

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.12.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
AND

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

Criminal Appeal Nos.216 & 540 of 2016

Sivalingam @ Anbu .. Appellant Accused in Crl.A.No.216/2016

State rep.by
The Public Prosecutor,
High Court,
Madras

(Tirupathur Town Police Station
Crime No.572/1980).

.. Appellant/Complainant in Crl.A.No.540/2016

Vs

State represented by
Inspector of Police,
CBCID,
Vellore District,
Vellore.

.. Respondent/Complainant in
Crl.A.No.216/2016

Sivalingam @ Anbu

.. Respondent /Accused in
Crl.A.No.540/2016

Prayer in Crl.A.No.216/2016:- Criminal Appeal filed under Section 374(2) Cr.P.C., by the appellant against the judgment in S.C.No.145 of 2010 dated 22.02.2016 on the file of the learned I Additional District and Sessions Judge, Vellore.

Prayer in Crl.A.No.540/2016:- Criminal Appeal filed under Section 378 Cr.P.C., to set aside the judgment of acquittal of the respondent/accused passed in S.C.No.145 of 2010 dated 22.02.2016 on the file of the learned I Additional District and Sessions Judge, Vellore.

In Crl.A.No.216 of 2016:-

For Appellant : Mr.R.Sankarasubbu

For Respondent : Mr.P.Govindarajan
Additional Public Prosecutor

In Crl.A.No.540 of 2016:-

For Appellant : Mr.P.Govindarajan
Additional Public Prosecutor

For Respondent : Mr.R.Sankarasubbu

COMMON JUDGEMENT

(Judgment of the Court was delivered by S.Nagamuthu.J)

The appellant in Crl.A.No.216 of 2016 is the sole accused in S.C.No.145 of 2010 on the file of the learned I Additional District and Sessions Judge, Vellore. He stood charged for offences under Sections 3 & 4 of the Explosive Substances Act, 1908 and Section 302 r/w Section 34 I.P.C., (6 counts). The trial Court by judgment dated 22.02.2016, convicted him for offence under Section 302 r/w 34 I.P.C., (5 counts) and sentenced him to undergo imprisonment for life for each count and acquitted him from the 6th count of the charge under Section 302 r/w 34 I.P.C., and also sentenced him to undergo rigorous imprisonment for 10 years for the offence under Sections 3 & 4 of the Explosive Substances Act. Challenging the said conviction and sentence, the appellant has come up with Criminal Appeal No.216 of 2016.

2.As against the acquittal of the accused from the 6th count of the charge under Section 302 r/w 34 I.P.C., the State has come up Crl.A.No.540 of 2016. That is how both the Criminal Appeals are before this Court for disposal.

3.The case of the prosecution, in brief, is as follows:-

One Mr.Palanisamy was working as an Inspector at Jolarpet Police Station in Vellore District. One Mr.Murugesan and Mr.Yesudass were working in the same Police Station as Head Constable and Police Constable respectively (these three persons are hereinafter referred to as D.1 to D.3 respectively). One Mr.Masilamani (P.W.1) and Mr.Unnikrishnan (P.W.2) were also working as Police Constables in the same Police Station. One Mr.Muthusamy was working as a Driver in the Police Department. On 06.08.1980, D.1 to D.3, along with P.Ws.1 & 2, and the Driver Mr.Muthusamy went to Elagiri Hills in Vellore District, on official duty, in the Car bearing Registration No.TNC 4849. Mr.Muthusamy drove the Car. At that time, they found 5 persons climbing down from the Elagiri Hills in a suspicious circumstances. Therefore, D.1 - Inspector of Police Mr.Palanisamy directed the other Police officials to surround those five persons and take them into custody. Accordingly, all the officials surrounded the five persons who were climbing down from the Elagiri hills and the Inspector of Police,

Mr.Palanisamy, took them into custody. On enquiries, those five persons disclosed their identity as (1)Anbu; (2)Chinnathambi; (3)Selvam; (4)Perumal and (5)Rajappa. Since, D.1 Inspector of Police, Mr.Palanisamy, was convinced that these people were involved in criminal offences, he took them all to the Car. In the Car, Mr.Masilamani (P.W.1) was made to sit on the right hand side of the back seat; Mr.Unnikrishnan (P.W.2) was made to sit on the left side and in between four accused viz., (1)Anbu; (2) Perumal; (3) Rajappa and (4)Selvam were seated. In the front seat of the Car, on the left side, the Inspector of Police Mr.Palanisamy (D.1) was seated and beside him, the Constables Mr.Muthusamy and Mr.Yesudass were seated. The accused Selvam was made to sit at the foot step of the front side of the Car. Mr.Muthusamy (Driver) was in the Driver's seat. Then the Car started its journey to Tirupathur Police Station. When it was nearing Anna Nagar junction, unexpectedly and suddenly, there was a blast in the Car. According to the case of the prosecution, it was the appellant who blasted it with a hand grenade. The Car suffered extensive damage due to the said blast. D.1 to D.3 and P.Ws.1 & 2 sustained injuries. So far as the persons in their custody are concerned, Mr.Selvam, who was sitting in the front seat of the Car sustained injuries and died. The appellant, Mr.Sivalingam (according to the prosecution also known as Anbu) escaped from the scene of occurrence. P.Ws.1 & 2 caught hold Mr.Perumal; Mr.Rajappa and Mr.Chinnathambi, Mr.Muthsamy (Driver of the Car) also assisted them in nabbing these accused. Then, all the injured were taken to the hospital and admitted in the Government Hospital at Tirupathur. Mr.Perumal, Mr.Rajappa & Mr.Chinnathambi were taken to the Tirupathur Taluk Police Station. On the request made by P.W.9, the then Investigating Officer, the then Judicial Magistrate, Tirupathur went to the Hospital and recorded the statements of D.1 - Mr.Palanisamy and P.Ws.1 & 2. Thereafter, P.W.9 registered a case on the complaint of P.W.1 - Mr.Masilamani. D.1 to D.3, succumbed to the injuries. So far as the persons in the custody of the Police are concerned, as we have already pointed out, Mr.Selvam died and Mr.Perumal, Mr.Rajappa & Mr.Chinnathambi, who were brought to the Police Station escaped from the Police custody and they were not immediately traced. Mr.Chinnathambi, who escaped from the custody as soon as the blast occurred, has not been so far secured. Mr.Anbu, who also escaped from the scene of occurrence, also could not be traced immediately.

4. During the course of investigation, the dead bodies of the deceased were sent for post mortem and the reports revealed that all the six persons died due to the blast injuries. Mr.Perumal and Mr.Rajappa who were escaped from the police custody were secured on the same day at 11.45 am and they died out of the blast injuries. The Doctors, who conducted post mortem on these dead bodies, have opined that the said persons would have

died due to shock and hemorrhage due to extensive blast injuries, on their bodies. The investigation was later on transferred to CB-CID. Charge sheet was laid on 04.11.1992. In the final report, Mr.Anbu and Mr.Chinnathambi were shown as accused.

5. But, as we have already pointed out, neither Mr.Anbu nor Mr.Chinnathambi could be traced immediately. The appellant herein was arrested on 20.06.2009. He was produced before the Court with the statement that he is Mr.Sivalingam @ Anbu who was involved in the crime. The final report was filed against him but his name was mentioned as Mr.Sivalingam.

6. According to the prosecution, the appellant Mr.Sivalingam has got a nickname as Mr.Anbu and that is why, his name was mentioned in the F.I.R., as well as in the other connected records as "Anbu". The accused/appellant disputed the same. According to him, he was never known as Mr.Anbu as he was known always only as Mr.Sivalingam. He further took the plea that he never involved in the crime.

7. Thereafter, wisdom dawned on the Police to include the charge under Sections 3 & 4 of the Explosive Substances Act also. Sanction was therefore obtained from the District Collector on 28.03.2012 (vide Ex.P.41). Thereafter, the trial Court framed charges as against the accused/appellant as detailed in the first paragraph of this judgment. The accused/appellant disputed the identity by pleading that he is not the one who is the accused in the case and by mistaken identity, he has been brought to the Court. In other words, he pleaded that he was never known as Mr.Anbu against whom final report was filed as he was known only as Mr.Sivalingam. However, the trial Court went on to frame charges against the accused/appellant to proceed with the trial.

8. During the trial, in order to prove the charges on the side of the prosecution, as many as 14 witnesses were examined and 57 documents and two material objects were marked. M.O.1 series are the photographs of the Car which was damaged in the blast and M.O.2 is the C.D containing the photographs of the Car. (no other material object whatsoever was marked).

9. Out of the said witnesses, P.Ws.1 & 2 are the injured eye witnesses. P.W.1 has stated about the fact that five persons namely, (1)Anbu; (2)Chinnathambi; (3)Selvam; (4)Perumal and (5) Rajappa were taken into custody and they were carried in the Car driven by Mr.Muthusamy (Mr.Muthusamy has not been examined as a witness). He has further stated that when the Car was nearing Annanagar junction, there was a sudden unexpected blast. He has not stated anything incriminating the accused/appellant except saying that the accused/appellant also travelled in the Car and

after the blast, he escaped from the scene of occurrence. He has further identified the accused/appellant as the one who escaped from the Car. He has also stated that the appellant is known as Mr.Anbu @ Sivalingam.

10.P.W.2 Mr.Unnikrishnan, yet another Constable, who also sustained injuries in the blast, has stated that he was also in the Car. He has further stated that when the Car was nearing Anna Nagar Junction, the accused/appellant made a mild bodily movement and took out a hand grenade and when it was in his hands, it suddenly blasted. He was also stated that the appellant is known as Mr.Anbu @ Sivalingam.

11.P.W.3 was a Constable attached to the Tirupathur Taluk Police Station. He has stated that he went to the place of occurrence on hearing about the occurrence and took the injured to the hospital. P.W.4 - Dr.Selvaraj, has spoken about the fact that he treated D.3 Mr.Yesudass at the Government Hospital, Tirupathur. He has spoken about the extensive injuries found on D.3. He has further stated that despite treatment, D.3 died at 6.20 am on 06.08.1980. He has further stated that he treated Mr.Murugesan (D.2) and he found a number of injuries on him. D.2 also died in the hospital while on treatment. On the same day, he examined D.1 - Mr.Palanisamy, the Inspector of Police. He found a number of injuries on him. He has further stated that D.1 also died subsequently, due to the injuries. He has further spoken about the treatment given to P.Ws.1 & 2 who were also brought to him for treatment. They also had extensive blast injuries on their body. He has further spoken about the post mortem conducted by him on the body of D.2.

12.P.W.5, the then Sub Inspector of Tirupathur Police Station, has stated that on the day of occurrence, he heard about the occurrence, went to the place of occurrence and took all the injured to the hospital. P.W.6 - Dr.Subramani, has spoken about the treatment given by him to Mr.Rajappa one of the deceased in the case. He found as many as 6 injuries on his body. On the same day, he examined the other injured Mr.Perumal. He also had as many as 6 injuries on his body. Exs.P.20 & P.21 are the Accident Register and Wound Certificate respectively pertaining to Mr.Rajappa. Exs.P.22 & P.23 are the accident register and wound certificate respectively pertaining to Mr.Perumal. He has further spoken about the post mortem conducted by him on the body of Mr.Selvam.

13.P.W.7 - Dr.Michel, has spoken about the post mortem conducted by him on the body of Mr.Rajappa on 06.08.1980 who also died succumbed to the injuries. He has further spoken about the post mortem conducted on the body of Mr.Perumal. In fact, the post mortem on the body of Mr.Perumal was conducted by one

Mr.Jetti. Since, he was not available, this witness has spoken about the post mortem conducted by Mr.Jetti on the body of Mr.Perumal. He has also spoken about the post mortem conducted on the body of the Inspector of Police Mr.Palanisamy(D.1) on 06.08.1980. He has stated that as many as 8 injuries were found on the body of D.1 and he died due to the extensive blast injuries.

14.P.W.8 has stated that when he was sleeping at his house, he heard about the noise of blast. He immediately rushed to the place of occurrence and found the injured and he helped them to be taken to hospital. P.W.9, the then Inspector of Police, Tirupathur Police Station has spoken about the registration of the case and the investigation done by him. He has further stated that he had collected the broken pieces of the Car at the place of occurrence and the other material objects and forwarded the same to Court for being sent for chemical analysis. He has further stated that since, the investigation was thereafter transferred to CB-CID, he handed over the case diary to them.

15.P.W.10 was then working as a Sub Inspector of Police, Tirupathur Police Station and he has stated that on intimation, he went to the place of occurrence and prepared an observation mahazar and rough sketch in the presence of witnesses. P.W.11, the then District Collector Villupuram District, has spoken about the sanction given by him for the Prosecutor to prosecute the case for offence under Sections 3 & 4 of the Explosive Substance Act also.

16.P.W.12 - the Forensic Expert has spoken about the 17 material objects recovered from the place of occurrence and he found that there were neither nitrocellulose nor ammonium nitrate and the chemical used for manufacturing matches alone were found. P.W.13 is the then Deputy Director of Forensic Science Lab. He has stated that he examined the material objects and found that the remains of ammonium nitrate and gun powder were found on all the material objects. P.W.14 has spoken about the further investigation done by him and the final report filed.

17.When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. The specific plea of the appellant/accused is that, he is not Mr.Anbu and he is only Mr.Sivalingam and he has got no such nickname as Mr.Anbu. He has further stated that he was never involved in the crime. In order to prove the same, on his side, he has examined three witnesses including himself. D.W.1 is the brother of the accused/appellant and he has stated that the accused/appellant is known only as Mr.Sivalingam and never he was known as Mr.Anbu. D.W.2 has also stated about the same facts. The appellant has examined himself as D.W.3 wherein, he

has stated that he was never known as Mr.Anbu and he has not involved in the crime at all and he was mistakenly taken into custody. A book authored by Mr.Sastri Ramaiah and other, it has been recorded that Mr.Anbu who is actually the accused in this case was killed later on by the Police. The said book has been marked as Ex.D.3. D.1 is the Transfer Certificate of Ms.Tamilselvin namely, D.W.2. Ex.D.2 is the Identity card of D.W.1. Ex.D.4 is the xerox copy of the requisition given by the accused to this Court. Ex.D.5 is yet another requisition given by the accused wherein, he has claimed that he is only Mr.Sivalingam and he is not Mr.Anbu. Ex.D.6 is the certificate issued by the school where the accused/appellant studied wherein, his name was mentioned as Mr.Sivalingam.

18.Having considered all the above, the trial Court convicted the accused under both the charges however, acquitted him from the 6th count under Section 302 r/w 34 I.P.C. Challenging the same, the appellant/accused is before this Court with Crl.A.No.216 of 2016. As against the acquittal of the accused from the 6th count of the charge under Section 302 r/w 34 I.P.C., the State has come up Crl.A.No.540 of 2016. That is how these two appeals are before this Court.

19.As we have already narrated, in this case, there are two eye witnesses to the occurrence. From their evidences, it is crystal clear that five persons by name (1)Anbu; (2) Chinnathambi; (3)Selvam; (4)Perumal and (5)Rajappa were taken into the Car. Apart from these five, there were 6 police personnel in the Car. When the Car was nearing Anna Nagar Junction, there was a sudden blast, in which, six persons died and P.Ws.1 & 2 sustained injuries. Thus, the presence of P.Ws.1 & 2, at the time of occurrence, cannot be doubted. From their evidences, it has been established by the prosecution that there was a blast, in which, six people died. The medical examination conducted and the nature of injuries sustained by the deceased as spoken by the Doctors would also go to prove that the occurrence was on account of a blast of some chemicals.

20.Now the question is, "Who was responsible for the said blast?" According to the case of the prosecution, the appellant whom according to the prosecution is known as Mr.Anbu @ Sivalingam, who was in the Car took out a hand grenade from his pocket which blasted. It is seen from the evidences of P.Ws.1 & 2 that even before all the five persons were carried in the Car, they were all personally checked by the Inspector of Police namely, D.1. Had it been true that the appellant had hand grenade that would not have escaped the notice of the Inspector of Police - D.1. That apart, so far as the evidence of P.W.1 is concerned, he has not at all stated that the accused/appellant took out a hand grenade which blasted. He has only stated that

when the Car was moving, there was a sudden blast. He has not stated anything incriminating the accused/appellant and he has only stated that the appellant escaped from the Car immediately after the occurrence.

21.P.W.2, the other eye witness has stated that the accused herein took out a hand grenade which suddenly blasted. But, he has been confronted with his earlier statement made. In none of the earlier statements, he told that the appellant took out a hand grenade which blasted. Though the occurrence was in the year 1980, the said witness was examined in the year 2013. He had not stated during this period that the accused took out the hand grenade which blasted. This silence was for a period of 33 years. Thus, for the first time, after 33 years, when he was examined as eye witness in the Court, he came out with the statement that this appellant took out a hand grenade while he was in the Car which blasted. When he was confronted with the same, he has no explanation to offer. Thus, it is crystal clear that it is only an after thought of this witness to say that the accused/appellant took out a hand grenade which blasted. Therefore, we are unable to give any weightage to this witness.

22.Apart from the same, on the side of the prosecution, the dying declaration said to have been made by D.1 to one Mr.S.Narayanan, the then learned Judicial Second Class Magistrate, No.2, Tiruppur has been marked as Ex.P.45 upon which, reliance has been made. Unfortunately, neither the Doctor who certified about the mental fitness of Mr.Palanisamy (D.1) nor the learned Magistrate who recorded the dying declaration from D.1. has been examined. Curiously and strangely, the dying declaration has been marked through the Inspector of Police. The contents of the dying declaration, thus, does not stand proved by the mere marking the same through the Investigating Officer. Thus, the contents of the dying declaration cannot be considered for any purpose, as evidence, as the same has not been proved. Therefore, Ex.P.45 also deserves to be rejected.

23.The learned counsel for the appellant would further point out that though, it is stated that number of material objects were recovered from the place of occurrence, which were also subjected to chemical examination, none has been marked in evidence during trial. There is no explanation at all for the same. The Investigating Officer has stated that these material objects were not at all sent to the Court. When that be so, it should be explained as to why the same were not sent to the Court and why they were not marked in evidence. In a case of this nature, serious attention should have been bestowed by the Police to see that there is no loophole in the investigation since, it will give room for the real culprits to escape from

the clutches of law. But unfortunately, the dying declaration of D.1 has not been duly proved by the prosecution at all and the material objects also have not been marked in evidence.

24. Not stopping with that, as the learned counsel for the appellant would further point out, the prosecution has failed to prove the autopsy pertaining to Mr. Yesudoss (D.3) conducted on 06.08.1980. The trial Court has acquitted the accused/appellant from the 6th charge under Section 302 r/w 34 I.P.C., in respect of causing of death of Mr. Yesudass. When we posed a question as to why the post mortem certificate pertaining to Mr. Yesudass (D.3) has not been marked in evidence, the learned Additional Public Prosecutor submitted that the said post mortem was not traceable. We directed the Inspector of Police, CB-CID to at least trace out a copy of the post mortem from the original records of the hospital. The Medical Officer, Government Hospital, Tirupathur by his letter dated 29.09.2016, has stated that the post mortem certificate pertaining to Mr. Yesudass (D.3) is not traceable at the Government Hospital, Tirupathur. It is really shocking that in such a serious case, which shocked the entire state of Tamil Nadu, the investigation was not done thoroughly and even the material documents have not been produced in Court to prove the guilt of the accused in accordance with law.

25. So far as the identity of the accused/appellant is concerned, Mr. R. Sankarasubbu, the learned counsel for the appellant submits that the accused was never known as Mr. Anbu and he is only Mr. Sivalingam. In order to prove the same, he has relied on the certificate issued by the School where the accused/appellant studied and on the oral evidences of D.Ws.1 to 3. The learned counsel would further submit that a Writ Petition was filed before the Hon'ble Supreme Court in W.P.No.62/1982 alleging that Mr. Anbu against whom final report has been filed in this case was killed by the Police in an encounter. The investigation was therefore, sought for in respect of the alleged killing of Mr. Anbu. The Hon'ble Supreme Court by a common order in W.P.Nos.55,62 & 68 of 1982, dated 29.03.1989, has directed the Government as follows:-

"6. Having given the matter careful consideration we think these three writ petitions relate to matters which properly fall within the domain of the State Governments, and that in the first instance the State Government should be petitioned. The facts mentioned in the three writ petitions call for a comprehensive review of what has been described as "encounters", and in conditions of disturbed law and order of the magnitude reflected in these writ

petitions we cannot preclude the possibility of personal feuds and enmities being settled and other motives being satisfied by recourse to the use of force under the guise of maintaining law and order. There is the imperative requirement of ensuring that the guardians of law and order do in fact observe the code of discipline expected of them and that they function strictly as the protectors of innocent citizens. We need say nothing more at this stage, for we are inclined to provide an opportunity to the petitioners to petition the State Governments concerned in the first instance for the relief sought in these writ petitions. The petitioners may make their representations within four weeks and upon such representations being made the State Governments concerned are required to dispose them of within three months thereafter. Liberty is granted to the parties to file further affidavits setting forth the fact of the filing of representations and of the nature of the response of the State Governments concerned and including such other facts as may be considered necessary for the effective disposal of these writ petitions."

26. The learned counsel for the appellant would however submit that the fate of the investigation is not known. The said order has been reported in 1989 (2) SCC 314 (Chaitanya Kalbagh v. State of U.P). In our considered view, since, we are convinced that the prosecution has failed to prove the charges against the appellant beyond reasonable doubt, assuming that he is known as Mr. Anbu and since, we are inclined to acquit him, we do not find any reason to go into the further question as to "Whether the accused/appellant is really known as Mr. Anbu @ Sivalingam or he is only Mr. Sivalingam?" Even, proceeding on the assumption that the accused/appellant is Mr. Anbu @ Sivalingam, since, we find that the prosecution has failed to prove the case beyond reasonable doubt, we are inclined to acquit him (Mr. Anbu @ Sivalingam).

27. In the result, CrI.A.No.216 of 2016, preferred by the accused/appellant is allowed and the conviction and sentence imposed on the appellant by the learned I Additional District and Sessions Judge, Vellore in S.C.No.145 of 2010 by judgment dated 22.02.2016 are hereby set aside. The appellant is acquitted of the charges levelled against him and he is directed to be set at liberty, forthwith, unless his presence is required

in connection with any other case. Fine amount, if any, paid by the appellant, shall be refunded to him. Bail bond, if any, shall stand discharged. CrI.A.No.540 of 2016 preferred by the State is dismissed.

sd/
Assistant Registrar(CCC)

/true copy/

Sub Assistant Registrar

jbm
To

- 1.The I Additional District and Sessions Judge, Vellore.
- 2.Prf.Sessions Judge, Vellore.
- 3.The Inspector of Police, CBCID Vellore District. Vellore.
- 4.The Inspector of Police, Tirupattur Town Police station.
- 5.The Superintendent Central Prison, Vellore.
- 6.The District Collector Vellore District.
- 7.The Directorate General of Police, Mylappore Chennai.4
- 8.The Public Prosecutor, High Court, Madras.

Copy to
The Section Officer,
Criminal Section,
High Court, Madras.

Criminal Appeal Nos.216 & 540 of 2016

RSY(CO)
GN(06/02/2017)