

Bail Slip

These Appellants/Petitioner viz, 1.Sekar S/o.Arunachala Gounder (A-1), 2.Mnimurugan S/o.Ayyakannu (A-2), 3.Seenu S/o.Kaliya Gounder (A-3) and 4.Ezhumalai S/o.Muthu Gounder (A-4) (A1 to 4 in S.C.NO.166 of 2009 dated 23/06/2010 on the file of the Principal Sessions Judge, Villupuram were directed to be released on bail as per order of this court dated 12/07/2010 in CrI.Mp.No.1 of 2010 in CrI.A.No.409 of 2010.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2018

DELIVERED ON : 13.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.409 of 2010

1.Sekar
2.Manimurugan
3.Seenu
4.Ezhumalai

... Appellants/Accused 1 to 4

Vs

State Rep. by
Deputy Superintendent of Police,
Thiruvannainallur Police Station,
Villupuram District.
Crime No.202/2008

... Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, against the conviction and sentences passed on them by the learned Principal Sessions Judge, Villupuram in S.C.No.166 of 2009 dated 23.06.2010 for the offences under Section 323, 506(i) IPC read with 3(1)(x) of SC/ST Act.

For Appellants : Mr.S.Saravanakumar

For Respondent : Mrs.T.P.Savitha
Government Advocate (CrI.Side)

JUDGMENT

This Criminal Appeal is filed against the judgment passed by the Learned Principal Sessions Judge, Villupuram in S.C.No.166 of 2009 dated 23.06.2010 for the offences under section 323, 506 (i) of IPC read with 3(1) (x) of SC/ST Act.

2. Brief case of the Appellants/Accused 1 to 4;

The case of the Prosecution is that the Appellants and PW 2 Santhosh Kumar residing in the same village and PW3 Kannan is a friend of PW2 belonging to Schedule Caste community and both PW2 and 3 were taking bath in public tank on 19.04.2008 at about 8.30AM, the appellants who were belonged to the Vanniar Community, assaulted PWs-2 and 3 and scolded with unparliamentary words with community name. Both PWs-2 and 3 were admitted in the Hospital by PW1. PW4 Doctor examined PWs-2 and 3 at about 12.30 noon on the same day and note down the injuries in the accident register Exhibits-P2 and P3. PW8 registered the FIR at about 12.15 noon on 20.04.2008 on the complaint preferred by PW1 in Crime No.202 of 2008 under Sections 147, 148, 294(b), 323, 506 (2) of IPC and 3 (1) (x) of SC/ST Act. PW10 took over the investigation and examined the witnesses and inspected the occurrence spot and preferred mahazar Exhibit-P4 and rough sketch Exhibit-P8. PW7 Tahsildar issued the community certificate for the appellants and also for the accused in Exhibit P5. On further investigation PW10 arrested the appellants /accused and remanded them to judicial custody on 30.04.2008 and after completing investigation, PW10 filed final report informing the commission of offences under Sections 294 (b), 323, 506(2) of IPC and 3 (1) (x) of SC/ST Act on 22.5.2008.

3. Before the trial Court, the prosecution examined 10 witnesses and marked 8 Exhibits. None were examined on the side of the defence nor were any exhibits marked. On appreciation of the materials before it, the learned trial Court under judgment dated 23.06.2010, convicted the appellants/accused A1 to A4 under Section 3(1)(x) of SC/ST Act and Section 506(i) of IPC and petitioners 2 and 3 are also convicted for offence under section 323 of IPC and sentenced to undergo Rigorous Imprisonment for two years and to pay a fine of Rs.10,000/- in default to undergo 6 months Simple Imprisonment for the offence under section 3(1) (x) of SC/ST Act, and for the offence under section 506(i) of IPC to undergo six months Simple Imprisonment and to pay a fine of Rs.2,000/- in default to undergo 3 months Simple Imprisonment and for the petitioners 2 and 3 for the offence under section 323 of IPC to pay a fine of Rs.500/- in default to undergo 1 month Simple Imprisonment. Against such finding, the present appeal.

4.I heard Mr.S.Saravanakumar, learned counsel for the appellants and Mrs.T.P.Savitha, learned Government Advocate (Criminal Side) for the respondent and perused the records.

5.The learned counsel for the appellants submits that the Lower Court ought to have seen that the inconsistent statement of the witness with regard to Exhibit P1 complaint, as per evidence of PW1, he gave complaint to PW8 Sub Inspector of Police and immediately case was registered. But in contra, the PW8 Sub Inspector of Police has stated that on 20.04.2008 the PW 1 gave complaint to the Head Constable in CSR.No.154 of 2008 and the same was registered on 20.04.2008. The Head Constable who received the complaint from the PW1 has not cited as witness and the foundation of Exhibit-P1 itself suspicious document and once the FIR itself is doubtful, the entire prosecution become doubtful and further the non examination of witness the Head Constable would cause adverse inference against the prosecution.

6.The learned counsel for the appellants submits that as per the evidence of PW4 the alleged victim PW2 and PW3 was brought to hospital by one Vadivel and he only explained before the Doctor how the occurrence took place but he was not cited as a witness and that the prosecution purposely suppressed earlier version which made by the said Vadivel.

7.The learned counsel for the appellants submits that the non examination of witnesses Dharmalingam, Vadivel, Manikandan, Rajavel, Subbarayan before the Trial Court creates adverse inference against the prosecution.

8.The learned counsel for the appellants submits that the prosecution has not come to Court with clean hands and the evidence of PW1 is unbelievable for the simple reason that immediately after occurrence on 19.04.2008 itself he gave the complaint before the Police, but as per the evidence of PW8 only on 20.04.2008 on the next day about 12.15 p.m. the complaint was received which made by PW1 was purposely suppressed and any complaint made would be treated as 161 statement of the witnesses and it is not admissible evidence.

9.The learned counsel for the appellants submits that the Lower Court ought to have seen that though the occurrence took place on 19.04.2008 the PW1, PW2, PW3 has been examined only on 23.04.2008 and no reasonable explanation put forth by prosecution.

10.The learned counsel for the appellants submits that the Lower Court ought to have seen that as per the prosecution entire incident took place at the public tank of the village but in contra, the doctor PW4 who was received earliest information stated that the incident took place at the resident of PW2 and PW3 and therefore there is contradict statement was given with regard to place of occurrence by the prosecution witnesses.

11.The learned counsel for the appellant submits that the Lower Court ought to have seen that all the witnesses are highly interested witnesses and that the testimonial of the interested witnesses have to be scrutinized very carefully and with caution and that no independent witnesses support the prosecution case.

12.The learned counsel for the appellants cited the decisions of this Court reported in Criminal Appeal No.459 of 2008 dated 10.07.2015 and Criminal Appeal No.595 of 2010 dated 12.09.2017.

13.This Court has considered the rival submissions.

14.On appreciation of rival contentions, this Court would inform that the prosecution case bristles with infirmities pointed out by learned counsel for appellants.

15.In 1995, in pursuance of section 23 of the SC & ST (P.A.) Act 1989, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules 1995 has been framed. Its Rule 7 relevant for our purpose runs as under:

"7.Investigating Officer. (1) An offence committed under the Act shall be investigated by a Police Officer not below the rank of a Deputy Superintendent of Police. The Investigating Officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time.

The Investigating Officer so appointed under sub-rule (1) shall complete the investigation on top priority basis within thirty days and submit the report to the Superintendent of Police who in turn will

immediately forward the report to the Director General of Police to the State Government".

16. In view of the nature of the offence, Higher Officials namely an Officer not below the rank of a Deputy Superintendent of Police has been specified in the Rules, to investigate this type of offences. Further Rule 7(1) specifically mentions that the Deputy Superintendent of Police should have specified past experience etc. Further, as per Rule 7(2), the investigation has to be completed within 30 days.

17. In *Mrs. Mariammal vs. State of Tamil Nadu* (1998(1) MWN (Cr.) (349)), this Court interpreted the said Rule as under:

"18. It follows from this Rule that it is mandatory in the case of an offence complained of under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 that the investigation should be done by a Deputy Superintendent of Police and not the Inspector of Police, whatever may be the allegation as true or otherwise. In other words even if the allegations in the FIR are not true even then the case can be investigated by the Deputy Superintendent of Police and not by the Inspector of Police."

18. In *Sambasivam and Another Vs State* (2007 (1) MWN (Cr.) 69], this Court has occasion to go elaborately into the significance of the said rule 7(1). In *Sambasivam* (supra), the Court observed as under Rule 7(1) of the Rules reads:

"An offence committed under the Act shall be investigated by a Police Officer not below the rank of a Deputy Superintendent of Police. The Investigation Officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time".

19. A careful reading of the above Rule and its purpose would reveal, that an Investigation Officer has to be appointed to investigate this kind of case by the State Government/Director General of Police/Superintendent of Police, taking into account the past experience, sense of ability etc. of the officer and this is possible only if the individuals are considered separately. Rule does not say that all the Deputy Superintends of Police are competent to investigate this kind of cases,

irrespective of their experienced, sense of ability etc. Therefore, in my considered opinion, a person, who has been named and appointed, considering his past experience and ability alone is competent to investigate this kind of cases, otherwise, the purpose of the Rule will not be served. If all the Deputy Superintendents of Police of the State are empowered, as observed by the trial Court, placing reliance upon some circular, which is not available for perusal, before me, then, there may not be any chance for the higher authorities to take into account the past experience, sense of ability and justice to perceive the implications of the case of the officer, which were considered so essential, to investigate this kind of cases, considering the sensitiveness and the caste discrimination prevailed or prevailing throughout, though we have crossed so many years from the date of independence. When the Rules framed under the Act, says how, by whom the case is to be investigated, I am of the view, the same cannot be nullified or overlooked, by issuing a circular, empowering all the Deputy Superintendents of Police, to investigate this kind of cases, forgetting or ignoring the purport of Rule 7, which is mandatory, not challenged. If it is to be taken, all the Deputy Superintendents of Police are empowered, the Rule need not say, past experience, sense of responsibility etc., simply it would have been stated by the officer not below the rank of Deputy Superintendent of Police in general form, which is not the import or purport of Rule 7, as read from its proper perspective.

20.The learned counsel for the appellants, inviting my attention to a decision of the Division Bench of the Andhra Pradesh High Court in Viswanadhula Chittibabu vs. State of A.P. (2002 (4) Andhra Law Times Reports 456) would submit that the investigation done by any person, not authorized under Rule 7 of the rules, should be treated as prejudice caused to the accused, since Rule 7 is mandatory and not-directory. It is observed in the above Ruling.

21.The Act was enacted in the year 1989, whereas the Rules were framed in the year 1995, under section 23 of the said Act. There was a delay of about six years in framing the Rules. It has to be considered why the Government framed this Rule. According to our logic, the Government experienced that the Act is being misused and therefore, felt that under such acts, the investigation has to be done by a responsible Senior Officer and therefore, they chose Deputy Superintendents of Police to make an investigation. This rule does not provide that all the Deputy Superintendents named by the State Government or Director General of Police or Superintendent of Police has to nominate and select Deputy Superintendent with integrity and experience to investigate into such offences, which will prevent the misuse

of the Act, and therefore, the provision contained in Rule 7 of the said Rules has to be interpreted as mandatory. In some of the rulings cited, their Lordships held that if there were procedural defects, the trial would not vitiate. The procedure means a procedure which is adopted by the Court. When the investigation has to be done by a Police Officer not below the rank by Deputy Superintendent of Police under Rule 7 of the said rules framed under section 23 of the said act, it has some meaning. It is not the procedural defect, it is inherent defect in making the investigation and that would vitiate the entire trial.

22.The same view was taken by this Court also in H.Thenmozhi Vs Inspector of Police P.R.Unit, St.Thomas Mount Police Station, Chennai and another (2006) 2 MLJ (Crl.) 463], wherein it is stated that the investigation done by the Inspector of Police vitiates; the entire proceedings and the accused is entitled to an acquittal. In the case involved in the above decision, as seen from the judgment, the investigation has been done by the Inspector of Police and the same has been forwarded to the Deputy Superintendent of Police to investigate the matter further, probably considering the facts, took the view that the same would vitiate the entire proceedings, giving acquittal which should be followed by me also, since I am in conformity with the view expressed by the learned judge.

23.Recently, in Sekar and others vs Deputy Superintendent of Police Puduchatram (CDJ 2011 MHC 5916], this Court while referring to the said Rule 7(1) reiterated the its earlier views which we have seen already.

24.In Asmathunnisa vs. State of A.P. (CDJ 2011 SC 332), referring to the said Rule 7(1) when the Investigating Officer namely Deputy Superintendent of Police is not the person as contemplated in the Rules, in other words, not specifically empowered referring to his past experience, the Hon'ble Apex Court held him an incompetent Police Officer to investigate such an offence.

25.Now considering the above rule position and the decisions on the point, there cannot be quarrel over the proposition that it is not all the Deputy Superintendent of Police even Police Officers above him in rank cannot investigate the offence alleged to have been committed under SC & ST (P.A.) Act, 1989 unless they are specifically empowered by the Government or by the Superintendent of Police (in case of Metropolitan Cities, the Deputy Commissioner) taking into account their past experience and sense of ability etc.

26.The consequence of investigation done by a Police Officer not below the rank of a Deputy Superintendent of Police who has not been so empowered as mandated in Rule 7(1) has been pointed out by this Court in Sambasivam (supra) that the entire proceedings vitiated.

27.Now in this case PW10, Deputy Superintendent of Police, Ulundurpettai took up his investigation on 23.04.2008. No materials or records to show that he has been empowered to undertake investigation with the required authorization as contemplated under Rule 7(1). Now on this aspect, we will revert to the case before us.

28.No doubt, PW10 is a Deputy Superintendent of Police, but the point is whether then he was statutorily qualified to investigate this case registered under SC & ST (P.A.) Act 1989. There is no record to show that a specific order empowering him to investigate this case has been passed by the District Superintendent of Police taking into account his special qualification as prescribed under the rules. Further, nowhere in his evidence, PW10 would say that he has been so empowered. In such circumstances, Periyasamy's case squarely applies to this case.

29.This Court finds itself in respectful agreement with the views expressed and reproduced herein above. Even if this Court accepts the position informed by PW10, Investigating Officer, that he was directed by the Superintendent of Police to investigate the case, there is nothing to indicate that in appointing him as the Investigation Officer the considerations informed in Rule 7(2) of the Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, were met. Rule 7(2) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules 1995 reads as follows:

"The Investigation Officer so appointed under sub-rule (1) shall complete the investigation on top priority basis within thirty days and submit the report to the Superintendent of Police who in turn will immediately forward the report to the Director General of Police to the State Government."

30.In the instant case, the complaint was preferred on 20.04.2008 and the FIR has been registered on 23.04.2008 and the final report has been filed before the concern Court on 22.05.2008. Besides such non-compliance with Rule 7(2) there is no material to indicate that the other requirements of the rule

were complied with. One further submission of learned counsel for appellants is that when PW6, witness to the observation mahazar, has been treated hostile since he had deposed to having been called to the police station to sign the same, Rule 6(1) of the Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Rules which required the investigation officer to visit the place of occurrence to assess the extent of atrocity, loss of life, loss and damage to the property and submit a report forthwith to the State Government, had not been complied with. The prosecution case only is further weakened by the fact that the evidence of PW6, mahazar witness, informs of his having been required to sign the same at the Police Station.

31. Now the questions is:

"Whether the prosecution has established the charges under section 3(1)(x) of SC & ST (P.A.) Act 1989 and sections 294(b), 323, 506(2) of IPC?

32. Section 3 of Scheduled Castes and Scheduled Tribes (PA) deals with the punishment for the offences of atrocities sub-section (1) to section (3) enacts as under:

"Whoever not being a member of Scheduled Caste or a Scheduled Tribe"

33. Clause (x) to sub-section (1) of section 3 of the Act reads as follows:

"Intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view."

34. In this case, it is established by recorded evidence that PWs-1 to 3 were the members of the Scheduled Castes while the appellants are the non Scheduled Caste Members. PW1 in his evidence stated that A1 to A 4 assaulted PWs-2 and 3 and abused them by calling their caste. The complaint preferred by him on 20.04.2008 was suppressed and there is no explanation for registering the FIR on 23.04.2008 through the Head Constable and he was not cited as a witness in this case. As per the evidence of PW4 Doctor, PWs-2 and 3 were brought to the hospital by one Vadivel and the content of the accident register was reported by him to the Doctor PW4. But PW1 in his evidence deposed that he took PWs-2 and 3 to the hospital and gave the complaint to PW8 the Sub Inspector of Police.

35. On careful reading of the evidences of PWs-1 to 4, it is seen that Exhibit-P1 was invented after due deliberation and the first complaint made on 20.04.2008 was suppressed. Hence the very genesis of the registration of FIR becomes doubtful. Further the non examination of the witnesses namely one Vadivel and the Head Constable who issued CSR.No.154 of 2008 dislodged the case of the prosecution.

36. Another important factor is that the injured cum eye witnesses PWs 1 to 3 have been examined only on 23.04.2008 and no reasonable explanation put forth by the prosecution regarding the delay which was specifically questioned by the appellants in the cross examination. Further the 161 Statements recorded on 20.04.2008 were suppressed by the prosecution.

37. It is well settled that, FIR in a Criminal case is an important document. Although it is not a substantive piece of evidence, it sets the Criminal Law in motion. It is like blue print for a building. If the basement of the building is not alright, then the building will collapse. Likewise if the FIR is not free from doubt, the very genuineness of the Prosecution case built in the FIR is open to doubt, consequently there will be casualty of the Prosecution case becoming a casualty unless the doubt has been cleared by the prosecution.

38. Thus in this case the FIR is fabricated. It does not reflect the true and earliest version. Thus, the possibility of embellishment cannot be ruled out. Thus the FIR in this case is not free from doubt. Consequently, the case of the prosecution projected through its witnesses with reference to the said FIR shaken the credit worthiness of PWs-1 to 3 and 5.

39. The oral evidence of PW1 does not corroborate the Medical evidence. When there is conflict between the Oral evidence and the Medical evidence, the oral evidence will prevail. Medical evidence has been pressed into service in a Criminal case for the purpose of corroboration. Medical evidence cannot be elevated to the status of substantive piece of evidence. As a corroborative piece, Medical evidence has been introduced to test the veracity of oral evidence of injured person. But under certain circumstances inconsistency between the evidence of ocular witness/injured affect credit worthiness of the ocular witness. Now in this case, in view of the fact that the FIR is not free from doubt, the variation as to the evidence of PWs-1 to 3 and the Medical evidence of PW 4 also assumes signal importance.

40.Now on a survey of the evidence adduced in this case and the breach of Rule 7 supra, in the light of the submissions on both sides, I have no hesitation to hold that the prosecution has not established the charges framed against the appellants beyond all reasonable doubts. Consequently, they are entitled to the benefit of doubts.

41.In view of the foregoing:

(a) this Criminal Appeal is allowed and the conviction recorded and the sentence of imprisonment and fine imposed on the Appellants by the Learned Principal Sessions Judge, Villupuram in S.C.No.166 of 2009 dated 23.06.2010 for the offences under sections 323, 506(i) of IPC read with 3(1)(x) of SC/ST Act are set aside;

(b) the appellants/accused are acquitted from all charges;

(c) Fine amount, if any paid by the appellants/accused Nos.1 to 4 shall be refunded to them.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1.The Judicial Magistrate No.II,
Ulundurpet.

2.The Chief Judicial Magistrate,
Villupuram.

3.The Principal Sessions Judge,
Villupuram.

4.Deputy Superintendent of Police,
Thiruvannainallur Police Station,
Villupuram District.

5.The Public Prosecutor,
High Court, Madras.

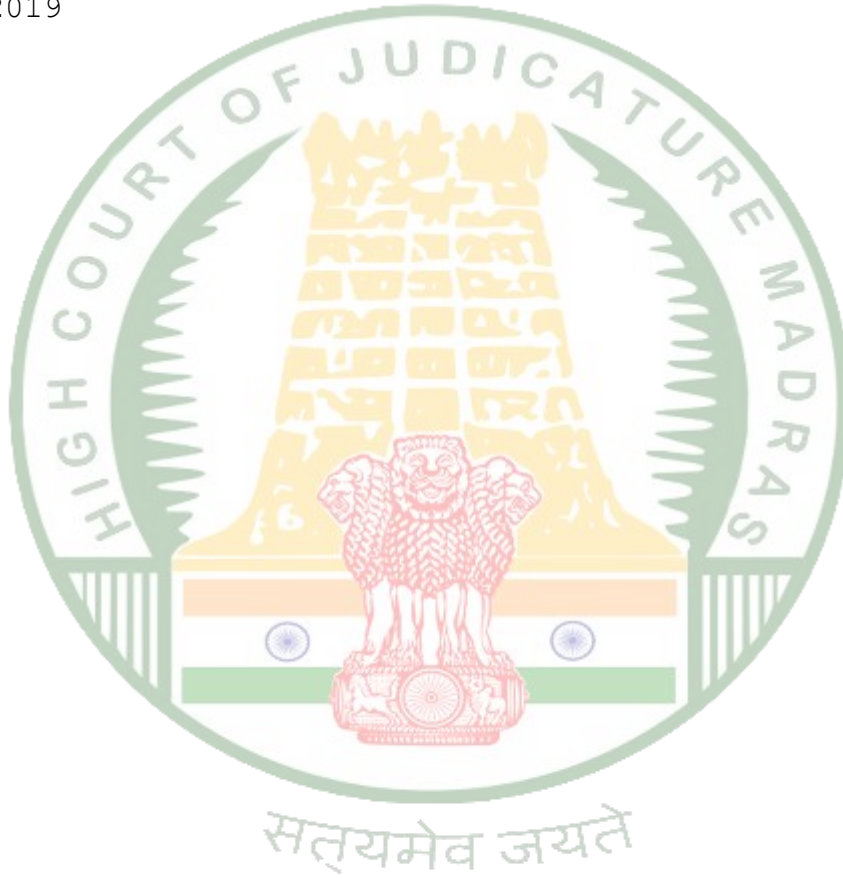
Copy to:

The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Mr.S.Saravanakumar, Advocate sr.no.86115

Criminal Appeal No.409 of 2010

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