

BAIL SLIP
IN
CRL.A.NO.352/2013

The Appellants herein namely (1) Sakthi @ Sakthivel (2) Periyasamy accused 3 and 5 in SC.No.169/2011 on the file of the II Additional District Judge Erode were released on bail as per order of this Court dated 10.10.2014 and made in MP.No.1/14 in Crl.A.Nos.352/13.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 12.04.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Crl.A.Nos.352, 348 and 425 of 2013

1.Sakthi @ Sakthivel
2.Periasamy

... Appellants in
Crl.A.No.352 of 2013/
Accused 3 and 5

Madesh @ Madeshwaran

.... Appellant in
Crl.A.No.348 of 2013/
2nd Accused

Ganeshan @ Malayaganesh

... Appellant in
Crl.A.No.425 of
2013/1st Accused

vs.

State, rep.by
The Inspector of Police,
Karunkalpalayam Police Station,
Erode District
(Crime No.904 of 2010)

... Respondent in all
the appeals

Criminal appeals preferred under Section 374(2) Cr.P.C.,
against the judgement dated 28.02.2013 passed by the II
Additional District Judge, Erode, in S.C.No.169 of 2011.

For Appellants : Mr.Philip Ravindran Jesudoss
in Crl.A.Nos.352 and 348 of 2013

Mr.S.Manoharan
in Crl.A.No.425 of 2013

For Respondent : Mr.M.Maharaja,Addl.P.P.
in all the appeals

COMMON JUDGMENT

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

The appellant in Criminal Appeal No.425 of 2013 is the first accused, the appellant in Criminal Appeal No.348 of 2013 is the second accused and the appellants in Criminal Appeal No.352 of 2013 are the accused 3 and 5, in Sessions Case No.169 of 2011, on the file of the II Additional Sessions Judge, Erode. Including these appellants, there were a total number of 9 accused. The trial Court framed as many as six charges against all the nine accused as detailed below:

Sl.No.	Charges (Section of law)	accused
1.	U/s.148 of the Indian Penal Code	A1 to A3 and A4 to A7
2.	U/s.302 read with Section 34 of the Indian Penal Code	A1 to A3
3.	U/s.307 read with Section 149 of the Indian Penal Code	A1 to A5, A8 and A9
4.	U/s.307 of the Indian Penal Code	A1 to A4
5.	U/s.302 read with Section 149 of the Indian Penal Code	A4 and A9
6.	U/s.147 of the Indian Penal Code	A8 & A9

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By judgement dated 28.2.2013, the trial Court convicted the accused 1 to 3 and accused No.5 alone for various offences and sentenced them as follows:

Sl.No.	Rank of accused	Conviction	sentence
1.	A1 to A3	U/s.148 of the Indian Penal Code U/s.302 read with Section 34 of the Indian Penal Code	rigorous imprisonment for one year each. imprisonment for life with fine of Rs.1000/-, in default, simple imprisonment for one year each.
2.	A5	U/s.148 of the Indian Penal Code U/s.302 read with Section 149 of the Indian Penal Code	rigorous imprisonment for one year. Imprisonment for life each with fine of Rs.1000/- each, in default, simple imprisonment for one year each

The sentences imposed against A1 to A3 and A5 were ordered to run concurrently. Challenging the said conviction and sentences, A1 to A3 and A5 are before this Court with this appeal.

2. The case of the prosecution in brief is as follows:

(a) The deceased in this case was one Mr.Sakthi @ Kandhasami. There was a liquor shop run by the Tamil Nadu State Marketing Corporation Limited at Four Road, Vairapalayam Village. The deceased was running a bar attached to the said shop, on licence. P.Ws.2 and 3 were working in the said bar under the deceased. On 28.11.2010, at about 3.00 p.m., the accused 4 and 5 along with another person, had come to the said bar to drink liquor. After having taken liquor for some time, in inebriated condition, they started breaking the bottles. On seeing the same, the deceased questioned them. They replied that 'we would do like that only'. This resulted in a quarrel. In the said quarrel, they attacked P.Ws.2 and 3, which resulted in injuries. Both were taken to the hospital. The accused 4 and 5 and the other assailants went out of the shop.

(b) On the same day, by around 7.00 p.m., in the bar, the deceased was sitting, doing business. P.W.1 had also arrived in the shop and he was talking to the deceased. P.Ws.2 and 3 were

also in the shop. There were also other customers in the shop. At that time, it is alleged that all these nine accused came to the bar. They came there and indulged in rioting. The first accused was armed with a knife. The second accused took a soda bottle, broke it and held it in his hand as a weapon of offence. The third accused was also holding a broken soda bottle and used the same as a weapon of offence. Accused 8 & 9 were standing outside the shop taking care that nobody else could enter into the shop so as to prevent the crime committed by the rest. The accused 4 to 9 were not armed with any weapon. On trespassing into the bar, it is alleged that the first accused stabbed the deceased with knife on his stomach. As a result, the small intestine protruded out. The second accused stabbed the deceased with broken soda bottle on the chest of the deceased. The third accused stabbed the deceased with a broken soda bottle on his left forearm. The deceased tried to escape. When he ran out of the bar, all the accused gave a chase. In front of the shop, the second accused reached the deceased and attacked him with a broken soda bottle on the back of his head. The deceased lost his balance and fell down. The third accused immediately stabbed the deceased with a broken soda bottle on his left thigh. The first accused again attacked the deceased with knife on his abdomen both on the right side and on the left side and also on the right elbow. The fourth accused attacked P.W.1 with soda bottle on his forehead. The fifth accused stabbed P.W.1 on his right shoulder with a broken soda bottle. The sixth accused stabbed P.W.1 on his nose with a broken soda bottle. The seventh accused stabbed P.W.1 on his right palm with a broken soda bottle. P.W.1 also fell down. All the accused then fled away from the scene of occurrence. P.Ws.5 and 6 also witnessed the occurrence, who were then in the bar. P.W.6 immediately took P.W.1 to the Erode Government Hospital. The deceased was also taken to the Erode Government Hospital. At 8.20 p.m., the Doctor examined the deceased and declared him dead.

(c) On intimation from the hospital, P.W.20, the then Sub Inspector of Police, Karunkalkpalayam Police Station, proceeded to the hospital, recorded the statement of P.W.1, returned to the Police Station and at 12.30 a.m. registered a case, in Crime No.904 of 2010, under Sections 147, 148, 307 and 302 of the Indian Penal Code against the accused 1 to 7. Ex.P26 is the First Information Report. He forwarded the complaint (Ex.P1) and the First Information Report (Ex.P26) to the Court, which were received by the learned Magistrate at 5.00 a.m. on 29.11.2010. The case was taken up for investigation by P.W.21. On 29.11.2010, at 1.30 a.m. P.W.21 visited the place of occurrence and prepared an observation mahazar and a rough sketch, in the presence of P.W.13 and another witness. Then, he recovered blood stained earth and sample earth from the place of occurrence, in the presence of the same witnesses under a mahazar. On going over to the hospital, he recorded the

statement of P.W.1 between 6.00 a.m. and 9.00 a.m. On the same day, he conducted inquest on the body of the deceased and forwarded the body for post-mortem. P.W.12, Dr.Venkatesh, conducted autopsy on the body of the deceased, on 29.11.2010 at 10.15 a.m. He found the following injuries on the body of the deceased:

"External Injuries: A incised wound 4 x 2 cm near (L) nipple 4 cm depth. (2) An incised wound (L) Hypochondria region 9 x 3 cm 3 cm depth. Small intestine protruding out (3) An incised wound 2 x 3 cm above umbilical (4) An incised wound above umbilical 2 x 1 cm (5) abrasion of left lower chest (6) A lacerated wound 6 x 2 cm (Rt) elbow (7) A lacerated wound at forearm lower 5 x 2 cm (8) A lacerated wound left thigh 3 x 2 cm (9) A lacerated wound back of occipital region 4 x 3 cm 3 cm bone deep. Internal extremities: Rib intact. Heart 250 gms 2 x 1 cm penetrating wound in the back of heart. Hyoid bone intact."

Ex.P.8 is the post-mortem certificate. The doctor gave opinion that the death of the deceased was due to shock and haemorrhage due to the injuries found on the deceased. He further opined that the injuries 1 to 4 and 6, found on the deceased could have been caused by a weapon like M.O.1 and the other injuries could have been caused by a broken bottle.

(d) P.W.21 recovered the blood stained clothe from the body of the deceased and he forwarded all the material objects to the Court. Then, he handed over the case diary to his successor for further investigation. P.W.22 took up the case for investigation on 28.11.2010. On 2.12.2010 at 8.00 a.m., near Erode Karaivaikal, P.W.22 arrested the first accused, in the presence of P.W.16 and another. On such arrest, he gave a voluntary confession, in which, he disclosed the place where he had hidden the knife and blood stained shirt. In pursuance of the same, he took P.W.22 and another witness to Karunkalpalayam Kakkan Nagar and produced the knife (M.O.1) and a shirt (M.O.8). P.W.22 recovered the same under a mahazar, in the presence of the same witnesses. At 11.30 a.m. on the same day, near Erode Paneer Selvam Park, he arrested the accused Nos.2 and 3, on being identified by the first accused. On such arrest, the second accused gave a voluntary confession, in which, he disclosed the place where he had hidden a blood stained shirt. The third accused gave a voluntary confession, in which, he disclosed the place where he had hidden a blood stained shirt. In pursuance of the same, accused 2 and 3 took the police and the witnesses to the respective places and produced each one, the blood stained shirt, which were recovered under a mahazar.

On returning to the police station, P.W.22 forwarded both the accused to the Court and also handed over the material objects to the Court. On 7.12.2010, A4 and A6 surrendered before the learned Judicial Magistrate of Kodumudi. On completing the investigation, he laid charge-sheet against all the nine accused.

3. Based on the above materials, the trial Court framed charges against the accused, as detailed in the first paragraph of this judgement. The accused denied the same as false. In order to prove the case, on the side of the prosecution, as many as 22 witnesses were examined, 33 documents were marked, besides 12 material objects. Out of the said witnesses, P.Ws.1 to 6 were examined as eyewitnesses. They have spoken about the entire occurrence. P.Ws.2 and 7 have turned hostile and they have not supported the case of the prosecution in any manner and the other eyewitnesses have spoken about the entire occurrence. P.W.8 is the father of the deceased. He has stated that on hearing about the occurrence, he came to the place of occurrence and took the deceased as well as P.W.1 to the hospital. P.W.9 is a partner of the bar along with the deceased. He has not stated anything incriminating against the accused. P.W.10, Dr.Omprakash, has spoken about the treatment given to P.W.1 at the Erode Hospital, at 8.10 p.m. on the day of occurrence. P.W.11 has spoken about the treatment given to P.W.1 at Erode Trust Hospital, which is a private hospital, where P.W.1 was shifted at 11.00 p.m. on the same day. P.W.12 has spoken about the post-mortem conducted and his final opinion regarding the cause of death. P.W.13 has spoken about the preparation of the observation mahazar and the rough sketch, at the place of occurrence and the recovery of blood stained earth and sample earth. P.W.14 is an employee of the Tamil Nadu Electricity Board. He has stated that at the place of occurrence there was no electricity failure, at the time of occurrence. P.W.15, the Head Clerk of the Judicial Magistrate Court, Erode, has stated that he forwarded the material objects for chemical examination. The report revealed that there were blood stains on all the material objects, including the knife. P.W.16 had spoken about the arrest of the first accused and the confession made by him and the recovery of M.O.1-knife and the blood stained shirt, on his disclosure statement. P.W.17 has spoken about the arrest of the accused 2 and 3, their disclosure statements and the consequential recoveries of material objects. P.W.18 is a Constable attached to the respondent police, who has stated that he handed over the First Information Report to the Magistrate at 5.00 a.m. on 29.11.2010. P.W.19 is a yet another constable. He has stated that he took the dead body and handed over the same to the Doctor for post-mortem. P.W.20 has stated about the complaint made by P.W.1 and the registration of the case. P.Ws.21 and 22 have spoken about the investigation done and the final report filed.

4. When the above incriminating materials were put to the accused, they denied the same as false. However, they did not choose to examine any witness on their side. Their defence was a total denial. Having considered all the above, the trial Court convicted all the accused as detailed in the first paragraph of this judgement.

5. We have heard the learned counsel for the appellants and also the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

6. The learned counsel for the appellants would submit that the evidences of the so called eyewitnesses, including P.W.1, cannot be believed, as they suffer from lot of infirmities. He would further submit that P.W.5 has stated during cross-examination that there was nobody else in the bar at the time of occurrence and therefore, the presence of the other eyewitnesses cannot be true. The learned counsel would further submit that P.W.4 has stated, during cross-examination, that at the time of occurrence, he alone was present in the bar. The learned counsel would submit that this has not been considered by the lower Court. He would further point out that P.W.8, the father of the deceased, had stated that on getting information about the occurrence, when he came to the place of occurrence, the deceased was struggling for life and there was nobody else available in the bar. From this, the learned counsel submitted that the presence of the other witnesses cannot be believed at all. He would further submit that P.W.1 had told the Doctor that he was attacked by four unknown persons. For these reasons, according to the learned counsel for the appellants, the appellants are entitled for acquittal.

7. The learned Additional Public Prosecutor would, however, oppose these appeals. He would submit that except P.Ws.2 and 7, all the other eyewitnesses, namely, P.Ws.1 and 3 to 6 have given clear evidence about the occurrence. He would further submit that the motive has also been spoken by P.W.3. He would further submit that the evidences of eyewitnesses are duly corroborated by the medical evidence as well. His main contention is that the discrepancies, which were pointed out by the learned counsel for the appellants, are very minor in nature, which would not dilute the case of the prosecution. Further, all the accused were already known to P.W.1 and therefore, there was no necessity to any test identification parade. He would further submit that the trial Court had considered and analysed the evidences of the prosecution case and has come to a right conclusion, convicting these accused. Thus, according to the learned Additional Public Prosecutor, there is no merit at all in these appeals.

8. We have considered the above submissions.

9. Let us first analyse the evidences of the so called eyewitnesses. P.W.1 is an injured eyewitness, whose presence, at the place of occurrence, cannot be doubted at all. Though in Ex.P1, he has mentioned vividly about the names of all the accused 1 to 7, in his evidence, even in chief examination, he has stated that the first accused came along with few more persons, at the time of occurrence, to the bar. He has further stated that the first accused stabbed the deceased with knife and four others, whose names were not known to him, attacked him with broken soda bottles. Thus, in effect, he has given evidence only as against the first accused and he has not stated anything about the rest of the accused.

10. P.W.2, as we already pointed out, has turned hostile and he has not supported the case of the prosecution in any manner. P.W.3, yet another eyewitness, has stated that at 7.15 p.m., the first accused came along with two other persons, to the bar. A1 was having a knife and the others were in possession of broken soda bottles. He has further stated that the first accused stabbed the deceased. He has not stated anything about the attack made on P.W.1. In effect, he has also spoken only about the first accused and he has not stated anything incriminating against the rest of the accused. P.W.4, yet another eyewitness, has stated that at 7.45 p.m., when he was in the shop, he heard the commotion from the bar. When he came out of the shop, he found the deceased lying on the road with stab injuries. Thus, he has not stated even about the presence of any of the accused. P.W.5 is yet another eyewitness, who has stated that at the time of occurrence, the accused 1 to 5, came to the shop. The first accused was having a knife, the second accused was having a broken soda bottle. The third accused was also having a broken soda bottle. He has stated that the first accused stabbed the deceased on his stomach with knife. The second accused stabbed the deceased with a broken soda bottle on his chest and the third accused also stabbed the deceased with a broken soda bottle. He has not stated anything incriminating against the rest of the accused. P.W.6 is yet another witness. He has stated that the accused 1, 2, 4 and 5 came to the shop. The first accused was armed with a knife and stabbed the deceased. The accused 4 and 5 stabbed P.W.1. Then, the second accused stabbed the deceased with a broken soda bottle. P.W.7 has turned hostile. On these evidences, it is crystal clear that so far as the presence and participation of the accused 1 and 2 are concerned, all the eyewitnesses have consistently and cogently spoken about the same. They have also spoken about the individual overt acts of accused 1 and 2. We find no contradiction between the evidences of these witnesses in respect of the overt acts of accused 1 and 2. But, so far as the accused 3 and 5 are concerned, we find

that there are lot of improbabilities and contradictions. As we have already pointed out, regarding their presence and participation, only P.W.5 has spoken. P.W.6 has spoken only about the presence and participation of A5 and he has not spoken about the presence and participation of A3. So far as the third accused is concerned, only P.W.5 has spoken about the same. In our considered view, it is not safe to convict the third accused solely based on the evidence of P.W.5 alone. So far as the fifth accused is concerned, his presence and participation, in the occurrence, has been spoken by P.Ws.5 and 6. But according to them, he did not cause any injury on the deceased. Though it is alleged that A5 caused injuries on P.W.1, the same has been disbelieved by the trial Court. Thus, the presence and participation of the fifth accused is also doubtful. Therefore, we find it difficult to sustain the conviction of the accused 3 and 5.

11. So far as the presence and participation of accused 1 and 2 are concerned, as we have already pointed out, all the eyewitnesses have consistently and cogently spoken about the same. The learned counsel for the appellants would submit that P.W.4 has stated that except him there was nobody else in the bar, at the time of occurrence. Thus, according to the learned counsel, none of the eyewitnesses would have been present at the time of occurrence. This argument does not persuade us at all. P.W.1's presence cannot be doubted. But however, he has spoken only about the first accused. P.Ws.5 and 6 have spoken about the presence and participation of the accused No.2, in a cogent manner. The presence of P.Ws.5 and 6 cannot be doubted at all. Thus, we find that there is no force in the argument of the learned counsel in this regard. The learned counsel would further submit that P.W.8, the father of the deceased, had stated that at the time when he came to the place of occurrence, he found the deceased alone lying on the road, with injuries. From this, the learned counsel would try to assail the presence of the rest of the eyewitnesses. This argument also does not persuade us, because, after the occurrence, P.W.1 had been taken to the hospital and the others would not have been by the side of the injured. Might be due to fear that the accused would come and indulge in riot, the others would have gone away. Therefore, we cannot attach much importance to P.W.8. The learned counsel would next submit that P.W.1 had told the Doctor that he was attacked by four unknown persons. But, this former statement has not been used by the accused to contradict P.W.1, when he was examined as a witness. The statement of P.W.1 cannot be used as a substantive evidence. Therefore, this argument is also rejected. From the foregoing discussion, we find that the prosecution has clearly established the charges against accused 1 and 2 and thus, the trial Court is right in

convicting the accused 1 and 2. So far as accused 3 and 5 are concerned, as we have already pointed out, the prosecution has failed to prove the case against them and therefore, they are entitled for acquittal.

12. Now turning to the quantum of punishment, the trial Court has imposed only a minimum punishment on accused 1 and 2, which does not require any interference at the hands of this Court.

13. In the result, the criminal appeal No.425 of 2013, filed by the first accused, and Criminal Appeal No.348 of 2013, filed by the second accused, are dismissed and the conviction and sentences imposed by the trial Court upon them are hereby confirmed. Criminal Appeal No.352 of 2013, filed by the accused 3 and 5, is allowed and they are acquitted from all charges, the bail bond, if any, executed by them shall stand cancelled; the fine amount, if any, paid by them shall be refunded to them forthwith.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1.The Inspector of Police,
Karunkalpalayam Police Station,
Erode District.

2. The II Additional District Judge, Erode.

3.The Public Prosecutor,
High Court, Madras

4.The Judicial Magistrate NO.I
Erode

5.The Chief Judicial Magistrate
Erode

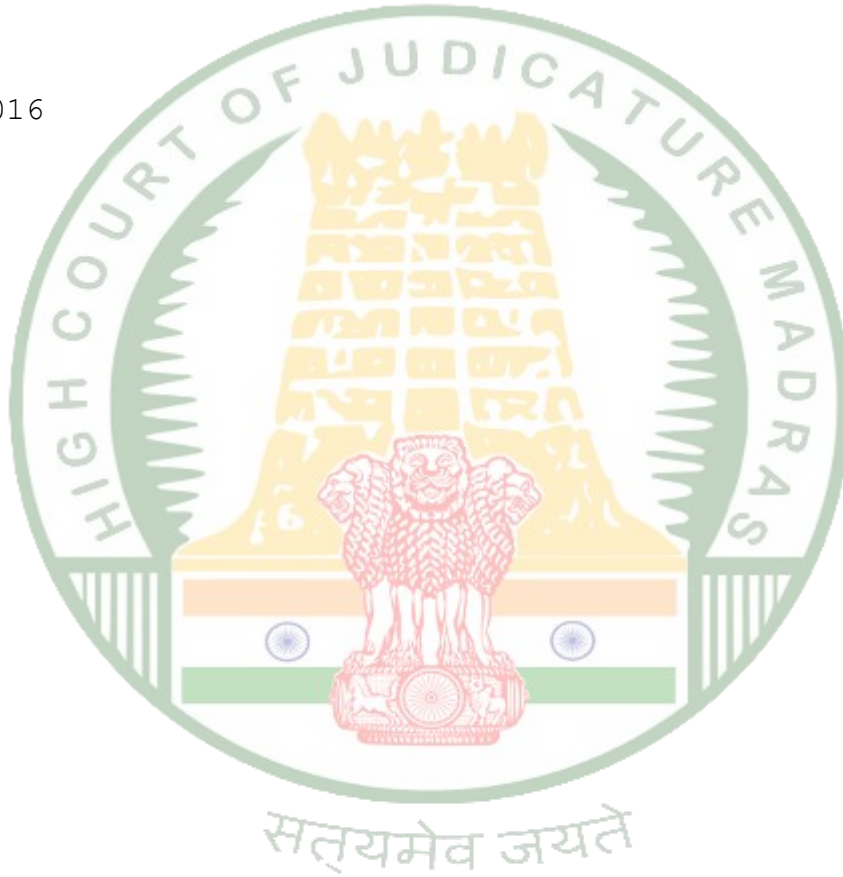
6.The Judicial Magistrate NO.I Tiruchirappalli

7.The Superintendent Central Prison, Coimbatore

8.The Record keeper, Criminal Section
High Court, Madras-104

Crl.A.Nos.352, 348 and 425 of
2013

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