirmities found on the side of the prosecution, has erroneously invited convictions and sentences against the accused as mentioned in the Judgment and therefore, the same are liable to be set aside.

15. The learned counsel appearing for the appellants/accused 1 and 2 has virtually supported the contentions putforth on the side of the appellants/accused 3 and 4 except the alleged fact that no motive has been in existence in between accused 1 and 2 and deceased.

16. In order to sustain the convictions and sentences passed against the appellants/accused by the trial Court, the learned Additional Public Prosecutor has contended that in the instant case, the defacto complainant is nothing but an injured eye witness and he clearly deposed to the effect that the occurrence has taken place as putforth on the side of the prosecution. Apart from the evidence given P.W.1, another independent witness by name Balakrishnan has been examined as P.W.2. Further, the persons, namely Mookkandi and Jegan have been examined as P.Ws.3 and 4 for the purpose of adducing evidence with regard to presence of accused 3 and 4 and the trial Court, after considering the evidence given by P.Ws.1 to 4 coupled with medical evidence given by P.W.9 has clearly invited convictions and sentences against all the accused as mentioned in the Judgment and therefore, the convictions and sentences passed by the trial Court do not warrant interference.

17. The specific case putforth on the side of the prosecution is that the occurrence has taken place on 04.07.2010 in Agaram Village.

18. The prosecution has set the law in motion only on the basis of Ex.P.1, complaint alleged to have been given by P.W.1 to P.W.7, Sub-Inspector of Police. In Ex.P.1 it has been clearly mentioned that the same has been registered on 04.07.2010 at about 18.00 hours.



19. At this juncture, it would be more useful to look into the evidence given by P.W.7, Sub-Inspector of Police. During the course of cross-examination, his specific evidence is that after receipt of intimation he reached Government Hospital, Tuticorin at about 19.15 hours and subsequently recorded a statement from P.W.1. Since P.W.7 has reached the Government Hospital, Tuticorin on the date of occurrence at about 19.15 hours and recorded statements subsequently, definitely Ex.P.1 would not have been registered on the same day at about 18.00 hours. The prosecution has not given any explanation with regard to vital contradiction found in Ex.P.1 as well in evidence of P.W.7.

20. The main contention putforth on the side of the appellants/accused 3 and 4 is that their names have not been found place in Ex.P.1, complaint. Simply because names of some of the accused are not found place in the First Information Report, the same would not pave the way for rejecting the case of the prosecution, if sufficient evidence is available so as to rope them in crime. But in the instant case, for the purpose of establishing the fact that accused 3 and 4 have been seen in the Village one Mookkandi has been examined as P.W.3 and his specific evidence is that on the date of occurrence at about 04.00 p.m Police have come to the place of occurrence. Therefore, it goes without saying that the evidence given by P.W.3 as well as evidence given by P.W.4 cannot be a basis for coming to a conclusion that all the accused are present in the place of occurrence.

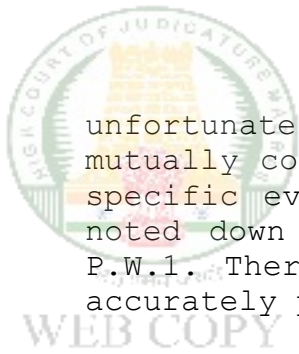
21. It is seen from the records that after occurrence, the Investigating Officer has made all arrangements to deploy sniffer so as to find out the real culprits and accordingly, one Madasamy, constable has been deputed with a sniffer and he has come down to the place of occurrence, but for the reasons best known to the prosecution, he has not been examined as one of the prosecution witnesses. Therefore, it is quite clear that the prosecution has schemingly suppressed the role of sniffer.

22. On the side of the appellants/accused 3 and 4, the decision in Rathinam alias Rathinam Vs. State of Tamil Nadu and another reported in 2011 (3) SCC (Cri) 111 relied upon, wherein the Honourable Apex Court has clearly held that the fact of calling a dog squad is suppressed, adverse inference can be drawn.

23. In the instant case, as pointed out earlier, one Madasamy, Constable has been deputed along with sniffer and to that effect the Investigating Officer has given evidence, but the prosecution has failed to examine the said Madasamy and further, the prosecution has failed to explain as to why service of sniffer has been utilised in the instant case, if really, the Sub-Inspector of Police knows all the accused at the time of registering the First Information Report. Since the said aspect has not been properly explained on the side of the prosecution, it is needless to say that the prosecution has not come forward with real facts.

24. The next contention putforth on the side of the appellants/accused 3 and 4 is that the prosecution has not given proper evidence with regard to place of occurrence.

25. On the side of the prosecution, a rough sketch viz., Ex.P.26 has been filed wherein two places of occurrence have been mentioned, but



unfortunately the alleged eye witnesses, namely, P.Ws.1 and 2 have given mutually contra evidence with regard to place of occurrence. Further, the specific evidence given by the Investigating Officer is that he has not noted down the building of Nadar Association which has been spoken by P.W.1. Therefore, it is quite clear that the prosecution has not at all accurately proved the place of occurrence.

26. It is seen from the evidence given by P.W.1 that the deceased has had many bad antecedents and further P.W.1 has stated in his evidence that he does not know the motive that existed in between the deceased and accused. Therefore, it is quite clear that in the instant case motive for occurrence has not at all been established on the side of the prosecution. Even assuming without conceding that if eye witnesses are available, motive has become insignificant, the Court has to further look into as to whether on the basis of evidence given by P.Ws.1 and 2 the prosecution has established the guilt of the accused punishable under the Sections mentioned in the charges. It has already been pointed out that Ex.P.1 is a concocted document by way of putting wrong time. Since Ex.P.1 itself is a concocted document, the Court can very well come to a conclusion that the genesis of the case of the prosecution itself is erroneous. Further, it has already been pointed out that the prosecution has wilfully suppressed the service of sniffer that has been used in the present case and further, the prosecution has failed to explain as to why such kind of service has been deployed. Therefore, viewing from any angle, it is needless to say that the entire case of the prosecution bristles with full of infirmities and the same have not at all been explained on the side of the prosecution.

27. The trial Court, without considering vital infirmities found on the side of the prosecution with regard to genesis of its case and also with regard to concoction of Ex.P.1, has erroneously invited convictions and sentences against the appellants/accused and in view of the discussion made earlier, this Court has found some force in the contentions put forth on the side of the appellants/accused and the present Criminal Appeal is liable to be allowed.

28. In fine, this Criminal Appeal is allowed and the convictions and sentences passed against the appellants/accused in Sessions Case No.5 of 2011 by the Principal District and Sessions Court, Thoothukudi are set aside and the appellants/accused are acquitted. Fine amounts if any paid by them are ordered to be refunded forthwith.

Sd/-

Assistant Registrar

\\True copy\\

Sub Assistant Registrar

To

1. THE PRINCIPAL DISTRICT AND SESSIONS JUDGE, THOOTHUKUDI

2. THE JUDICIAL MAGISTRATE, SRIVAIGUNDAM



3. THE DIRECTOR GENERAL OF POLICE CHENNAI

4. THE DISTRICT COLLECTOR THOOTHUKUDI DISTRICT

5. THE SUPERINTENDENT OF POLICE THOOTHUKUDI

6. INSPECTOR OF POLICE ERAL POLICE STATION, THOOTHUKUDI DISTRICT.

7. THE SUPERINTENDENT CENTRAL PRISON, PALAYAMKOTTAI
(WITH COPIES TO BE SERVED ON THE ACCUSED)

8. THE ADDITIONAL PUBLIC PROSECUTOR, MADURAI BENCH OF MADRAS HIGH
COURT, MADURAI.

+2 CC TO M/S.S.CHANDRASEKARAN, ADVOCATE SR.NO.9073

+1 CC TO M/S.K.PRABHU, ADVOCATE S.NO.9143

Judgment made in
Crl.A(MD)No.143 of 2013
26.02.2015

PS

NA/27/02/2015/P8/13C