

Bail Slip

The Appellant in CrI.A.No.298/2015 viz., R. Murugan, S/o Raja Reddiar aged 48 years was granted bail as per order of this Court dated 24.11.2015 made in MP.1/2015 in CrI.A.No.298/2015

THE HIGH COURT OF JUDICATURE AT MADRAS

Judgement Reserved on : 02..08..2016

Judgement Pronounced on: 11..08..2016

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE MR. JUSTICE V.BHARATHIDASAN

Criminal Appeal No.298 of 2015

R.Murugan ... Appellant / Sole Accused

-Versus-

State Rep. by
The Inspector of Police,
CBI/SCB, Chennai.
RC 5/S/10/CBI/SCB/Che
[Crime No.257 of 2009 on the file of
Kanakamma Chatram Police Station] ... Respondent / Complainant

Criminal Appeal filed under Section 374 of Cr.P.C. challenging the conviction and sentence imposed on the appellant by the learned I Additional Sessions Judge, Tiruvallur, in S.C.No.184 of 2011 dated 29.04.2015.

For Appellant : Mr.N.R.Elango, Senior Counsel
for Mr.R.Vivekanandan

For Respondent : Mr.K.Srinivasan, Special
Public Prosecutor for CBI
Cases Assisted by

Mr.E.Raja, Addl. Public
Prosecutor and

Mr.M.Maharaja, Spl.
Government Pleader for State

JUDGEMENT

The appellant, the sole Accused in S.C.No.184 of 2011 on the file of the learned I Additional Sessions Judge, Tiruvallur, who stands convicted for offence under Sections 302 and 307 of IPC and under Section 27 of The Arms Act, 1959 and sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- in default to suffer simple imprisonment for a further period of six months for offence under Section 302 of IPC; and to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5,000/- in default to suffer simple imprisonment for a further period of six months for offence under Section 307 of IPC and to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5,000/- in default to suffer simple imprisonment for a further period of six months for offence under Section 27 of The Arms Act, 1959, has come up with this criminal appeal challenging the above said conviction and sentences.

2.0. The case of the prosecution in brief is as follows:- The accused is a resident of Door No.2/695, Sholinghur Road, R.K.Pet Village, Pallipattu Taluk, Tiruvallur District. He was working as a Head Constable at Mappedu Police Station in Tiruvallur District. P.W.3 was the Sub Inspector of Police of the said Police Station. On 08.07.2009, P.W.3 received a message from the Office of the Deputy Superintendent of Police to depute a police constable from the said police station for Escort Duty to escort the accused from the Central Prison, Puzhal, Chennai to Court and from Court to Central Prison. P.W.3, accordingly, deputed the accused for the said duty and issued a transit passport [Ex.P.1] to the accused. The accused was to escort the under-trial prisoners on 09.07.2009. The accused, accordingly, reported to P.W.4, the then Head Constable attached to Armory, Armed Reserve, Tiruvallur, on 09.07.2009. After making necessary entries in the register, P.W.4, handed over the accused, a .303 Rifle [Gun] with butt AR56/TLR [Body No.31505] and 10 Nos. of cartridges. P.W.4 also handed over 778 model handcuff (1 No.), 109 model handcuff (1 No.) and 532 model handcuff (2 Nos.). After making necessary entries in the register (Ex.P6), the accused left the Office of P.W.4 with the above arms and ammunitions and handcuffs. Accordingly, the accused went to Central Prison, Puzhal, Chennai along with the other police constables. P.W.5, the Superintendent of Central Prison, after making necessary entries in the relevant registers, handed over a total number of six under-trial prisoners to the accused and the other police constables for being escorted to the court of Judicial Magistrate at Tiruttani and to bring them back to the prison. The under-trial prisoners were (1) Appu @ Yuvaraj (P.W.18), (2) Semon (P.W.34), (3) Dhanasekaran (the deceased), (4) Chinna

Kesavan, (5) Murugan @ Mettur Murugan and (6) Ramalingam @ Kareem. These under-trial prisoners were taken out of the prison by escort police party, including the accused at 10.51 a.m. on 09.07.2009.

2.1. From the prison, the under-trial prisoners were taken in the police van bearing Regn. No.TN 20 G 0272. For the purposes of safety, the escort police handcuffed the under-trial prisoners in pairs. The under-trial prisoners (1) Dhanasekaran and (2) Semon were handcuffed together by means of a single handcuff. The right hand of the deceased was handcuffed with the left hand of P.W.34. Similarly, the other accused were also handcuffed by making them as pairs. The deceased was sitting in the last row in the van. Just in front of him, in the next forward seat the deceased and P.W.34 were sitting. P.W.34 was sitting by the side of the widow. The other under-trial prisoners were sitting in the other seats. The van took off its journey around 10.30 a.m. from Central Prison Puzha, Chennai, towards Tiruttani. Around 12.30 p.m., the van was passing through Pattaraithangal Village.

2.2. It is alleged that at that time the accused, who was sitting just behind the deceased, shot at the deceased once with the rifle in his possession from a close range. The bullet pierced through the neck of the deceased and exited and it came out and broke the window glass pane of the police van. It went off. In the next round of shooting P.W.34 sustained injury on the handcuffed hand. The other escort constables and the other under-trial prisoners, on hearing the loud noise caused by gun shot were shocked. The van was immediately stopped by the driver. The deceased had fallen inside the van in a pool of blood.

2.3. P.W.13, the yet another escort police traveled in the very same van snatched the .303 rifle from the hands of the accused. The accused cried calling as Amma! Amma!! [Mother! Mother!!]. Then, he informed Tiruttani Police Camp Office about the above incident. The driver of the van (P.W.22), informed the Armed Reserve about the above incident. From Armed Reserve, his superior instructed him to move the vehicle to Kanakammachatram Police Station. Accordingly, P.W.24 drove the van from the place of occurrence with the dead body of the deceased and with P.W.34, the injured and other inmates of the van. He parked the vehicle just behind Kanakammachatram Police Station. Then, on going over to the police station, P.W.1 presented a written complaint [Ex.P.27] to the Sub Inspector of Police at 01.30 p.m. on the same day.

2.4. On receipt of the complaint [Ex.P.27] from P.W.1,

P.W.26, the then Sub Inspector of Police, Kanakammachatram Police Station registered a case in Crime No.257 of 2009 under Sections 302 and 307 of IPC. Ex.P.41 is the FIR. Then, he handed over the case diary to the Inspector of Police for investigation.

2.5. P.W.33, the then Inspector of Police, Kanakammachatram Police Station, taking up the case for investigation, inspected the police van in which the occurrence had taken place. He prepared an observation mahazar (Ex.P.49) and drew a rough sketch (Ex.P.48) in the presence of one Mr.Ramaiah and Mr.Mani. P.W.33 examined P.W.1 and others and recorded their statements. He recovered a .303 rifle, an empty magazine, 5 Nos. of unfired cartridges under a Form-95 (Ex.P.55) from P.W.13. Inside the van, P.W.33 found 2 Nos. of empty .303 cartridges [already fired] and 3 Nos. of live .303 cartridges [unfired]. He recovered all the five cartridges under a Form-95 [Ex.P.50].

2.6. P.W.33, thereafter, at 02.45 p.m. rushed to the place where the gun shot occurrence took place where he prepared an observation mahazar (Ex.P.51) and drew a rough sketch (Ex.P.52) in the presence of Mr.Ramachandran and Mr.Udhayakumar. He also recovered some broken window pane glass pieces with blood stains from the place of occurrence and also took swab of blood stains by using gauze cloth from the scene of occurrence under a mahazar (Ex.P.53). P.W.33, in the course of investigation, examined the under-trial prisoners who traveled along with the deceased in the police van and recorded their statements. P.W.33 at 04.30 p.m. arrested the accused at 04.30 p.m. at the police station itself in the presence of one Mr.Ramaiah and Mr.Mani and forwarded him to the court for judicial remand.

2.7. P.W.15 was the then Revenue Divisional Officer-cum-Executive Magistrate of Tiruvallur Sub Division. On 09.07.2009 at 12.30 p.m., he received information from the District Police Office about the occurrence. Immediately, he rushed to Kanakammachatram police station at 01.00 p.m. He was waiting at the police station till 05.30 p.m. awaiting instructions from the Superintendent of Police concerned. According to him, one Deputy Superintendent of Police wanted him to wait at the District Collector's Office. Accordingly, he was waiting. At 08.30 p.m. on the same day, the Inspector of Police [name not mentioned] handed over the FIR of this case which he received at 08.40 p.m. It was accompanied by the complaint (Ex.P.27). On going through the same, according to him, since he found that case had been registered under Sections 302 and 307 of IPC, he told the Inspector of Police that there was no need for Magisterial Inquiry by the Executive Magistrate. Therefore, he returned home. On the next day, that was on 10.07.2009, he

received instructions from the District Collector to hold inquest on the body of the deceased. Accordingly, between 08.30 a.m. and 10.30 a.m., he conducted inquest on the body of the deceased at Government Hospital, Tiruvallur. Ex.P.32 is his report. Then, he forwarded the body for postmortem. Autopsy was conducted by a team consisting of three doctors.

2.8. P.W.16, Dr.Sekar, who conducted autopsy along with two other doctors on the body of the deceased on 10.07.2009 at 10.40 a.m. noticed the following:-

"Male body Name: Dhanasekaran, aged 24, Spot muscle Skin containing piece of Skin with underlying tissues, was sent for ballistic opinion through constable No.465-Tr.S.Vijaykumar, under broken seals.

Above item was examined. A circular hole 0.5 cm diameter was observed on it. Powder tattooing due to gun shot was observed around the hole, copper in traces were detected around the margin of the hole indicating that the hole was caused by the impact and passage of objects made of copper, like copper jacketed bullet.

The following Article was sent for chemical analysis through Tr.S.Vijayakumar. P.C.No.465 under unbroken seals.

(1) Stomach and contents. (2) Intestine and contents. (3) Liver. (4) Kidney. (5) Preservative of Saline. (6) Blood.

The above six articles were examined and alcohol or other poison was not detected in any of them."

Ex.P.33 is the postmortem certificate and Ex.P.34 is his final opinion that the injury found on the deceased could have been caused by a bullet and the death was due to shock and hemorrhage as a result of gunshot injury.

2.9. After the postmortem was over, P.W.23, recovered the blood stained clothes from the body of the deceased and forwarded the same to the court. During the course of investigation, it came to light that the deceased-Dhanasekaran, P.W.34-Semon were associates and they were involved in six criminal cases previously and one among them was a case of murder and robbery in which the victim was the mother of the accused. P.W.33 collected details of all those cases and then, he handed over the case diary to his successor.

2.10. In the mean while, the Madras High Court, on a

petition made by the father of the deceased, transferred the investigation to Central Bureau of Investigation. Accordingly, P.W.36, took up the case for investigation. P.W.35, who was the Inspector of Police in CBI, assisted P.W.36. P.W.35 examined a number of witnesses, recorded their statements and handed over the same to P.W.36.

2.11. P.W.36 continued the investigation , examined many witnesses. The arms and ammunitions both fired and unfired which were recovered in this case were all sent for ballistic expert's opinion and the ballistic report revealed that the fired cartridges were used in .303 rifle used by the accused. On completing the investigation, he laid charge sheet against the accused. According to the final report since the deceased was the one who killed the mother of the accused, with a view to wreak vengeance, in retaliation, he shot at the deceased with the rifle in his possession. In the final report the accused was thus charged under Sections 302 and 307 of IPC and under Section 27 of the Arms Act, 1959.

3. Based on the above materials, the trial court framed three charges: [1] under Section 302 of IPC for murder of the deceased-Dhanasekaran by firearm; [2] under Section 307 of IPC for attempt to murder P.W.34-Semon; and [3] under Section 27 of the Arms Act for using the firearms. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 36 witnesses were examined, 58 documents and 13 material objects were marked. On the side of the defence, Exs.D1 to D.17 were marked.

4.0. Out of the said witnesses, P.W.1 is the father of the deceased. He has stated that the deceased was involved in criminal cases and he was lodged at the Central Prison, Puzhal, Chennai. He has further stated that he , later on, heard that when the deceased was taken under police escort in a police van from Central Prison, Puzhal, Chennai to the Court of Judicial Magistrate at Tiruttani, he was shot dead by the accused.

4.1. P.W.2 was the then Head Constable at Mappedu Police Station. He has stated that he deputed the accused for escort duty to escort the under-trial prisoners from Central Prison, Puzhal, Chennai to the Court of Judicial Magistrate at Tiruttani and to escort them back to the Central Prison on 09.07.2009. He has spoken about the necessary entries made in the register and the issuance of passport to the accused assigning him the escort duty.

4.2. P.W.3 was the then Inspector at the District Police

Office, Tiruvallur. He has stated that he only instructed P.W.2 to depute the accused to the escort duty. P.W.4 was the then Head Constable in the Armory of the Armed Reserve. He has stated that he handed over a .303 rifle with but No. AR56/TLR and also 10 Nos. of live cartridges. In the register at page-174, the accused had signed and obtained the arms and ammunitions [Ex.P.7] on 09.07.2009. P.W.4 has further stated that he handed over 778 model handcuff (1 No.), 109 model Handcuff (1 No.) and 532 model handcuff (2 Nos.). He has spoken about the further entries made in the relevant register.

4.3. P.W.5 was the Superintendent of Central Prison, Puzhal, Chennai. He has stated that on 09.07.2009, he handed over a total number of six under-trial prisoners to the escort police party including the deceased for being escorted to the court of Judicial Magistrate at Tiruttani and to escort them back to the Central Prison. The deceased and P.W.34 were among those under-trial prisoners. He has further stated about the necessary entries made in the relevant registers.

4.4. P.W.6-Dr.Gowri was on duty on 09.07.2009 in the Causality at Government Hospital, Tiruttani. Around 02.30 p.m., P.W.34-Semon was brought before her for treatment. When she inquired P.W.34, he told that a bullet had pierced his right hand around 12.30 p.m. when he was traveling in the police van bearing Regn. No.TN 20 G 0272. She treated him as out patient. Ex.P.18 is the wound certificate. P.W.7 Dr.Dakshayani, has stated that P.W.34 was brought to the Government General Hospital, Chennai on 09.07.2014. P.W.34 was then conscious. On examination, P.W.7 found a lacerated injury measuring 7 x 5 x 2 cm on his right hand between the index finger and the thumb He was discharged on the next day. Ex.P.20 is the accident register and Ex.P.21 is her opinion.

4.5. P.W.8 is the Ballistic Expert. On 09.07.2009, he received an information from the District Police Office at Tiruvallur seeking his help in the mater of investigation of this case. On 10.07.2009, he visited the Government Hospital at Tiruvallur. He was present when postmortem was conducted on the body of the deceased. Around 02.00 p.m., he returned to the District Police Office and examined the police van bearing Regn. No.TN 20 G 0272. One Mr.Thamaraiselvan, a Forensic Science Expert, assisted him. On such examination, he gave opinion that considering the distance between the back seat of the van where the accused was sitting and the next front sea of the van where the deceased was sitting the injuries on the deceased could have been caused by a .303 rifle from such a range. On 13.07.2009, he received .303 rifle used by the accused from the court. He also received live cartridges [5 Nos.] and empty cartridge [1 No.]

and another set of empty cartridge [1 No.] and live cartridges [3 Nos.]. All these cartridges were of .303 size. When he examined these cartridges and the rifle, he found that the rifle was a .303 rifle and these cartridges could be used in the said rifle to shoot. He found the said rifle in working condition. He used one live cartridge in the said rifle and made a test fire. Then, he compared the empty cartridge which was used for test fire with the other fired cartridges received from the court. From the point of trigger, he found that there was similarity. Thus, he found that the empty cartridges received from the court could have been fired only from the rifle [M.O.1]. In this regard, he submitted a report under Ex.P.22.

4.6. Latter, P.W.8 received a cut portion of the muscle with entry wound removed from the body of the deceased by the doctor. There were tattoo marks around injury. On chemical examination, he found copper powder in the muscle. He opined that this copper powder on the injured muscle tallied with the chemical used in the cartridges. Thus, in effect, his opinion is that the fired cartridges recovered from the place of occurrence [from inside the van] had been fired only from 0.303 rifle [M.O.1] used by the accused.

4.7. P.W.9 is the Scientific Officer in the Forensic Sciences Laboratory. On 09.07.2009, as requested by the Investigating Officer, he visited Kanakammachatram Police Station. He examined the police van bearing Regn. No. TN 20 G 0272. He found the dead body of the deceased still lying in the van itself. He found both the entry as well as exit wounds in the body. He assisted the investigating officer to collect the fired cartridges and live cartridges from the place of occurrence. P.W.10 was one of the members of the escort party. He has stated about the occurrence. P.W.11 is yet another member of the escort party. He has not stated anything about the occurrence. P.W.12 was also a member of the escort party. He has not stated anything about the occurrence. P.W.13 was working as Police Constable at Uthukottai Police Station. On 09.07.2009, he was also deputed for escort duty. He traveled in the police van in question escorting the under-trial prisoners. He has stated that he was sitting by the side of the entrance of the van. The entrance door was closed when the above van was running. He has further stated about the places where the accused and the deceased were sitting. He has further stated that around 12.30 noon, when the vehicle was still moving, he heard a loud noise, like a gunshot. When he turned back, he found the broken window glass pane of the van scattered inside the van. He also found the deceased lying with injury. The accused was still holding the rifle. The accused made a second shot. P.W.34 also sustained injury in the said incident. Then,

he snatched away the rifle from the accused. He has further stated that the accused was shouting as "Amma! Amma!! [Mother! mother!!]. Then, he informed about the occurrence to his higher police officials, who, in turn, informed him to take the vehicle straight to Kanakammachatram police station. Accordingly, the driver of the van took the van along with the under-trial prisoners, the dead body of the deceased, accused and other escort party to Kanakammachatram police station and made a complaint to the police upon which the present case was registered.

4.8. P.W.14 was yet another member of the escort party. He has also stated that he heard a loud noise like a gunshot twice. When he turned back, he found the deceased lying with injuries. P.W.34 also had sustained injury. According to him, P.W.13 snatched the rifle from the accused.

4.9. P.W.15 is the Revenue Divisional Officer cum Executive Magistrate. He has stated about the inquest held by him. P.W.16 has spoken about the autopsy conducted by him on the body of the deceased and his final opinion regarding the cause of death. P.W.17 was yet another member of the escort party. He has stated that at the time of occurrence, out of tiredness, he was sleeping. He heard a noise resembling the noise of bursting of tyre. When he woke up, he found the deceased lying with injury. He has further stated that P.W.13 snatched the rifle from the accused. P.W.18 was one of the under-trail prisoners, who was escorted by the accused in the van. He has stated that at the time of occurrence, he was sleeping and therefore, he did not know as to how the occurrence took place. He was treated as hostile. P.W.19, the Motor Vehicle Inspector has stated that on 24.07.2009, he examined the police van bearing Regn. No. TN 20 G 0272. He found that two window glass panes on the left side of the van were completely broken. In this regard, he gave a certificate [Ex.P.37]. P.W.20 was the then Sub Inspector of Police in the Armed Reserve. He has stated about the arms and ammunitions handed over to the accused at the Office of the Armed reserve. P.W.21 was the then Inspector of Police at Armed Reserve, Tiruvallur. On 09.07.2009, according to him, around 12.40 p.m., he received an information that one of the under-trial prisoners died due to gunshot in the escort van itself. He instructed the driver of the van to take the van straight to Kanakammachatram police station. P.W22 was the driver of the van. He has stated that at the time of occurrence, when the vehicle was on moving, he heard a loud noise. At once, stopped the vehicle. Again there was such a noise. Then, he found that the deceased had died due to gunshot. Thereafter, he informed P.W.21 and as instructed by him, he took the van along with the inmates and the dead body of the deceased straight to

Kanakammachatram police station. P.W.23 has spoken about the cases pending against the deceased. P.W.24, was the then Sentry in the Central Prison-II, Puzhal, Chennai. He has stated about the entrusting of under-trial prisoners including the deceased to the escort party. P.W.25 has spoken about the photographs taken at the place of occurrence as well as the in the police van. P.W.26 has spoken about the registration of the case at 01.15 p.m. on 09.07.2009.

4.10. P.W.27 has turned hostile and he has not supported the case of the prosecution in any manner. P.W.28, the then VIII Metropolitan Magistrate, Chennai, has stated that he recorded the statements of some of the prosecution witnesses under Section 164 of Cr.P.C. P.W.29, the then Judicial Magistrate No.IV, Salem, has stated about the recording of the statements of some more witnesses. P.W.30, the Forensic Science Expert, has stated that he examined the material objects recovered from the place of occurrence. He found human blood stains on all the material objects. P.W.31 has spoken about the serology examination conducted. P.W.32 has spoken about the chemical examination conducted on the visceral organs of the deceased. The report revealed that there was no poison detected in any of the visceral organs.

4.11. P.W.33, the then Inspector of Police, Kanakammachatram Police Station. He has spoken about the initial investigation done by him. P.W.34 was the one of the under-trial prisoners, who traveled into the police escort van. He was handcuffed with the deceased. According to him, at the place of occurrence, the van was proceeding at a speed of 80 km per hour. He has further stated that suddenly, he heard a loud noise and window sliding glass pane of the van by his side were broken. When he turned, he found the deceased lying down with injury in a pool of blood. When the accused again attempted to shoot at him, he held the same with his right hand. The accused made a shot and this time, the bullet injured his right hand between index finger and thumb. P.W.35 has spoken about the investigation done by P.W.36 with whom he was assisting. P.W.36 the Inspector of Police from CBI has spoken about the entire investigation done by him and the filing of charge sheet against the accused.

5. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C. he denied the same as false. He, however, did not choose to examine any witness. He filed a detailed written statement under Section 313 of Cr.P.C. The crux of the statement is that when he was sitting innocently on the last seat holding the rifle in his hand, suddenly, P.W.34 and the deceased turned backwards, punched on his face and tried to snatch the rifle. This resulted in a scuffle. In that

process, someone's finger had triggered the rifle and bullet went off. That is how, according to him, the deceased sustained gunshot injury and died. He has made reliance on the earliest report filed by P.W.13 to the court wherein at the earliest point of time, he has stated that when the deceased tried to attack, shot was made. Thus, according to the accused, he did not shoot at either the deceased or P.W.34 and thus, he was innocent.

6. Having considered all the above, the trial court convicted the appellant/accused as detailed in the first paragraph of this judgement. Challenging the above said conviction and sentences, the sole accused is now before this Court with the present criminal appeal.

7. We have heard the learned counsel appearing for the appellant/accused and the learned Additional Public Prosecutor appearing for the respondent/State and we have also perused the records carefully.

8. To know the background of the case, let us first examine the admitted facts. The deceased in this case was an under-trial prisoner and he was being escorted by the accused and other escort party from Central Prison-II, Puzhal, Chennai to the Court of Judicial Magistrate at Tiruttani on 09.07.2009. There is no dispute that P.W.34 was the yet another under-trial prisoner with whom the deceased was handcuffed and they were sitting just on the last but one forward seat of the van by the side of the window. There is also no dispute that the accused was sitting on the last seat of the van just behind the deceased by the side of the aisle. There is also no dispute that the accused was in possession of .303 rifle [M.O.1] and 10 live cartridges. There is also no dispute that the occurrence had taken place at 12.30 p.m. at the place of occurrence when the vehicle was still moving.

9. It is also not in dispute by the accused that the gunshot injury on the deceased was made only by a shot from M.O.1-Rifle. The opinion of the ballistic expert also clearly establishes the same. It is also not in dispute that the death of the deceased was due to gunshot injury and the bullet had been fired only from M.O.1-Rifle. There is also no dispute that P.W.34 also sustained injury in the same occurrence. He was handcuffed along with the deceased.

10. Now, the disputed fact is as to whether the deceased was shot at intentionally by the accused or the bullet went off from the rifle accidentally during the alleged scuffle as it is projected by the accused. It is, of course, the duty of the

prosecution to prove positively that the gunshot was made by the accused intentionally. In order to prove that the accused had motive to shoot at the deceased, it is projected by the prosecution that the deceased had a number of criminal cases against him and one among the said cases was the case of murder of the mother of the accused and robbery. The deceased and P.W.34 were co-accused in the said case of murder for robbery. It is alleged that because of the said motive, the accused intentionally shot at the deceased.

11. The learned senior counsel appearing for the appellant would submit that no record whatsoever has been produced in respect of the said criminal cases against the deceased. Neither is there oral evidence let in to show that the accused knew the deceased. The accused would not have known that he was deputed to escort the under-trial prisoners including the deceased. As per the evidence available, the request for providing police escort would be received from the Central Prison concerned to the District Police Office, from where it would be communicated to the Armed Reserve concerned and also to the relevant police stations. The police constables from various police stations would be deputed on rotation basis for police escort duty. The communication from the Central Prison concerned would not indicate as to who were all going to be escorted. Similarly, the communication from the District Police Officer also would not indicate as to who were all going to be escorted. Therefore, in the instant case, when the accused went to Central Prison-II, Puzhal, Chennai, as a member of police escort party, neither he nor any other members of the police escort party would have known that one among the under-trial prisoners to be escorted was the deceased. The learned senior counsel would further submit that there is also no evidence that the deceased knew to the accused previously. We find no reason to reject this argument. In the light of these facts and circumstances of the case, we find it difficult to accept the theory of the prosecution that the accused had motive against the deceased and that he became a member of the escort party only with a view to kill him.

12. Admittedly, at 10.30 a.m. the under-trial prisoners were taken in the police van. As usual, the accused were handcuffed in pairs. P.W.34 and the deceased were handcuffed together. They were sitting on the last but one seat on the left side of the van. The accused was sitting behind them. There is no evidence to show that the accused had chosen that place wantonly. The van was proceeding in a high speed. According to P.W.34, when the van was proceeding at a speed of 80 km/ph many of the escort police, he himself and the deceased were all sleeping. At that time, according to P.W.34, some perceived it

resembling like the noise of bursting of the tyre and some perceived it as a gunshot noise. Nobody had seen the accused shooting at the deceased or P.W.34. Therefore, there is no eye-witness account to speak to the fact that it was this accused who shot at the deceased intentionally as well as P.W.34.

13. Now, turning to the circumstances of the case, the other inmates of the van would say that they found the accused still holding the rifle and P.W.13 snatched away the same from the accused. At that time, the accused did not resist and he simply handed over the rifle to P.W.13. This conduct of the accused in simply handing over the rifle without making any resistance would be, to some extent, consistent with the innocence pleaded by him.

14. But, at the same time, the Special Public Prosecutor appearing for CBI would submit that if one single shot had been made from the rifle, the stand of the accused may be probable, but, in the instant case, two shots were made which would clearly indicate that the accused had intentionally shot with the rifle and it was not an accidental firing as it is claimed by the accused in his statement under Section 313 of Cr.P.C.

15. The above said contention of the learned Special Public Prosecutor is resisted by the learned senior counsel for the appellant bringing to our notice the discrepancies in respect of fired cartridges allegedly recovered from the van. According to mahazar [Ex.P.50], P.W.33, the Investigating Officer, who conducted investigation initially in this case until transfer of the case to CBI and P.W.8, the Forensic Science Expert, in the van near the dead body of the deceased, 2 Nos. of fired cartridges and 3 Nos. of live cartridges were lying. Thus, totally 5 Nos. of cartridges were lying at the place of occurrence. As per Ex.P.55, according to P.W.33, he recovered 5 Nos. of live cartridges from P.W.13 along with M.O.1-Rifle. So far as the cartridges, both fired and live, recovered in this case are concerned, according to the learned counsel, there is anomaly. According to P.W.13, as soon as the second shot was made, he snatched away the rifle and the live cartridges from the accused. He has not stated as to how many cartridges, both fired and live, were lying inside the van. Long after the occurrence P.W.9, the Scientific Officer, examined the van. At that time, according to him, inside the van, only 2 Nos. of fired empty cartridges and 1 No. of live cartridge were found. He has further stated that he collected these 3 Nos. of cartridges and handed over the same to P.W.33. But, P.W.33 has stated that he found a total number of 5 cartridges lying in the van. According to him, 2 Nos. of fired empty cartridges and 3 Nos. of live cartridges were found lying. He has further stated

that he thus recovered a total number of 5 cartridges from the van under Ex.P.50, it is not explained to the court. When P.W.9, an independent Scientific Officer has stated that at the time of examination of the van, there were only 3 Nos. of cartridges found lying in the van, it is not known as to how P.W.33 recovered 5 Nos. of live cartridges from the van. Apart from that, according to P.W.13, there was only one fired empty cartridge found lying inside the van which is evident from one of the photographs taken. He has further stated that 1 No. of live cartridge and 1 No. of fired empty cartridge were found in the van as seen in the photographs taken. There is no explanation for this also. As we have already pointed out, P.W.13 recovered all the live cartridges from the accused. According to P.W.33, P.W.13 handed over only 5 live cartridges which were recovered under Ex.P.55. But, P.W.13 has stated that he did not hand over any cartridge at all to P.W.33. When he was confronted with Ex.P.55, he disowned the same. He has further stated that he handed over all the live cartridges snatched from the accused only to P.W.9, the Scientific Officer and he did not hand over anything to P.W.33. But, P.W.9, the Scientific Officer, has not stated so. At any rate, when P.W.13 has stated that he snatched away all the live cartridges, how could it happen that he handed over only 5 live cartridges which were allegedly recovered under Ex.P.55. These anomalies in the matter of recoveries have not been explained away by the prosecution. The learned senior counsel would submit that the story that the second shot was made by the accused cannot be true because according to the photographs there was only one fired cartridge found lying in the van. In our considered view this anomalies create enormous doubts in the case of the prosecution.

16. Now, turning to the injury on P.W.34, the Doctor [P.W.7] has opined that it was only a lacerated injury. There was no gun metal powder found in the said injury. Such injury could have been caused during struggle also. There is no indication of any piercing nature of the injury. In such view of the matter, the contention of the learned senior counsel appearing for the appellant that the said injury would have been caused not by gut shot, but, by struggle seems to be probable. Thus, the same deserves acceptance.

17. It is true that onus is upon the accused to prove as to how the shot was made from the rifle which was in his possession. In his statement filed under Section 313 of Cr.P.C., he has stated that when he was sitting innocently on the last seat, P.W.34 and the deceased together turned backwards and tried to snatch the rifle and in that struggle someone's finger had triggered the rifle which resulted in the gunshot. In this regard, the learned senior counsel for the appellant would

submit that this is supported by the earliest report of PW.13. P.W.13 at the earliest point of time, had submitted a report to the learned Judicial Magistrate at Tiruttani under Ex.D.4. In the said report, P.W.13 has stated that when the deceased tried to escape from the van there was a scuffle in which in a gut shot, the deceased died. He had further stated that in respect of the same, on the file of Kanakammachatram police station, a case had already been registered in Crime No.257 of 2009 under Section 176 of Cr.P.C. Referring to this document, which was submitted to the learned Magistrate at the time when the rest of the accused were produced, the learned senior counsel appearing for the appellant would submit that the FIR registered under section 176 of Cr.P.C. has been suppressed. We find force in the said argument. When P.W.13 was confronted with Ex.D.4, he has stated that since he was informed that case would be registered under Section 176 of Cr.P.C., he had mentioned so in Ex.D.4. This explanation, in our considered view, is too difficult to be accepted. P.W.13 is not an ordinary person, who can have such a lame excuse. But, he was the Head Constable who knew about the importance of the report that he was submitting to the Magistrate. We believe that only after knowing that a case had been registered under Section 176 of Cr.P.C. in Crime No.257 of 2009, he submitted such a report to the learned Magistrate.

18. The above conclusion is fortified by the other facts also. As pointed out by the learned senior counsel, the FIR (Ex.P.41) on the file of Kanakammachatram police station bears Sl.No.C-1259017. The Crime Number of the case is 257 of 2009 dated 09.07.2009 and as per the said FIR, the case was registered under Sections 302 and 307 of IPC. Ex.D.6 is yet another FIR on the file of the very same police station registered in Crime No.256 of 2009 dated 07.07.2009. The Serial Number of Ex.D.6-FIR is C-1259015. Since the present case was registered in Cr.No.257 of 2009, the Serial Number in the FIR book should have been C-1259016 for this FIR. But, quite surprisingly, it bears the serial Number as C-1259017. Absolutely, there is no explanation as to what had happened to the FIR form having Sl.No. C-1259016. This would clearly go to show that in the FIR form bearing Sl. No. C 1259016, a case had been registered and the said FIR has been destroyed. That is the reason why, in Ex.D.4, P.W.13 has mentioned that the FIR was registered under Section 176 of Cr.P.C.

19. In this connection, the evidence of the Revenue Divisional Officer [P.W.15] also assumes importance. He has stated that at 12.30 noon on 09.07.2009, he received an information through the Village Administrative Officer of Kanakammachatram about the occurrence. He went to Kanakammachatram police station at 01.00 p.m. and was waiting

till 05.30 p.m. But, the FIR was not at all handed over to him till 05.30 p.m. The Deputy Superintendent of Police who visited the police station wanted him to go over to the Collector's Office and to wait there for some more time. Accordingly, he went to the Collector's Office and waited till 08.30 p.m. It was only at 08.40 p.m. the FIR was handed over to him. He has further stated that on perusal of the FIR since he found that the case had been registered under Sections 302 and 307 of IPC, he felt that there was no need for magisterial inquiry under Section 176 of Cr.P.C. Thus, though P.W.15 had gone to the police station at 01.00 p.m. and though he was waiting till 08.30 p.m., the FIR was not handed over to him. Absolutely, there is no explanation for this inordinate delay also.

20. In the light of the missing of the FIR form bearing Serial Number C-1259016 and in the light of the evidence of P.W.13 and the special report made by him under Ex.D.4, if we appreciate the evidence of P.W.15, it is crystal clear that Ex.P.41-FIR would have been prepared around 08.00 p.m. in the night in a hurried manner under Sections 302 and 307 of IPC and the same was thereafter handed over to P.W.15 by destroying the FIR registered under Section 176 of Cr.P.C in the FIR Form Sl.No.1259016. This creates enormous doubts in the case of the prosecution. Even after the transfer of investigation to the CBI, the investigating officer has not thoroughly investigated into these issues to obviate the doubts arising out of the same. From these circumstances it is crystal clear that until 08.30.p.m. it was believed that it was a case of accidental fire when the deceased tried to snatch away the rifle from the accused and it took the shape of murder only thereafter. Thus, the defence of the accused is fortified by means of probabilities as discussed thus far.

21. It needs no over emphasis to point out that the onus of the accused to prove his defence is not as onerous as that of the prosecution to prove the charges beyond reasonable doubts. It is true that the statement of the accused under Section 313 of Cr.P.C. does not have any evidential value and it only projects the stand of the accused. At the same time, we have to remember that as per the settled law, it is enough if the accused probabilises his defence. By means of either direct or circumstantial evidences which, we have dealt with elaborately hereinabove, the accused, in this case, has established that there is no truth in the version of the prosecution that he intentionally shot at the deceased and also P.W.34. In our considered view, the innocence of the accused has been established by proving the probabilities.

22. Admittedly, in this case, the deceased died while in

the custody of the police. Prior to the introduction of sub-section (1A) to Section 176 of the Code of Criminal Procedure, 1973, if a person dies while in custody of the police, magisterial inquiry shall be held by the Executive Magistrate. By amending Section 176 of Cr.P.C. and by introducing sub-section (1A), the Parliament has divested the Executive Magistrate from holding magisterial inquiry in respect of the death of a person while in custody of the police and instead the power has been conferred upon the jurisdictional Judicial Magistrate to hold inquiry. Such inquiry held by the Judicial Magistrate, undoubtedly, shall not amount to investigation by the police. But, the purpose of empowering a Judicial Magistrate to hold inquiry is to assist the prosecution to unearth the truth at the earliest point of time. Since more authenticity and solemnity are attached to the magisterial inquiry held by a Judicial Magistrate it would be of immense help to the investigating officer to take forward the investigation. A Division Bench of Madurai Bench of this Court, on a reference, in *Esakkiammal v. State by Inspector of Police, CBCID, Tirunelveli*, (2016 (1) CTC 726) has answered the issue in this regard that such magisterial inquiry is not in substitution of the investigation done by the police but, in addition to the investigation being done by the police. In *People's Union for Civil Liberties v. State of Maharashtra*, (2014) 10 SCC 635, the Hon'ble Supreme Court has issued certain directions as to how the investigation is to be conducted in respect of police encounter cases. Looking at from any angle, in the instant case, after the registration of the FIR, there should have been a reference made to the learned jurisdictional Judicial Magistrate to hold inquiry under Section 176(1A) of Cr.P.C. We fail to understand as to why this mandatory provision was not followed in the instant case. Had inquiry been held by a Judicial Magistrate concerned, we are sure that the truth would have come to light. We have got every reason to believe that the matter was not referred to the jurisdictional Judicial Magistrate with some ulterior motive either to help somebody or to foist the case against somebody. Instead of referring the same to the jurisdictional Judicial Magistrate, as we have elaborately discussed hereinabove, the FIR was referred to the Executive Magistrate, who rightly said that he cannot hold inquiry under Section 176(1) of Cr.P.C. He held only inquest under Section 174 of Cr.P.C. All these anomalies and short-comings in the process of investigation create enormous doubts in the case of the prosecution and therefore, we are forced to come to the conclusion that the prosecution has not come forward with the true version of the occurrence.

23. At this juncture, we need to emphasis that in a case of this nature where the prosecution relies only on circumstantial

evidence, the prosecution is expected to prove the circumstances projected by it beyond reasonable doubts and all such proved circumstances should form a complete chain without any break so as to unerringly point to the guilt of the accused and that there should not be any other hypothesis which is consistent with his guilt. If we apply the above said settled broad principles to the facts of the present case, as we have elaborately discussed hereinabove, there are no chain of circumstances unerringly pointing to the guilt of the accused as there are lot of doubts and the alternative hypothesis projected by the accused is consistent with his innocence. Therefore, the appellant is entitled for acquittal.

24. Before parting with this case, we would like to state the following:-

In respect of the escort of prisoners, the governing statute is "Prisoners (Attendance in Courts) Act, 1955." Section 9 of the Act empowers the State Government to make rules for carrying out the purposes of this Act by notification in the official gazette in particular and without prejudice to the generality of the foregoing power such rules may be

(e) the escort of persons confined in a prison to and from Courts in which their attendance is required and for their custody during the period of such attendance;

(f); and

(g) the guidance of officers in all other matters connected with the enforcement of this Act.

25. It was brought to the notice of this court that so far the State Government of Tamil Nadu as well as Union Territory of Puducherry are concerned, no such rule has been issued by the respective Government in respect of the escort of prisoners confined in prisons to Court as required under Section 9 of Prisoners (Attendance in Courts) Act, 1955.

26. The learned Additional Public Prosecutor brought to our notice paragraph 453 in Chapter - XXX (Part-1), page 137 of the Tamil Nadu Prison and Reformatory Manual, Volume II] which was issued as per G.O.Ms.868, Judicial, dated 15th July 1908 and G.O.Ms.No.3698, Home, dated the 27th December, 1955. It is only as per the above two Government Orders, the escort of prisoners confined in prisons has been done all these years. When the statute provides that there has to be a statutory rule governing the escort of prisoners under the Act, we are doubtful whether these two government orders would satisfy the said legal requirements. Assuming that these two Government Orders could be enforced, in our considered view, they have become outmoded

and in effective by passage of time. In these Government Orders it is stated that the prisoners escorted under these rules shall ordinarily be sent by rail; when travelling by rail, the accommodation to be provided shall be of second class in the case of 'C' class prisoners and first class in the case of 'A' and 'B' class prisoners. In our considered view, in these days, taking the prisoners that too hardened criminals in trains along with the other passengers including the women and children would not practically be conducive to the welfare of the co-passengers. It is known that while on transit, unless situation warrants, they should not be handcuffed. If that is so, how the safety of the co-passengers could be ensured when the hardened criminal travels with the other passengers without handcuffs. For any reason, if the criminals are handcuffed, the children who are travelling in the train on seeing them would get frightened and the same would have a psychological impact in them. Therefore, in our considered view, except an accused being transmitted from one state to another state it would not, in our considered view, be conducive to allow them to travel along with other passengers more particularly the women folk and children. These two Government Orders fuhrer state that for low risk prisoners, the following shall be the number of escort police to be provided:-

Low Risk Prisoners

For a single prisoner	: 2 Police Constables
For two prisoners	: 2 Police Constables
For more than two and nor more than four prisoners	: 2 Police Constables
For more than four and not more than six prisoners	: 3 Police Constables
For more than six and not more than ten prisoners	: 1 Head Constable and 4 Police Constables

In our considered view, this is not workable. For more than two and not more than four prisoners, if 2 police constables escort, suppose all the four suddenly try to escape in four different directions, it would not be possible for 2 police constables to chase and catch them hold. These are only illustrations. A close reading of the entire chapter would show that many of the provisions are either outmoded or impractical. This rule has travelled a distance of more than 62 years and it now struggles to serve its purpose. Therefore, it is high time that the Government of Tamil Nadu should have a re-look into these rules

and to put in place a new rules.

27. When we suggested that a Committee, consisting of the Director General of Police, Government of Tamil Nadu, the Inspector General of Prisons, Commissioner of Police, City of Chennai and State Public Prosecutor may look into the issue and to make a suggestion to the Government to frame appropriate rules, the learned Additional Public Prosecutor, on instructions from the Director General of Police, submitted that the Director General of Police, Government of Tamil Nadu is agreeable for the said suggestion.

28. In view of the same, we issue a direction to the Government of Tamil Nadu to constitute a Committee consisting of The Director General of Police, the Inspector General of Prisons, the Commissioner of Police and the State Public Prosecutor to make a thorough study of the issue and to submit a report to the Government to frame, if need be, appropriate rules governing the escort of prisoners confined in prisons as required under Section 9 of Prisoners (Attendance in Courts) Act, 1955.

29. In the result, this criminal appeal is allowed. The conviction and sentences imposed on the appellant/accused by the trial court are set aside and he is acquitted of all the charges. Fine amount already paid, if any, shall be refunded to him. The bail bond executed by the appellant shall stand terminated.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

सत्यमेव जयते

kmk

To

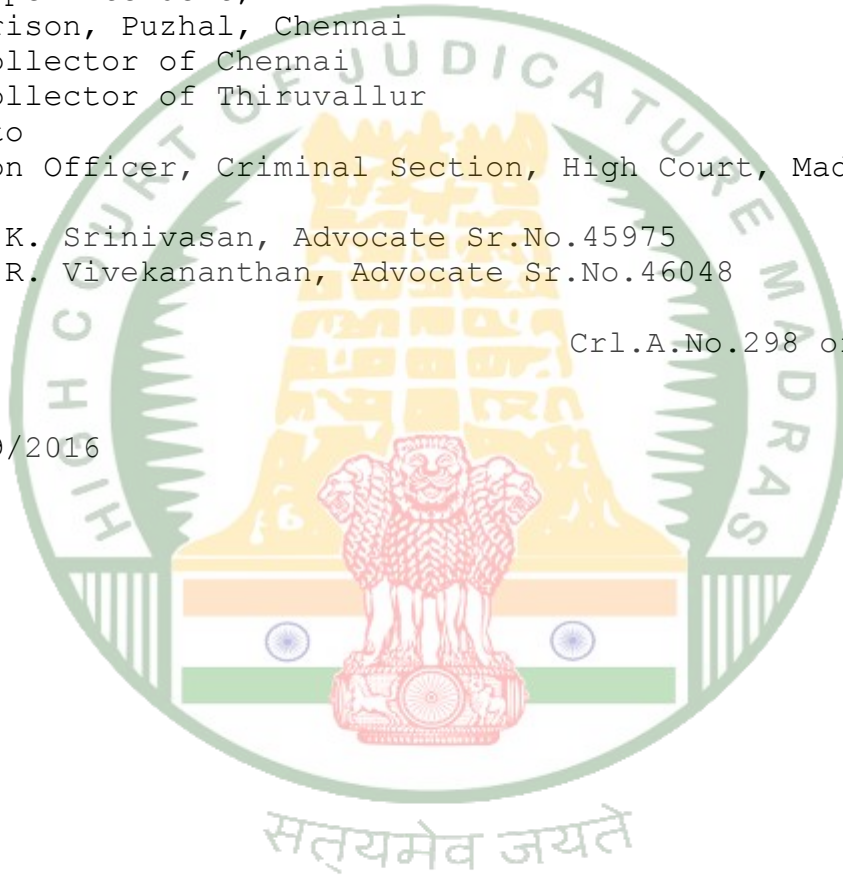
- 1.The Director General of Police, Government of Tamil Nadu, Chennai 600004.
- 2.The Inspector General of Prisons, Government of Tamil Nadu, Egmore, Chennai-8.
- 3.The Commissioner of Police, Chennai City,Vepery, Chennai.7.
- 4.The I Additional Sessions Judge, Tiruvallur, Tiruvallur District.

- 5.The Inspector of Police, CBI/SCB, Chennai.
- 6.The Inspector of Police,Kanakammachatram PS,Tiruvallur District.
- 7.The Special Public Prosecutor for CBI Cases, High Court, Chennai.
- 8.The Public Prosecutor, High Court, Madras.
9. The Chief Secretary,
Govt., of Tamil Nadu,
Fort St. George, Chennai 9
10. The Judicial Magistrate, Tinuttani
11. -do- Thro 'The Chief Judicial Magistrate, Tiruvallur
12. The Superintendent,
Central Prison, Puzhal, Chennai
13. The Collector of Chennai
14. The Collector of Thiruvallur
15. Copy to
The Section Officer, Criminal Section, High Court, Madras 104

+1 CC to K. Srinivasan, Advocate Sr.No.45975
+3 CC to R. Vivekananthan, Advocate Sr.No.46048

Cr1.A.No.298 of 2015

VD (CO)
MD : 20/09/2016



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