

Bail Slip

The Accused/Appellant namely Mariyappan @ Karukkan, was directed to be released on bail as per the order of this court dated 14.12.2007 made in Crl.M.P. No. 2/2007 in Crl.A.No.770 of 2007, and the accused/Appeellant namely Muthu @ Kottimuthu was directed to be released on bail as per order of this court dated 23.11.2007 made in Crl.M.P. No.1/2007 in Crl.A.No.770 of 2007.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.08.2017

CORAM:

THE HON'BLE MR.JUSTICE C.T. SELVAM

Crl.A.No.770 of 2007

1.Madurai @ Perumal
S/o.Kirshnakonar

Muthu (a) Kottimuthu (a) Muthukumar
S/o.Gurusamy

Mariyappan (a) Karukkan
S/o.Narayannan ..Appellants/Accused

Vs.

State represented by
Inspector of Police,
El, Mylapore Police Station,
Chennai. ..Respondent/Complainant

Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code against the judgment of learned Additional District and Sessions Judge, Fast Track Court IV, Chennai, passed in S.C.No.264 of 2006 on 31.07.2007.

For Appellants : Mr.P.Pugalenthir

For Respondent : Mr.V.Arul

Additional Public Prosecutor

J U D G M E N T

This appeal arises against judgment of learned Additional District and Sessions Judge, Fast Track Court IV, Chennai, passed in S.C.No.264 of 2006 on 31.07.2007.

2. Prosecution case is that on 21.01.2003 at about 12.00 p.m., accused 1 to 5 conspired and planned to commit theft in the house of PWs.1 and 5. Pursuant thereto, first accused stood outside the house and accused 2 to 5 went inside with knives, tied the hands of PW-5 and at knife point, threatened PW-1 and children and took jewels, cash and other articles in the house. A case was registered in Crime No.176 of 2003 on the file of respondent for offences u/s.397 and 454(2) IPC. Upon completion of investigation, a charge sheet was filed informing commission of offence u/s.395 IPC against first accused and offence u/s.395 r/w.397 IPC against accused 2 to 5 before learned XVIII Metropolitan Magistrate, Chennai. On committal, the case was tried in S.C.No.264 of 2006 on the file of learned Additional District and Sessions Judge, Fast Track Court IV, Chennai. Before trial Court, prosecution examined 8 witnesses and marked 17 exhibits and 13 material objects. None were examined on behalf of defence nor were any exhibits marked.

3.1. PW-1/complainant spoke to offence committed by accused, informing the same to police over phone, preference of Ex.P1 - complaint, and of identifying accused 3, 4 and 5. PW-1 identified accused 1, 3, 4 and 5 but not second accused. PW-1 also deposed that she identified some of the stolen articles and knives used by accused at the police station.

3.2. PW-2, husband of PW-1, spoke to his being informed about the occurrence by PW-1 and of preference of complaint by PW-1.

3.3. PW-3 spoke to obtaining of his signature and another in Ex.P2, observation mahazar and Ex.P3, seizure mahazar. PW-4 has also spoken on the same lines.

3.4. PW-5, mother-in-law of PW-1, spoke to the acts of the accused and their tying her hands using bed sheets.

3.5. PW-6, a neighbour of PW-1, deposed that he went to the house of PW-1 to wash his hands, continuously called PW-1 and since there was no response, entered the house and saw PWs.1 and 5 and two children with their mouths covered and that when he started shouting 'thief thief', all the accused ran away. PW-6 deposed to members of the public chasing the accused and that third accused was caught. PW-6 also deposed to informing police over phone.

3.6. PW-7, Inspector of Police, spoke to registration of case in Crime No.176 of 2003 on the file of respondent for offences u/s.397 and 454 (2) IPC and taking up investigation. PW-7 spoke to visiting the place of occurrence, preparation of mahazars, examination of witnesses, arrest of accused, recording of confessions of accused and seizure of material objects. PW-7

also spoke to handing over the case papers to PW-8, Inspector of Police, who, on completion of investigation, filed a charge sheet informing commission of offences u/s.397 and 454 (2) IPC before learned XVIII Metropolitan Magistrate, Chennai.

4. On appreciation of materials before it, trial Court, under judgment dated 31.07.2007, while acquitting second accused, convicted accused 1, 3, 4 and 5 for offences u/s.392 r/w 397 IPC and sentenced each of them to 7 years R.I. and fine of Rs.1,000/- i/d 6 months S.I. for each of the offences. Trial Court directed that sentences run concurrently. Against such finding, the present appeal has been filed.

5. Heard learned counsel for appellants and learned Additional Public Prosecutor.

6. Appellants are accused 3, 4 and 5. It is brought to notice that accused 1 and 3 have served the sentence imposed on them. Second accused has been acquitted by trial Court. The prosecution case suffers the following infirmities:

While according to the charge, first accused stood outside the house of PW-1 requiring the other accused to enter and do the damage, it is the evidence of PW-1 that first accused entered the house. No test identification parade has been conducted. PW-1 has admitted to having identified accused 3, 4 and 5 at the police station on 01.02.2003. She has been examined in chief on 23.04.2007. The presence of PW-1, her daughter and mother-in-law at the police station at 12.00 a.m. on 31.12.2003 is admitted by PW-7, investigation officer. PW-4, who has been examined to speak to the arrest of and recovery from accused 3 to 5, has turned hostile. Other mahazar witnesses have not been examined. PW-6, who has been examined to speak to his immediate presence at the scene and at the time of occurrence and of seeing PWs.1, 5 and others having been made to sit down in a row with their mouths sealed, has, in cross, admitted to his not having been examined by the police and informed that he had not tendered any statement. Trial Court has taken note of the position that in respect of an occurrence on 21.01.2003, all Section 161(3) Cr.P.C. statements have reached the Court only of 25.10.2004. The above informed bristling infirmities in the prosecution case makes it necessary that appellants be afforded the benefit of doubt.

7. The Criminal Appeal shall stand allowed. The conviction and sentence passed by learned Additional District and Sessions Judge, Fast Track Court IV, Chennai, passed in S.C.No.264 of 2006 on 31.07.2007, are set aside and appellants are acquitted of all charges. Fine amount, if any, paid shall be refunded. Bail bond(s), if any, executed shall stand cancelled.

Before parting with the case, it is necessary to inform why identification of the accused by witnesses in Court cannot be taken at face value when there is evidence to indicate that accused persons had been shown to witnesses prior to their examination in Court. In *Vijayan v. State of Kerala* [1999 SCC (Cri) 378], the Supreme Court held thus:

'6. ... This test identification parade was discarded by the learned Sessions Judge as it was apparent from the evidence of PW 3 that the photograph of accused Vijayan was shown to her before the test identification parade and further, just before she was entering the sub-jail to identify the accused, somebody had told her to identify the tallest man shown in the parade. The High Court also agreed with the conclusion of the learned Sessions Judge and did not rely upon the same but queerly enough, the High Court relied upon the evidence of PW 3 as she identified the accused in court after so many years on the ground that corroboration to the same is available. This conclusion on the face of it is unsustainable. Since the accused Vijayan was not known to PW 3 and the test identification parade having been discarded, the substantive evidence of identification in the Court after so many years cannot be relied upon. ...'

In *D.Gopalakrishnan v. Sadanand Naik and others* [2006 (1) SCC (Cri) 600], the Supreme Court has observed as follows:

'7. There are no statutory guidelines in the matter of showing photographs to the witnesses during the stage of investigation. But nevertheless, the police is entitled to show photographs to confirm whether the investigation is going on in the right direction. But in the instant case, it appears that the investigating officer procured the album containing the photographs with the names written underneath and showed this album to the eyewitnesses and recorded their statements under Section 161 CrPC. The procedure adopted by the police is not justified under law as it will affect fair and proper investigation and may sometimes lead to a situation where wrong persons are identified as assailants. During the course of the investigation, if the witness had given the identifying features of the assailants, the same could be confirmed by the investigating officer by showing the photographs of the suspect and the investigating officer shall not first show a single photograph but should show more than one photograph of the same person, if available. If the suspect is available for identification or for video identification, the photograph shall never be shown to

the witness in advance.'

Of particular significance is the last line : 'If the suspect is available for identification or for video identification, the photograph shall never be shown to the witness in advance.' This observation would apply with equal force to the witness seeing the suspect at the police station. In both circumstances, the possibility of witness wrongly identifying the suspect as the assailant in Court at the instance of the investigating agency looms large and hence, is to be avoided. Of course, there would be a rare case when despite prior knowledge, the identification of the accused in Court, may be acceptable but then it becomes the duty of the Court to inform why it is so.

-s/d-

Assistant Registrar (CS-II)

True Copy

Sub-Assistant Registrar

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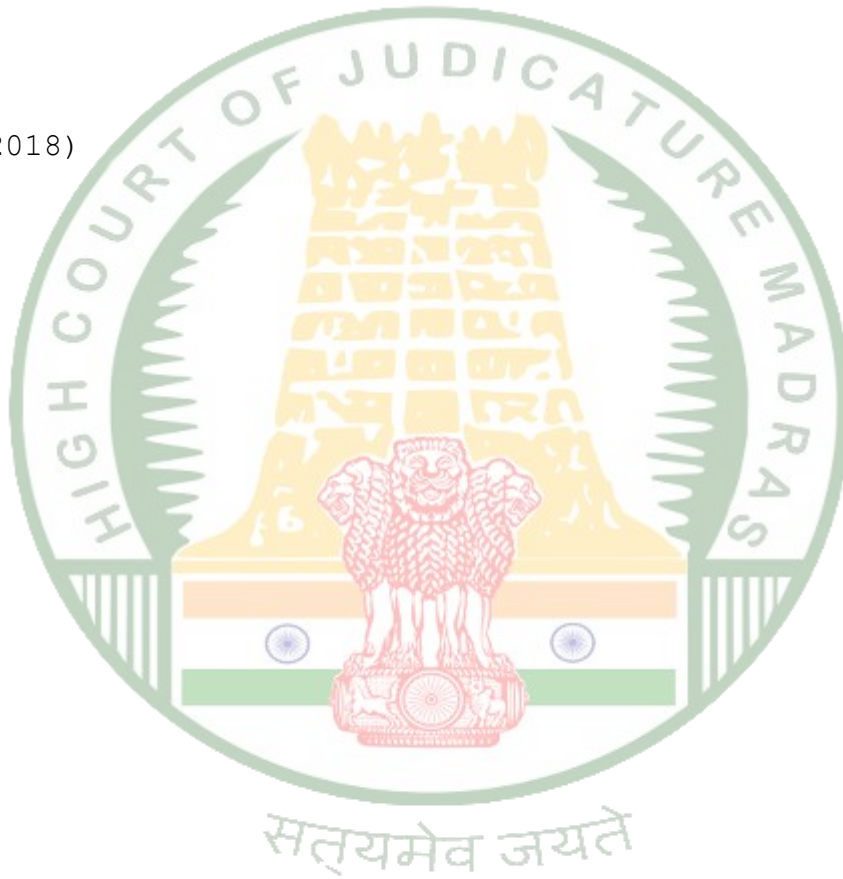
1. The Additional District and Sessions Judge,
Fast Track Court IV, Chennai.
2. The Inspector of Police,
E1, Mylapore Police Station,
Chennai.
3. The Metropolitan Magistrate
No. XVIII, Saidapet, Chennai.
4. The Chief Metropolitan Magistrate
Egmore, Chennai.
5. The Commissioner of Police
Mylapore, Chennai 4.
6. The Superintendent, Central Prison
Puzhal, Chennai.
7. The Record Keeper
Criminal Section
High Court, Madras 104.

8. The Public Prosecutor,
Madras High Court, Chennai.

+1 CC to Mr.P. Pugalenthil, Advocate sr 60594.

Crl.A.No.770 of 2007

LRS (CO)
SP (28/03/2018)



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