

Bail Slip:- The Accused Viz., Ferozkhan was released on bail as per order of this Court dated 23.2.2016 and made in M.P.No.1 of 2007 in CrI.A.No.768 of 2007.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.02.2016

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THE HON'BLE DR.JUSTICE P.DEVADASS

CrI.A.No.768 of 2007

Ferozkhan ... Appellant/Accused

Versus

State: Rep. by
Inspector of Police
F-2, Egmore Police Station
Chennai. ... Respondent/Complainant

Criminal Appeal filed under Section 374 of Cr.P.C to set aside the Judgment and Conviction passed by the learned Additional District and Sessions Judge [Fast Track Court No.3], Chennai in S.C.No.147 of 2007 dated 21.07.2007.

For Appellant : Mr.K.Abdul Azeez

For Respondent : Mr.P.Govindarajan
Addl. Public Prosecutor

JUDGMENT

A1 in the Sessions Case in S.C.No.147 of 2007 on the file of the learned Additional Sessions Judge [Fast Track Court No.III], Chennai is the appellant.

2. A1 and six others were prosecuted before the said Court for offences under Sections 147, 148, 458, 333, 307 and 506(ii) r/w 149 IPC.

3. After trial, the trial court acquitted A2 to A7. It had also acquitted A1 from offences under Sections 147, 148, 458, 333, 307 and 506(ii) of IPC; but found him guilty for the following offences and sentenced him as under:

Conviction	Sentence
(i) 451 IPC	(i) 2 years S.I. and fine Rs.1,000/- i/d 2 months S.I.
(ii) 332 IPC	(ii) 2 years S.I. and fine Rs.1,000/- i/d 2 months S.I.

Both the sentences were directed to run concurrently. Fine amounts were paid.

4. The case of the prosecution briefly runs as under:

(i) PWs.1 to 3 viz., Dr.Suresh Kumar, Dr.Anand and Dr.Indumathi Santhanam were on duty on 20.04.2006 at the Government Children's Hospital at Egmore, Chennai. An infant died. A1 is related to the dead child. At about 11.15 p.m, unidentified persons entered the emergency ward. Beaten PW1; fisted him. He swooned. P.Ws.2 and 3 witnessed the occurrence. PW1 has been taken to Government General Hospital, Chennai.

(ii) On hospital intimation, PW.11 Mohan -Sub Inspector of Police, F-2 Egmore Police Station, Chennai visited the said hospital, received Ex.P1 complaint from PW1. He registered this case [Ex.P9, F.I.R.]. He examined PW1 and other witnesses and recorded their statement under Section 161 Cr.P.C. In the meanwhile, PW9 Dr.Thangam treated PW1. He complained of pain in his right cheek. [Ex.P7 Accident Register copy]. PW11 visited the scene place. Prepared Ex.P10 Observation Mahazar in the presence of PW6 and another person. He also drew Ex.P11-rough sketch of the scene place.

(iii) On 22.04.2006, PW13 has arrested A1 to A5. He has recorded Ex.P12 confessional statement of A1 in the presence of PW5 and another person. In pursuance of the information in Ex.P12, at the instance of A1, PW11 seized MO1 weapon under Ex.P13 seizure mahazar in the presence of said witnesses. He sent the arrested persons to jurisdictional Magistrate for judicial custody. Under Ex.P14 Form 95 PW11 produced the case property to court.

(iv) Thereafter, P.W.12 Rajagopal, Assistant Commissioner, Egmore Range continued the investigation. He altered the Section of law by adding Sections 147, 148, 452, 332, 324, 307 and 506(ii) of IPC [Ex.P15 alteration memo]. PW12 recorded further statement of certain witnesses. Based on the confessional statement of A6[Ex.P16], he seized MO2 motor cycle under Ex.P17 mahazar in the presence of witnesses. He has arrested the other accused. Sent them to court for judicial custody. He has produced MO2 to the court under Ex.P18-Form 95.

(v) Thereafter, P.W.13-Mohan, Assistant Commissioner, Egmore Range continued the investigation. He obtained Ex.P8 Wound Certificate for PW1 from P.W.10 Dr.Sambandam. Concluding his investigation, he filed the final report in this case before the concerned court.

5. The learned Additional Sessions Judge, [Fast Track Court No.III], Chennai upon hearing both and on consideration of the case records, framed charges under Sections 458, 333 r/w 149, 307 r/w 149 and 506(ii) of IPC as against A1. The accused pleaded not guilty to the charges.

6. To substantiate the charges, prosecution examined P.Ws.1 to 13, marked Exs.P1 to P18 and exhibited M.Os.1 and 2.

7. When the accused was examined under Section 313 Cr.P.C. on the incriminating aspects appearing in the prosecution evidence, he denied the offences. He did not examine any witness. However, he marked Exs.D1 and D2 to establish his defence of alibi ["elsewhere"].

8. Upon consideration of the above evidence, the trial court gave clean chit to A2 to A7 but not to A1.

9. According to the learned counsel for the appellant, in Ex.P1 complaint itself PW1 had stated that his assailant was a total stranger. Thus, prosecution has to fix the identity of the accused. However, it was not done so.

10. The testimony of PW3 that there was a prior test identification through video clippings is legally impermissible. PW3 did not disclose the same in her statement to police. Further, copies of the same has not been furnished to A1 under Section 207 Cr.P.C. Further, none of the investigation officers spoken about conducting of any such scientific investigation to fix

the identity of the accused. De hors such evidence of PW3, nothing remains except suspicion and surmises. Prosecution has failed to establish the charges beyond all reasonable doubts.

11. On the other hand, the learned Additional Public Prosecutor would submit that the occurrence took place inside the hospital. The identification of A1 has been established through the evidence of PW3. Thus, the trial court has rightly convicted and sentenced the appellant.

12. I have anxiously considered the rival submissions, perused the judgment of the trial court and the entire materials on record.

13. Now the question is whether offences under Sections 451 and 332 IPC have been established by the prosecution as against A1 beyond all reasonable doubts?

14. In this case, the identity of PW1 is not known to PW1. Till the occurrence, A1 was a stranger to him. So also to PWs.2 and 3. PW1 has not mentioned A1 in his Ex.P1 complaint. In such circumstances, establishing the identity of the accused is very important. His presence at the scene of crime at the time of occurrence is very important.

15. PW1 would admit that immediately after the occurrence he had swooned. PW2 also did not identify A1. In the trial court PW3 had identified A1 as the person who has assaulted PW1 at the time of occurrence. Prior to the occurrence, A1 was a total stranger to PW3.

16. PW3 has stated before the trial court that in the Director's office through video clippings she had identified A1. The identification of A1 by PW3 before the trial court is the substantive evidence. Identification of the accused before that will come under Section 9 of the Indian Evidence Act. But, it will not be substantive evidence. It will be only a corroborative piece of evidence. There cannot be a conviction solely based on corroborative evidence. Corroborative evidence also must be admitted in evidence as per the technical rules of Indian Evidence Act.

17. PW11 had recorded the statement of PW3 under Section 161 Cr.P.C. In it, PW1 did not say that she had identified A1 through the video clippings in the Director's office. PWs.11 to 13 who have investigated this case did not open their mouth as to the identification of A1. The said identification material was not furnished to A1 under Section 207 Cr.P.C. Naturally, the defence

will be taken by surprise. A1 will be prejudiced. So, the said corroborative piece of evidence of PW3 necessarily have to be eschewed from our zone of consideration. In this case, the identification of A1 by PW3 before the trial court is the first identification. Necessarily such a piece of evidence should be eschewed.

18. In this case, prosecution has failed to produce acceptable evidence to show that A1 was involved in the commission of offence. In the facts and circumstances, no test identification parade was conducted. P.Ws.11 to 13, the Police Officers have not properly investigated the case and taken steps to establish the identity of A1 in this case.

19. What remains is suspicion and surmises; however, they may be strong, they may not be a substitute for legal proof. Absolutely, there is no incriminating evidence as against the appellant/A1. Prosecution has failed to establish its case beyond all reasonable doubts.

20. In view of the foregoing, this criminal appeal is allowed. The conviction and sentence awarded to the appellant are set aside. He is acquitted. Fine amount shall be refunded to him.

Sd/-

Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

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To

1. The Additional Sessions Judge,
[Fast Track Court No.III]
Chennai.

2. The Additional Public Prosecutor,
High Court, Madras.

3. The Inspector of Police
F-2, Egmore Police Station
Chennai.

1 cc to Mr.K. Abdul Azeez, Advocate, Sr. 11220

Crl.A.No.768 of 2007

JSV (CO)

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