

BAIL SLIP

The Petitioners/ Accused 1.Arul, S/o.Natarajan, 2.Elango S/o.Natarajan were directed to be released on bail as per order of this court dated 07/06/2011 and made in MP No. 1/2011 in Crl A.309/2011 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.03.2018

DELIVERED ON: 20.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.309 of 2011

1.Arul
2.Elango

...Appellants/Accused 1 & 2

Vs

The State represented by:
Inspector of Police,
Harur Police Station,
Dharmapuri District,
Crime No.804/04.

...Respondent/Complainant

Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the judgment passed by the learned Additional Sessions Judge, (Fast Track Court) Dharmapuri in S.C.No.29 of 2010, dated 26.04.2011 convicting the Appellants under Section 326 of I.P.C. and sentenced to undergo 7 years Rigorous Imprisonment each and also pay a fine of Rs.1,000/- each i/d to undergo 6 months Simple Imprisonment each and they also found guilty u/s. 352 of I.P.C. and are ordered to pay a fine of Rs.500/- each i/d to undergo 2 weeks simple imprisonment each to set aside the same and acquit them.

For Appellants : Mr.M.G.Udhayasankar
for M/s.S.Shanthakumari

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

JUDGMENT

This Appeal is being directed against the Judgment of conviction sentencing the appellants' for offences punishable under Sections 326 and 307 of IPC, to undergo Rigorous Imprisonment for a period of 7 years and also to pay a fine of Rs.1000/-, in default to undergo Six months Simple Imprisonment,

for offence under section 352 of IPC ordered to pay a fine of Rs. 500/-, in default to undergo two weeks Simple Imprisonment. The present appeal is filed by the accused 1 and 2 in S.C.No.29 of 2010. The 3rd accused in the above appeal is acquitted from all the charges.

2. According to prosecution case there was previous enmity between the families of the appellants / accused herein and defacto complainant. The said enmity arose out of pathway dispute.

3. The appellants and accused No.3 in the above crime number who happened to be brothers with common intention of causing hurt to defacto complainant and his family on 06.10.2004 attacked the defacto complainant and his family.

4. Out of said attack the defacto complainant family suffered injuries. Defacto complainant's son namely Senthil Kumar sustained severe head injury and died on 23.04.2005.

5. According to defacto complainant the head injury causing Senthil Kumar's death was out of a blow from A2 by an iron spade. Out of investigation over the defacto complaint's statement made under Section 161(3) of Cr.P.C. the F.I.R. in Crime No.803 of 2004 dated 06.10.2004 came to be registered under Sections 341, 324, 323, and 506 (ii) of IPC as against the accused.

6. In the meantime, T.Senthil Kumar died on 23.04.2005 was hospitalized in National Institute of Mental Health and Nero Science Hospital, Bangalore.

7. Accordingly Charges came to be laid under Sections 326, 302 r/w 34, 352 r/w 34 of I.P.C. against the 1st Accused namely Arul and Sections 302, 326 r/w 34, 352 r/w 34 of I.P.C. against the 2nd Accused namely Ilango and Sections 326 r/w 34, 302 r/w 34, and 352 of I.P.C. against the 3rd Accused Kumaran.

8. To establish Charges of causing Grievous hurt with a deadly weapon under Section 326, Assault under Section 352 of I.P.C. and Murder with common intention, prosecution examined 15 witnesses and marked 15 Exhibits, and M.O-1, M.O-2, the spade and stick said to have involved in the offence were produced.

9. Defending the prosecution version on the side of appellant one Ilango was examined as DW-1 and Exs-D1 to D5 were marked. That apart the Court Exhibits in Ex-C-1 the Statement given by the 2nd appellant under Section 162 of I.P.C. and Ex-C2, FIR in Crime No.803 of 2004 were marked.

10. On appraisal of Oral and Documentary evidence Trial Court found that there is no offence made out under Section 302 of IPC and Common Intention established under Section 34 of IPC.

11. In as much as the offence of Murder, the trial Court found that the said offence cannot be attributed against the appellants as the records disclosed that though the alleged occurrence said to have taken place on 06.10.2004, the deceased after about 6 months died on 23.04.2005. It is relevant to note here that no treatment records and pertaining details furnished before the Court below.

12. It was further found that victim Selvakumar was treated and discharged by Dr. Sankar PW4 much prior to his demise and as well prior to his hospitalization in Bangalore. Therefore holding that in a condition that expecting Autopsy Report of deceased and No medical treatment records produced and that in absence of any specific reason by PW-11 Dr. Rajendraprasad as to specific reason that of death the Trial Court found that the charge punishable under Section 302 of IPC unproved and accordingly acquitted the said charge against the accused. Whereas the trial Court on evaluation of evidence found that the charge under Sections 326 and 352 of IPC proved against A1 and A2 thereby convicted and sentenced the appellants in above terms. The 3rd accused was acquitted of charges against him as unproved.

13. Against the order of conviction under Sections 326 and 352 of IPC, the appellants (A1 & A2) are before this Court by way of this criminal appeal challenging the sentence imposed on them.

14. I heard Mr. M.G. Udhayasankar for M/s. S. Shanthakumari, learned counsel for the appellants and Mrs. T.P. Savitha, learned Government Advocate (Criminal Side) for the respondent and perused the entire materials available on record.

15. The prime contentions of the learned counsel for the appellants are as follows:

The Trial Court herein failed to see that PW1 to PW3 could not be eye witness to the alleged occurrence which is evident from their contradictory statement with regard to overt act attributed to the appellants.

16.It is his further contention that originally the appellants were attacked by defacto complainant and his family and the appellants sustained injuries in the same transaction which was brought on record before the Court below through D2 and Exhibits-D1 to D5.

17.Ex-C2, F.I.R. in Crime No.803 of 2004 made by the appellant with regard to above quarrel run that only as to private defense they defended the defecto complaint's family attack.

18.It is also his contention that when medical records were not produced by the prosecution, trial Court ought not to have concluded injuries to be grievous.

19.It is his further contention that the responsible Police failed to follow the procedure enshrined in Police Standing Order 566.

20.The learned counsel for the appellant also contends that the corresponding F.I.R. submitted before the Court after six days from its alleged registration also creates serious doubt over it. Therefore it his contention that such delay would prove that the prosecution case is false.

21.Per contra, the learned Government Advocate (Criminal Side) citing the conclusion and reasons thereon in the Impugned Judgment seeks dismissal of this appeal by confirming the impugned judgment. According to him there was no illegality or infirmity in investigation process. Accordingly he prays for dismissal of this appeal.

22.On perusal of the impugned Judgment, as stated above it is seen that the Trial Court has convicted the appellant for offence under Sections 326 and 352 of IPC by relying upon Ex-P4 the Wound Certificate of the defacto complainant Arumugam. Except the wound certificate in Ex-P4 and as well the version of PW1-PW3, no other document discuss about the nature of injuries.

23. Whereas, on perusal of the evidences of PW1 and PW2, it seen that according to defacto complainant PW1 Arumugam the first appellant was handed with spade during the above alleged quarrel, whereas PW2, Rajan, the wife defacto complainant who is alleged to have taken part in the above quarrel had deposed that it was the 2nd appellant who beaten the deceased on head and handed with spade. Both the above statements are thus contrary as to the nature of weapon and as well as the sequence of alleged attack, besides the person involved in the said attack.

24. At this juncture, from Exs-D1 to D5 it is seen that the appellants were attacked by the defacto complainant and his family. It is relevant to note here that D1-D3 are wound certificates issued to appellants and their brother Kumaran. F.I.R. in Crime No.803 of 2004 discloses that on 06.10.2004 there was a quarrel between their family and defacto complainant family and out of same the appellants sustained injuries.

25. In this context, it would be useful to look into the complaint made by defacto complainant himself in Ex-P8 that in pursuant of a land dispute he and his family to obstruct the access of appellant's family into a disputed land have placed stones and created an obstruction. When the appellants directed the defacto complainant to remove the obstruction, there was a quarrel. The said issue of obstruction is also found true from the complaint made by the appellants pertaining to the above quarrel.

26. Thus it is seen that there are two Crimes Nos.803 and 804 came to be registered as against the appellants and defacto complainant respectively.

27. No doubt that a case and its counter case should be enquired and laid with charge sheet in both crime numbers if there was an actual quarrel enunciating contents of both the complaints as true denoting the dispute or otherwise to refer both the case if found untrue.

28. At this juncture, it would be useful to look into Rule 588 of the Madras Police Standing Orders dealing with procedure of investigation and laying of final report involving cases and its counter cases.

29.It is also the duty of the investigation officer to produce and exhibit the counter complaint in Court and to prove medical certificates of persons wounded or opposite side.

30.Admittedly in the case on hand the said mandatory procedure was not followed. In fact such procedure is contemplated under law only to enable the Court to arrive at the truth and just decision.

31.In this regard it would be useful to look into the decision of this Court made in Crl.A.No.483 of 1984 in the matter of Krishnamoorthy Vs State reported in 1989 Law Weekly Criminal 103, wherein the Hon'ble Division Bench of this Court while allowing an appeal against the conviction for an offence under Section 302 of I.P.C. held that in cases involving the case and a case in counter if the above procedure is not followed by investigating agencies, it is not safe to fasten criminal liability upon the appellants therein.

32.The relevant portion is extracted in hereunder:

"18.If the investigating machinery had followed the procedure adumbrated under Order 588-A of the Madras Police Standing Orders, they could not have contemplated any difficulty in laying a definite case. It is worthwhile to quote Order 588-A of the Madras Police Standing Orders. It is as follows:-

588-A. Charge Sheets in cases and counter cases:-

In a complaint and counter complaint, obviously arising out of the same transaction, the investigation officer should enquire in to both of them, and adopt one or the other of the two courses viz., (1) to charge the case where the accused were the aggressors, or (2) to refer both the cases if he should find them untrue. When the investigating officer proceeds on the basis of the complaint it is his duty to exhibit the counter complaint in the Court and also to prove medical certificate of persons wounded on the opposite side. He should place before the Court a definite case which he asks it to accept. The investigating officer in such cases should not accept in toto one complaint and examine only witnesses who support it and give no explanation at all for the injuries caused to the other side. The truth in these cases is invariably not in strict conformity with either complaint and it is quite necessary that all the facts are placed before the Court to enable it to arrive at the truth and a just decision.

If the investigating officer finds that the choice of either course is difficult, viz., to charge one of the two cases or to throw out both, he should seek the opinion of the Public Prosecutor of the District and act accordingly. A final report should be sent in respect of the case referred as mistake of law and the complainant or the counter-complainant, as the case may be, should be advised about the disposal by a notice in Form 96 and to seek remedy before the specified Magistrate, if he is aggrieved by the disposal of the case by the police.

It is clear from the above said Order what is the duty of the investigating officer when there is a case and a counter-case. It is found that these instructions are not followed by the police on the quasi-totality of cases. The learned Public Prosecutor would do well in bringing these instructions to the notice of the investigation officer in Tamil language in a clear manner, so that the investigating machinery is not making a perfunctory investigation, when faced with the investigation of a case and a counter-case.

19. So far as the case on hand is concerned, the investigating officer has not proceeded with the case according to the instructions given in the Madras Police Standing Orders noted above. He has simply suppressed one case and it is only at the time of his cross-examination that he cursorily referred to the other case, without explaining why he has chosen the version of PW.1 rather than that of the accused."

33. However, in the case on hand when a specific question was put to the investigation officer, it is seen that he has in particular stated that he is totally unaware of the status of Crime No.803 of 2004 confirming that the said F.I.R. was not charge sheeted.

34. In the case on hand, admittedly the F.I.R. in Crime.No.803 of 2004 registered against the defacto complaint and the Wound Certificates were not produced by Investigation Officer, whereas as produced and marked as exhibits by the defense.

35. In fact the prosecution has suppressed the genesis and origin of occurrence and thus has not presented the true version.

36. In this context it would be relevant to look into the decision of the Hon'ble Apex Court made in (2008) 2 SCC Criminal 727 in Baburam and others Vs State of Punjab, wherein conviction under Section 302 on the appellant therein was set aside on the

ground that prosecution has suppressed genesis and origin of occurrence and has thus have not presented the true version in a case pertaining to a case and counter case.

37. In view of the forgoing reasons and the above legal preposition the conviction on appellants is found to be infirm. Accordingly the convictions on the appellants are found to be unsustainable under law. It is equally important to state that the prosecution witnesses 1 to 3 contradicted each.

38. The Trial Court has also not given proper audience to defense side on par with prosecution evidence.

39. In view of reasons supra, the Impugned Judgment is set aside and the 1st Appellant is acquitted from the Criminal Charge punishable under Sections 326 and 352 of IPC and the 2nd Appellant also shall stand acquitted from the charges punishable under Sections 326 and 352 of IPC.

vs

Sd/-
Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

To

1. The Additional Sessions Judge,
Fast Track Court) Dharmapuri.
2. The Judicial Magistrate,
Harur.
3. The Chief Judicial Magistrate,
Dharmapuri @ Krishnagiri.

4. The Director General of Police,
Chennai.

5. The Superintendent of Police,
Dharmapuri District.

6. The Superintendent,
Central Prison, Vellore

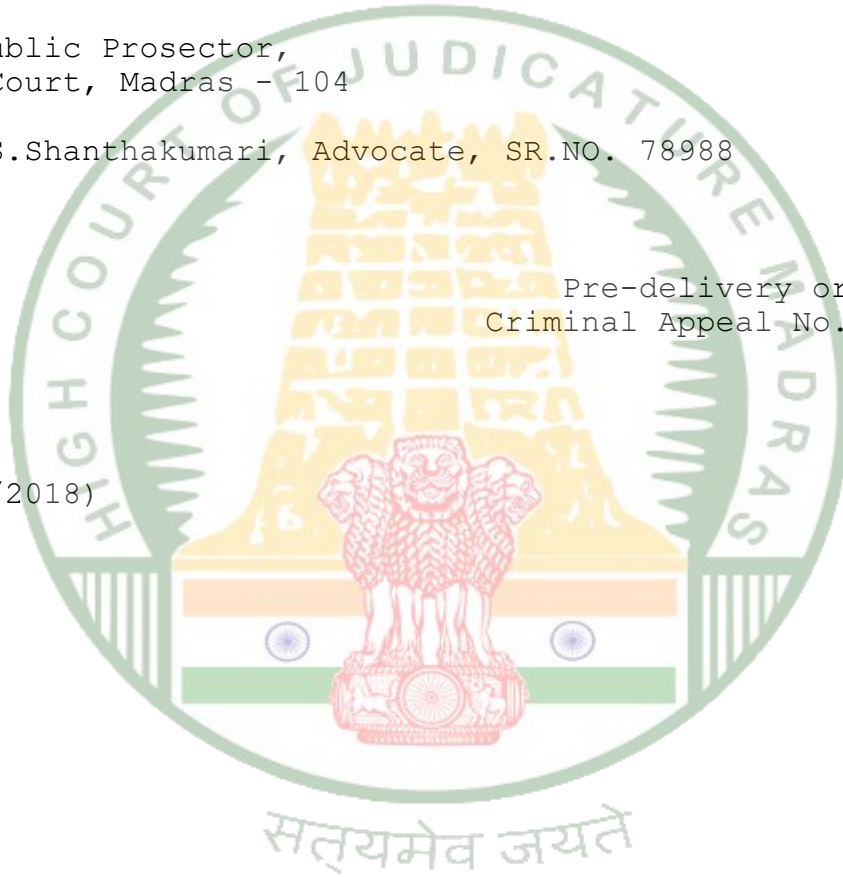
7. The Inspector of Police,
Harur Police Station,
Dharmapuri District.

8. The Public Prosecutor,
High Court, Madras -104

+1CC M/s.S.Shanthakumari, Advocate, SR.NO. 78988

Pre-delivery order made in
Criminal Appeal No.309 of 2011

SPD(CO)
KAK(17/12/2018)



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