

Bail Slip

1. Suresh, 2. Muttai kannu Deva @ Deva, 3. Loganathan, 4. Vinayagam
The above said appellants/Accused was directed to be released on bail as per order of this court dated 28.06.07 made in MP.1/07 in CrI.A.No.403/07.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.403 of 2007

1. Suresh

2. Muttai kannu Deva @ Deva

3. Loganathan

4. Vinayagam

... Appellants

Vs

The State of Tamil Nadu
rep. by the Inspector,
North Police Station,
Vellore,
(Crime No.389/2005)

.. Respondent

Prayer:- Criminal Appeal filed under Section 374(2) of Cr.P.C., to call for the records of S.C.No.31 of 2006 dated 20.02.2007 on the file of the Assistant Sessions Judge (Sub-Court) at Vellore, and to set aside the conviction and sentence passed by the Assistant Sessions Judge (sub-Court), Vellore in s.c.No.31 of 2006 dated 20.02.2007.

For Appellant

: Mr.T.R.Radhakrishnan

For Respondent

: Mr. R.Selvan

Government Advocate

JUDGEMENT

A1 to A4 in S.C.No.31 of 2006 on the file of the Assistant Sessions Judge (Sub Court), Vellore, are the appellants herein. They stood charged for the offences under Sections 341, 392 and 394 r/w.34 IPC. By judgment, dated 20.02.2007, the trial Court convicted and sentenced the appellants/accused as detailed below:-

Accused	Section of law	Sentence
A.1 to A.4	341 I.P.C.	Simple imprisonment for one month.
A.3 & A.4	392 I.P.C.	Rigorous imprisonment for 10 years and to pay a fine of Rs.3000/-, in default, to undergo rigorous imprisonment for year.
A.1 & A.2	392 r/w.34 IPC	Rigorous imprisonment for 10 years and to pay a fine of Rs.3000/-, in default, to undergo rigorous imprisonment for one year
A.1 & A.2	394 IPC	Rigorous imprisonment for 10 years and to pay a fine of Rs.3000/-, in default, to undergo rigorous imprisonment for one year
A.3 & A4	394 r/w. 34 IPC	Rigorous imprisonment for 10 years and to pay a fine of Rs.3000/-, in default, to undergo rigorous imprisonment for one year

Now, challenging the above said conviction and sentence, the appellants/accused are before this Court with this Criminal Appeal.

2. When the matter was taken up for hearing, the learned counsel appearing for the appellants would submit that pending appeal A3 in this case, Loganathan S/o. Kalia Perumal died on 31.03.2017. A memo along with death certificate has been filed to that effect. Since A3 died pending appeal, the appeal against A3 is dismissed as abetted.

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

P.W.1 is the de-facto complainant. He is the resident of Vellore and he is doing business in spare parts. On 11.04.2005 at about 10.00 p.m., while he was returning home in his cycle, near basket ball ground at the Vellore Fort, all the four accused waylaid him and restrained him, A1 attacked him with hands and A2 attacked him with a beer bottle on his head and A3 took Rs.1000/- from him and A4 robbed the cell phone, P.W.1, fell down and he raised alarm. Immediately, the general public came there, then all the accused ran away. P.W.2 took him to the police station and lodged a complaint.

4. P.W.16 Inspector of Police, working in the respondent police station, on receipt of the complaint registered a case in Crime No.389 of 2005 for an offence under Section 394 IPC and prepared First Information Report (Ex.P.12). Then he sent P.W.1 for treatment along with memo.

5. P.W.14, Doctor, working in the Government Hospital, Vellore, examined him and found the following injuries:-

- " 1. 1 x 2 cm laceration in injury below eyelid right eye.
2. Peri corneal ...haematoma right eye (redness of eye)
3. Peri corneal swelling right eye.
4. Small abrasion over scalp"

6. P.W.16, commenced the investigation and proceeded to the scene of occurrence and prepared Observation Mahazar (Ex.P.12) and Rough Sketch (Ex.P.13) in the presence of the witnesses and recorded the statements of the witnesses. P.W.16, then proceeded to the hospital and recorded the statement of P.W.1; On 12.04.2005, at about 5.00 a.m., he arrested A1 and on such arrest, he has given a voluntary confession. After arrest of A2, he has also given a voluntary confession and A3 was also arrested on the same day at about 6.45 a.m., and on such arrest he has also given a voluntary confession, and P.W.16 recovered a sum of Rs.500/- under a cover of Mahazar Ex.P.14. A4 was arrested at about 7.30 a.m., and has given a voluntary confession, based on his confession, he recovered a Nokia cellphone under the cover of Mahazar (Ex.P.15). He recorded the statement of Doctor and on 26.04.2005, he arranged for a test identification parade.

7. P.W.13 Judicial Magistrate No.I, Vellore conducted a test identification parade, in which, P.Ws.1, 2 3 identified the accused. After completion of investigation, he handed over the investigation to P.W.17. P.W.17 continued the investigation,

recorded the further statement of the other witnesses and after completion of investigation, he laid charge sheet against the accused.

8. Based on the above materials, the trial Court framed the charges as mentioned in paragraph one of the judgment and the accused denied the same. In order to prove its case, on the side of the prosecution, as many as 17 witnesses were examined and 15 documents were exhibited, besides 2 M.O.s. marked.

9. Out of the witnesses examined, P.W.1 is the victim in this case. According to him, on 09.04.2005, at about 10.00 p.m., while he was returning home through Vellore Fort road, near a basket ball ground, all the accused waylaid him and A1 attacked him with hands and caused injuries, and A2 attacked him with beer bottle on his head and A3 took a sum of Rs.1000/- and A4 robbed a cell phone belongs to him. Subsequently, he identified the accused in the test identification parade. Thereafter, he went to the police station and lodged a complaint.

10. P.W.2 is a Ward Councillor. He is an eye-witness to the occurrence. According to him after hearing the noise, he rushed to the scene of occurrence there and saw the accused attacking P.W.1, and he took the victim to police station, then admitted him in the hospital, he also identified the accused in the test identification parade. P.W.3 is another eye-witness. He has also identified the accused in the test identification parade. P.W.4, is yet another eye-witness, saw all the four accused attacking P.W.1. P.W.5 is a person working in the TASMACH shop. According to him, all the accused purchased beer bottles from his shop at about 8.00 p.m. Thereafter, at about 11.00 p.m., they came again and purchased the liquor bottles. P.W.6, is a person who has given a mobile phone bearing no.9443811823 to P.W.1. P.W.7 running a small hotel at Vellore. According to him, all the accused, came to his hotel at about 10.00 p.m., and they had a dinner. P.W.8 is working in the Electricity Board, Vellore Municipality and he speaks about the solar light provided at the scene of occurrence. P.W.9 is a witness to the Observation Mahazar. P.W.10 is also another witness to the Observation mahazar and Rough Sketch. P.W.11 is a witness to the recovery of Rs.500/- and the confession of the accused, but he turned hostile. P.W.12, another witness to the recovery of M.O.s1 and 2 has also turned hostile. P.W.13 is a Judicial Magistrate No.I, Vellore, conducted test identification parade. According to him, all the 3 witnesses have identified the accused. P.W.14 is a Doctor, who admitted P.W.1 in the hospital and issued Accident Register, Ex.P.10. P.W.15 is another Doctor, who examined A2, who also suffered injuries in this crime, at the time of occurrence and has given Accident

Register (Ex.P.11) According to him he suffered injuries on his neck. P.W.16, Inspector of Police, who registered the complaint, conducted investigation and arrested the accused and recovered the stolen articles and then handed over the investigation to P.W.17. Then, P.W.17, Inspector of Police, who continued the investigation and after recording the statement of other witnesses, he laid charge against the accused.

11. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., they denied the same as false. However, they did not examine any witness or mark any documents.

12. Having considered all the above materials, the trial Court convicted the accused as stated in the first paragraph of this judgment. Challenging the same, the appellant/accused is before this Court with this Criminal Appeal.

13. I have heard Mr.T.R.Radhakrishnan, learned counsel appearing for the appellants and Mr. R.Selvam, Government Advocate, appearing for the respondent and perused the materials available on record carefully.

14. The learned counsel appearing for the appellants would submit that P.Ws.2 to 4 are said to be eye-witnesses to the occurrence, but they cannot be eye-witnesses as P.W.1 has clearly stated that all the witnesses came to the scene after the occurrence. P.W.1 in his evidence categorically stated that P.W.2 came to the scene only after the occurrence. Hence, the evidences of the witnesses cannot be relied upon for convicting the appellants. So far as P.W.1 is concerned, even though a sum of Rs.500/- and mobile phone are said to have been recovered from the accused both the mahazar witnesses have turned hostile. Hence, the recovery cannot be believed. The learned counsel would further submit that the test identification parade was not conducted properly and the identity of the accused was already shown to P.W.1. He would further submit that the arrest and recovery of the alleged stolen articles were not proved by the prosecution and hence, the appellants cannot be convicted for the offences under Sections 392 and 394 IPC and there is no case is made out for convicting the accused for the offence under Section 394 IPC.

15. Per contra, the learned Government Advocate would submit that P.W.1 is the victim in this case, he has suffered injuries and the same has been proved by examining the doctor and marking the accident register. Subsequently, the stolen articles were recovered from the accused and P.W.1 has also identified the stolen properties and thereafter, the test

identification parade was conducted immediately after the occurrence, in which P.W.1 has identified all the four accused. Even though the mahazar witnesses have turned hostile, from the materials available on record, the prosecution has clearly proved the recovery from the accused. Hence, once the stolen articles recovered from them immediately after the occurrence, the presumption under Section 114(a) of Evidence Act, will come to play and that it has to be held that it is only the appellants who have stolen the property. Even though P.Ws.2 to 4 were not considered as eye-witnesses, the evidence of P.W.1., which is reliable and trustworthy, is sufficient to convict the appellants. Considering all those materials, the trial Court rightly convicted the appellants and there is no reason to interfere with the judgment of the Court below.

16. I have considered the rival submissions and perused the materials available on records carefully.

17. P.W.1 is the victim in this case, according to him, on the date of occurrence while he was coming back to his house, all the accused way laid him and A1 attacked him with hands and caused injuries near the eyes and A2 attacked him with beer bottle on his head and caused injuries. Then A3 stolen a sum of Rs.1000/- and A4 stolen the mobile phone. Immediately, he went to the police station and filed a complaint, Ex.P.1., in which, he has clearly stated that four unknown persons had attacked him and stolen a sum of Rs.1000/- and a nokia cell phone and based on his complaint, a crime was registered at about 11.00 p.m., and then he was sent for treatment and P.W.14 who admitted him in the hospital found a lacerated injuries on the right eye lid and swelling on the right eye and injuries on the head. Then, on the next day morning at about 5.00 a.m., to 7.30 a.m., all the accused were arrested and a sum of Rs.500 was recovered from A3 and A4, which was marked as M.O.1 and the properties also identified by P.W.1, that it belongs to him. There after on 03.05.2005, a test identification parade has been conducted by P.W.13, Judicial Magistrate No.I, Vellore, in which, P.W.1 has clearly identified all the four accused. Hence, it is clearly established that it is only these accused attacked P.W.1 and stolen the money and mobile phone. Since the stolen articles were recovered from the accused immediately after the occurrence, under Section 114(a) of Evidence Act, the burden is on the accused to explain the possession of the stolen articles. But there is no plausible explanation on the side of the appellants/accused for the same.

18. It is the contention of the learned counsel for the appellants that P.W.2 to P.W.4 are not the eye-witnesses to the occurrence and their evidence cannot be relied upon. A perusal of Ex.P.1, Complaint and the evidence of P.W.1, it could be seen that all the witnesses only came to the scene after the

occurrence, there is no chance for them to see the accused. P.W.1 in the cross examination has stated that P.W.2 only came after the occurrence and ran away from the scene of occurrence. P.W.3 in his cross examination has also admitted that before he went to the scene of occurrence, all the accused had left the place. P.W.4 has also saw P.W.1 only after the occurrence. In the above circumstances, P.Ws.2 to 4 cannot be the eye-witnesses to the occurrence. But, P.W.1, the victim in this case has categorically narrated the entire occurrence and the evidence is also corroborated by the other evidence and his evidence is more reliable, hence there is no reason to disbelieve the evidence of P.W.1 and the same is alone sufficient to convict the appellants.

19. The next contention of the learned counsel for the appellants is that test identification parade was not properly conducted after the occurrence. The test identification parade was conducted by P.W.13, a Judicial Magistrate and the learned Judicial Magistrate has followed all the legal procedures conducted test identification parade, in which, P.W.1 has clearly identified all the accused. Hence, there is no reason to disbelieve the test identification parade conducted by the learned Magistrate.

20. So far as the contention of the learned counsel for the appellants that the mahazar witnesses turned hostile and hence the recovery is not proved. The occurrence took place on 11.04.2005 and the accused were arrested on the next day and the mobile phone was also recovered from them subsequently which was also identified by P.W.1. Hence, I am of the considered view that merely because the witness for the recovery of the material objects turned hostile, on that ground the prosecution case cannot be disbelieved. Considering all the materials, I am of the considered view that the prosecution clearly established the guilt of the accused and the trial Court also considering all those materials, rightly convicted the appellants and there is no reason to interfere with the same.

21. So far as the quantum of sentence is concerned, the learned Government Advocate appearing for the respondent would submit that the appellants are all habitual offenders and number of criminal cases are pending against them. In the above circumstances, there is no reason to interfere with the conviction and sentence imposed on the appellants and the criminal appeal fails and deserves to be dismissed.

22. So far as paying the fine amount, the learned counsel for the appellants would submit that they are poor persons and they are not able to pay the fine amount.

23. In the result, the Criminal Appeal is dismissed and the conviction and sentence imposed on the appellants are confirmed. The appellants are directed to pay a sum of Rs.1000/- in toto for all the offences instead of each of the offences imposed by the trial Court. The appeal against the 3rd appellant/A3 is dismissed as abated.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1. The Assistant Sessions Judge,
Sub court, Vellore.

2.The Inspector,
North Police Sttion,
Vellore,

3.The Judicial Magistrate No.4,
Vellore.

4.The Chief Judicial Magistrate,
Vellore.

5.The Superintendent,
Central Prison,
Vellore.

6.The Principal Sessions Judge,
Vellore.

7.The District Collector,
Vellore.

8.The Public Prosecutor,
High Court, Madras.

+2cc to Mr.T.R.Radhakrishnan, Advocate sr.no.84085

Cr1.A.No.403 of 2007

ks(co)
nr 23/05/2018