

Bail Slip

The Appellants/Accused in Crl.A. 93/2011 viz., Anandan , Siva @ Viswalingam and Prabhakaran @ Meesai Prabhakaran were directed to be released on bail as per order dated 17.02.2011 in M.P. 1/2011 in Crl.A.No.93 of 2011 on the file of the High Court,Madras.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.11.2018

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Crl.A.Nos.608 of 2009 and 93 of 2011
and M.P.No.1 of 2009

1.Anandhan
2.Siva @ Viswalingam
3.Prabhakaran @ Meesai Prabhakaran

..Appellants in Crl.A.No.608/2009

1.Anandan
2.Siva @ Viswalingam
3.Prabhakaran @ Meesai Prabhakaran

..Appellants in Crl.A.No.93/2011

Vs.

State by
The Inspector of Police
R-6 Kumaran Nagar Police Station
Chennai 1.

Respondent in both Crl.Appeals

Criminal Appeals filed under Section 374(2) Cr.P.C. to set aside the judgment passed against the appellants in S.C.No.221/2008 dated 10.11.2008 by the Additional District Sessions Judge, Fast Track Court No.I, Chennai and acquit them.

For Appellants : Mrs.P.V.Rajeswari
Legal Aid Counsel

For Respondent : Mrs.Kritika Kamal, P.
Govt. Advocate (Crl.Side)

J U D G M E N T

These Criminal Appeals have been preferred against the judgment dated 10.11.2008 passed in S.C.No.221 of 2008 by the Additional District Sessions Judge, (Fast Track Court No.I),

Chennai.

2. On the complaint [Ex.P.1] lodged by Antony Udaykumar [P.W.1], Choudry [P.W.7] the Inspector of Police, R6 Kumaran Nagar Police Station, registered a case in Cr.No.2275 of 2007 under Section 395 IPC and prepared the printed FIR [Ex.P.10]. After completing the investigation, he filed final report against Anandan [A1], Karthik [A2], Palanichamy [A3], Siva [A4] and Prabhakaran [A5] for the offence under Section 395 r/w 397 IPC before XXIII Metropolitan Magistrate and the same was taken on file as PRC No.10 of 2008. On the appearance of the accused, the provisions of Section 207 Cr.P.C. were complied with and the case was committed to the Court of Session. The case was taken on file as S.C.No.221 of 2008 and was made over to the Additional Sessions Court, Fast Track Court, Chennai for trial. The trial Court framed the following charges against the accused:

A1 to A4	Section 395 r/w 397 r/w 34 IPC
A5	Section 395 r/w 397 r/w 34 IPC, 394 and 506(ii) IPC

When questioned, the accused pleaded 'not guilty'.

3. To prove the case, the prosecution examined 7 witnesses, marked 11 exhibits and one material object. When the accused were questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against them, they denied the same. On behalf of the accused, no witness was examined nor any document marked.

4. After considering the evidence on record and hearing either side, the trial Court, by judgment dated 10.11.2008 in S.C.No.221 of 2008, convicted all the accused for the offence under Section 395 r/w 397 IPC and sentenced them to undergo 7 years Rigorous Imprisonment, challenging which, while Anandan [A1], Siva [A4] and Prabhakaran [A5] filed CrI.A.Nos.608 of 2009 and 93 of 2011, Karthik [A2] and Palanichamy [A3] filed CrI.A.No.833 of 2008.

[a] In CrI.A.No.833 of 2008, this Court passed the following order on 22.11.2018:

"This criminal appeal has been preferred by Karthik (A2) and Palanichamy (A3), challenging their conviction and sentence in S.C.No.221 of 2008 imposed by the Additional Sessions Judge (FTC No.1), Chennai, by judgment dated 10.11.2008.

2 During the pendency of this appeal, it appears that Karthik (A2) was allegedly murdered by Palanichamy (A3) on 23.01.2012, in connection with which, a case in J4 Kotturpuram P.S. Cr. No.96 of 2012 was registered under Sections 147,148, 301 and

302 read with Section 34 IPC. Thereafter, on 17.04.2013, Palanichamy (A3) was allegedly murdered to avenge the death of Karthik (A2), in connection with which, a case in J8, Neelangarai P.S. Cr. No.83 of 2013 was registered on 07.06.2013 under Section 302 IPC.

3 In view of the fact that both Karthik (A2) and Palanichamy (A3), who are the appellants in this appeal are no more, this criminal appeal abates in terms of Section 394(2) Cr.P.C., inasmuch as, none of the relatives of the deceased has, so far, filed any application to continue with the appeal.

In the result, this criminal appeal is dismissed as abated."

[b] In Crl.A.Nos.608 of 2009 and 93 of 2011, this Court passed the following order on 22.11.2018:

"Anandhan (A1), Siva (A4) and Prabhakaran (A5) were convicted and sentenced in S.C. No.221 of 2008 on 10.11.2008 by the Additional District and Sessions Judge (Fast Track Court No.I), Chennai. Challenging the said conviction and sentence, Anandhan (A1), Siva (A4) and Prabhakaran (A5) approached M/s. K.J. Saravanan and J.N. Naresh Kumar, advocates, for filing an appeal. Accordingly, the said counsel filed Crl.A. Sr.No.33565 of 2009 with a delay of 243 days. For condonation of delay, M.P. No.1 of 2009 in Crl.A. Sr.No.33565 of 2009 was filed and this Court, by order dated 07.10.2009, condoned the delay and directed the Registry to number the appeal. Accordingly, the appeal was numbered as Crl.A. No.608 of 2009.

2 Since the trio did not get suspension of sentence and bail in Crl.A.No.608 of 2009, they approached one Mr. Kalyani, advocate, to file a fresh appeal. Believing them, Mr. Kalyani filed a fresh appeal in Crl.A.Sr. No.3978 of 2011 with a delay of 746 days. A petition in M.P.No.2 of 2011 in Crl.A.Sr. No.3978 of 2011 was filed for condonation of delay under Section 5 of the Limitation Act. This Court, vide order dated 11.02.2011, condoned the delay of 746 days and directed the Registry to number the appeal. Accordingly, the appeal was numbered as Crl.A.No.93 of 2011. Thereafter, a petition in M.P. No.1 of 2011 in Crl.A.No.93 of 2011 for suspension of sentence and bail was filed on behalf of the trio by Mr. Kalyani, advocate and

this Court, by order dated 17.02.2011, suspended the sentence and released them on bail.

3 Now, it has come to the notice of the Registry that, for the same accused in respect of same Sessions Case, two appeals, viz., Crl.A.Nos.608 of 2009 and 93 of 2011 are pending. When both appeals were listed for hearing, Mr. Vijendran, advocate appearing on behalf of Mr. Kalyani, advocate on record in Crl.A. No.93 of 2011, submitted that Mr. Kalyani has been suspended from practice by the Bar Council of India and therefore, he cannot proceed with the case. He also brought to the notice of this Court that way back on 29.07.2013, Mr. Kalyani has given a letter to the Deputy Registrar (Crl. Side), High Court, stating that he did not know that his clients had filed Crl.A. No.608 of 2009 through another advocate and on coming to know of that, he is withdrawing his appearance in Crl.A. No.93 of 2011.

4 Mr. Jayakumar, learned counsel representing M/s.K.J.Saravanan and J.N. Naresh Kumar, submitted that since the trio had engaged Mr.Kalyani without their knowledge and had filed Crl.A. No.93 of 2011, it is deemed that they are not holding the brief of the said accused now.

5 The aforesaid facts do disclose a very sorry state of affairs in the administration of criminal justice system and requires immediate attention. However, the fact remains that the accused had played truant with this Court by engaging two advocates at different points of time and had secured bail.

6 In such view of the matter, this Court appoints Mrs.P.V.Rajeswari (Enrolment No.784 of 1990), an advocate who has 28 years of experience in the Criminal Side, as Legal Aid counsel, for the appellants to proceed further with the appeals.

7 Today, Mr. G.S. Pushparaj, Inspector, R6 Kumaran Nagar Police Station is present.
Post on 26.11.2018 for final disposal."

[c] The orders dated 22.11.2018 extracted above would show the tactics adopted by Anandan [A1] Siva [A4] and Prabhakaran [A5] in filing two appeals through different counsel and getting the relief of bail from this Court.

5. Heard Mrs.P.V.Rajeswari, learned counsel appearing for the accused and Mrs.Kritika Kamal, P., learned Government Advocate (Crl.Side) appearing for the respondent-State.

6. Mrs.P.V.Rajeswari, learned counsel for the accused made the following submissions:

[a] The conduct of Antony Udaykumar [P.W.1] in not approaching his owner or the police immediately does cause a serious doubt on the very foundation of the prosecution case.

[b] In his cross-examination, Antony Udaykumar [P.W.1] has stated that he had merely signed the complaint that was prepared by the police and that he does not know the accused.

[c] No Test Identification Parade was conducted to identify the accused.

[d] The recovery of the vehicle that was allegedly used by the accused was by a different police and not by the Investigating Officer.

[e] The witnesses who were examined to prove the recovery of the vehicle have turned hostile and hence, the recovery is suspicious.

[f] The police have failed to recover the knife that was allegedly used by Prabhakaran [A5] in the offence and therefore, the conviction under Section 397 IPC is unsustainable.

[g] There is no material to corroborate the testimony of Antony Udaykumar [P.W.1].

[h] The confession statement of the accused have gone to the Court belatedly.

[i] The case at hand was concocted to detain the accused under the Tamil Nadu Goondas Act [Act 14 of 1982].

7. Per contra, the learned Government Advocate [Crl.Side] refuted the contentions.

8. This Court gave its anxious thought to the rival submissions.

9. To appreciate the rival submissions, it may be necessary to appraise the evidence of Antony Udaykumar [P.W.1]. Antony Udaykumar [P.W.1], in his examination-in-chief, has stated that he hails from Myladuthurai; he was employed by Gopinath [P.W.2] as driver for his travels car; on 12.08.2007, around 4.30 p.m., a person by name Prabhakaran [A5] approached him; Prabhakaran [A5] introduced himself as a friend of his boss Gopinath [P.W.2] and requisitioned the services of the travels car; he contacted his boss Gopinath [P.W.2] who permitted him to take the trip; Prabhakaran [A5] got into the car and after the car went to a

certain distance, 4 other persons got into the car; he was asked to go to Tiruvanmiyur; at Tiruvanmiyur, he was asked to wait and all the five got down from the car and went somewhere and returned in 1/2 an hour; he was asked to proceed to MGR Nagar by Prabhakaran [A5] and as he was going via Kasi Theatre bridge, they asked him to stop the car saying that they wanted to attend the nature's call; all the 5 got down and Prabhakaran [A5] whipped out and brandished a knife at his face and pulled him out of the car; he took Rs.450/- from his pocket, threatened him and asked him to run for his life; Prabhakaran [A5] and the others got into the car and fled; after the incident, he was in shock and fearing his boss, he went to his native place Myladuthurai and remained there; on 17.08.2002, Gopinath [P.W.2] came to his house in the village and at that time, he told him about the incident; then, they both came to Chennai and lodged a complaint (Ex.P.1) to the Inspector of Police, R6 Kumaran Nagar Police Station, who took up the investigation of the case as stated above; he was examined-in-chief on 09.07.2008 and on that date, Siva [A4] and Prabhakaran [A5] cross-examined him and the others did not. He was recalled on 13.10.2008 and was subjected to cross-examination. In the cross-examination, as contended by Mrs.P.V.Rajeswari, he has stated that the complaint was drafted in the Police Station and that only in the Police Station, he had seen the accused and not before that.

10. At the first blush, there appeared to be some force in the submission of Mrs.P.V.Rajeswari that a false case could have been foisted on the accused. But, on a reading of the evidence of Gopinath [P.W.2], the cloud got cleared. Gopinath [P.W.2], in his evidence, has stated that he is an Engineer by profession; he purchased the Tata Indigo car bearing Registration No.TN-01-W-9506 for his travel business and had appointed Antony Udaykumar [P.W.1] as driver; on 12.08.2007, Antony Udaykumar [P.W.1] contacted him around 4.30 p.m. and told him that one Prabhakaran [A5] has approached him for hiring the car and that he permitted him to take the trip; thereafter, there was no news about the driver or the car for 4 days and hence, on 17.08.2007, he went to Antony Udaykumar's [P.W.1] house in Myladuthurai, where he found him in his house in a state of shock; Antony Udaykumar [P.W.1] told him about the events and so, they both came to Chennai and lodged a complaint with R6 Kumaran Nagar police for necessary action; in the FIR [Ex.P.10], in column 7, the name of the suspects have been shown as Prabhakaran and 4 others; Antony Udaykumar [P.W.1] did not know the name of the other four accused who travelled with Prabhakaran [A5] in the car and therefore, he did not give their names; in the cross-examination of Gopinath [P.W.2], he stated that he does not personally know as to how the incident had taken place and that he knew it only through his driver Antony Udaykumar [P.W.1]; it was suggested to him that he had not employed Antony Udaykumar [P.W.1] at all, which he denied.

11. While investigation was being conducted by Choudhry [P.W.7], all the accused were apprehended by one Akbar Ali on 20.08.2007 at 17.45 hrs. in connection with another case of robbery and they were produced before the Inspector of Police, R7 K.K.Nagar Police Station. In respect of that offence, a case in R7 K.K.Nagar Police Station Cr.No.2116 of 2007 was registered under Sections 341, 294(b), 336, 353, 397 and 506(ii) IPC by Sekar [P.W.6], the Inspector of Police, R7 K.K.Nagar Police Station. Sekar [P.W.6], in his evidence, has stated that after he registered FIR in Cr.No.2116 of 2007, he interrogated the accused and learnt about the involvement of the accused in the present case Cr.No.2275 of 2007 on the file of R6 Kumaran Nagar Police Station.

12. Sekar [P.W.6] recorded the confession statement of Prabhakaran [A5] and the admissible portion of the confession statement was marked as Ex.P.6. Pursuant to the disclosure made by Prabhakaran [A5], the Tata Indigo car bearing registration No.TN-01-W-9506 was recovered under the cover of mahazar [Ex.P.9] in the presence of witnesses Subramani [P.W.4] and Ramesh [not examined]. Thus, the recovery of the car is pursuant to the disclosure made by Prabhakaran [A5], which is relevant under Section 27 of the Evidence Act. Though the recovery witness Subramani [P.W.4] turned hostile, the recovery, per se, will not become suspect, since the same has been satisfactorily proved through the evidence of the Investigating Officer. After the recovery of the car, Gopinath [P.W.2] approached the jurisdictional Magistrate and produced the necessary records to show that he is the owner of the car and obtained interim custody of the same under Section 451 Cr.P.C. Gopinath [P.W.2], in his evidence, has stated this fact also and the car was brought to the trial Court and was marked as M.O.1. The accused have not suggested to Gopinath [P.W.2] that he is not the owner of the car. Thus, the prosecution have satisfactorily proved that the Tata Indigo car bearing Registration No.TN-01-W-9506 belonged to Gopinath [P.W.2]. If the police had wanted to foist a case on the accused, they would not have taken a circuitous route of involving the car of Gopinath [P.W.2]. That apart, as rightly pointed out by Mrs.Krithika Kamal, learned Government Advocate [Crl.Side], the case in R6 Kumaran Police Station was registered on 18.08.2007, whereas, the case in R7 K.K.Nagar Police Station was registered only on 20.08.2007 after the accused were caught by Akbar Ali and public when they committed robbery and were handed over to the police.

13. Mrs.P.V.Rajeswari, learned counsel contended that the identification of the accused at the Police Station by Antony Udaykumar [P.W.1] coupled with the fact that the Test Identification Parade was not conducted would impeach the

credibility of the testimony of Antony Udaykumar [P.W.1]. This is not the case where the offence was committed in a trice. It is the specific case of Antony Udaykumar [P.W.1] that all the five accused got into his car, took him to Tiruvanmiyur, got down from the car and made him wait for 1/2 an hour, returned and asked him to proceed to MGR Nagar and while he was near Kasi Theatre, they once again got down from the car on the pretext of attending to nature's call; Prabhakaran [A5] brandished a knife and all the accused threatened him and forcibly took away the car. Thus, the facts show that Antony Udaykumar [P.W.1] had spent more than 3 hours with the accused and therefore, on these facts, it would not have been necessary for the police to conduct the Test Identification Parade. Similarly, seeing the accused in the Police Station will not per se vitiate his dock evidence. The identification of the accused in the Police Station is hit by Section 162 Cr.P.C. in the light of the judgment of the Supreme Court in Ramkishan Mithanlal Sharma vs. State of Bombay [AIR 1955 SC 104], which view was reiterated by the Supreme Court in Malkhansingh vs. State of Madhya Pradesh [(2003) 5 SCC 746], the relevant passage of which reads thus:

"7. . . . The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact." (Emphasis supplied)

The identification of the accused in the police station could not have been used as a corroborative piece of evidence qua dock identification. It is a trite law that identification parade proceedings conducted by the Magistrate will not suffer the bar under Section 162 Cr.P.C. and the same can be used for corroborating the testimony of the dock evidence of the identifying witness and nothing more. It is true that in the cross-examination of Antony Udaykumar [P.W.1], he has slipped here and there, but, his examination-in-cross should be appreciated bearing in mind the fact that his examination-in-chief was conducted on 09.07.2008 and cross-examination was done on 13.10.2008.

14. Section 154 of the Evidence Act was amended by Central Act 2 of 2006 with effect from 16.04.2006, by virtue of which, sub section 2 has been included, which permits this Court to accept that part of the evidence of a hostile witness, which is

compatible with the case of the prosecution, if the same is otherwise found to be credible. In this case, the evidence of Antony Udaykumar [P.W.1] has been adequately corroborated by the evidence of Gopinath [P.W.2] and therefore, this Court cannot reject the testimony of Antony Udaykumar [P.W.1].

15. As regards the contention of Mrs.P.V.Rajeswari that Antony Udaykumar [P.W.1] should have approached the police immediately, this Court is of the view that had he done so, the situation would have been ideal, but, in true life, ideal situations do not arise often. Antony Udaykumar [P.W.1] has explained that he hails from a village and has come to Chennai on employment and that he does not even have a place in Chennai and was provided accommodation by Gopinath [P.W.2] in the office; after the incident, he got scared and went to his village fearing dire consequences; Gopinath [P.W.2], in his evidence, has stated that since he did not hear anything from the driver for four days, he went to his village and found him there in a petrified state. In a given situation, not every person will react in a stereotyped manner. Reactions to a given situation will differ from individual to individual. Just because Antony Udaykumar [P.W.1], a driver ran to his native village after the incident, that will not, by itself, be a reason to disbelieve his testimony. Similarly, the failure of the police to recover the knife can, at the most, be called as remiss in the investigation and that also cannot be a reason to hold that no knife was used in the robbery.

In the result, this Court does not find any merit in the appeal and the same stands dismissed and the conviction and sentence imposed on 10.11.2008 in S.C.No.221 of 2008 by the Additional District Sessions Judge (Fast Track Court No.I), Chennai, stands confirmed. Consequently, connected miscellaneous petition is closed. This Court, places on record its appreciation to Mrs.P.V.Rajeswari, for taking up this case pro bono and presenting the same with erudition.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

gms

To

1.The Additional District Sessions Judge,
Fast Track Court No.I, Chennai .

2. The Judicial Magistrate No.XXIII, Chennai.
 3. The Superintendent, Central Prison, Puzhal, Chennai.
 - 4.The Inspector of Police
R-6 Kumaran Nagar Police Station, Chennai 1.
 - 5.The Public Prosecutor,
High Court, Madras.
 6. The Director General of Police
Mylapore, Chennai 4.
 7. The Section officer
Criminal Section, High Court, Madras 104.
- +1 CC to Mr.P.V.Rajeswari, Advocate sr 80771

Crl.A.Nos.608 of 2009 and 93 of 2011

SSD(CO)
SP(09/01/2019)



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