

BAIL SLIP

The Appellants herein/Accused Viz 1.Kadhiravan, S/o.Selvaraj, 2.Ravikumar, S/o.Arumugam and 3.Prabakaran, S/o.Selvaraj, were directed to be released on bail as per the order of this court dated 09.08.2011 made in MP.1 of 2011 in CrI.A.No.445 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.12.2018

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CrI.A.No.445 of 2011

1. Kadhiravan
2. Ravikumar
3. Prabakaran

... Appellants/Accused 1 to 3

Vs.

State represented by
Inspector of Police,
Tiruppur North Police Station,
Tiruppur District.

...Respondent/Complainant

Prayer:Criminal Appeal filed under Section 374 Cr.P.C., against the judgment of conviction dated 31.03.2011 in S.C.No.248 of 2010 on the file of the Additional District and Sessions Court (Fast Track Court No.V), Coimbatore at Tiruppur.

For Appellants : Mr.S.N.Arun Kumar

For Respondent : Mr.G.Ramar
Government Advocate
(CrI. Side)

JUDGMENT

This criminal appeal has been preferred seeking to set aside the conviction made by judgment, dated 03.03.2011 in S.C.No.248 of 2010 on the file of the Additional District and Sessions Court (Fast Track Court No.V), Coimbatore at Tiruppur.

2 The facts in brief leading to the filing of this criminal appeal are as under:

2.1 It is the case of the prosecution that on 07.02.2010, around 4.00 a.m., the appellants herein broke the asbestos roof of Saraswathi Provision Stores, committed robbery therein and when Gopal (PW1), Watchman, noticed them, they assaulted him with an iron rod, tied his hands and dumped him in a nearby water tank and escaped with the booty. Only after dawn, Sellamuthu (PW4) who went to the water tank, noticed Gopal (PW1) there and rescued him. Information was conveyed to Sridhar (PW2), the owner of Saraswathi Provision Stores, who came to the place of occurrence and admitted Gopal (PW1) for treatment to Kumaran Hospital, where Dr.Padmanaban (PW6) examined him and gave wound certificate (Ex-P8).

2.2 On the complaint (Ex-P1) given by Gopal (PW1), Thirukasamy (PW7), Sub-Inspector of Police, registered a case in Crime No.990 of 2010 on 07.02.2010 under Section 394 IPC and prepared the printed FIR (Ex-P9). The complaint and the printed FIR (Ex-P9) reached the jurisdictional Magistrate on the same day at 8.30 p.m. as could be seen from the endorsement thereon.

2.3 The investigation of the case was taken over by Dhanaraj (PW8), Inspector of Police, who went to the place of occurrence and prepared Observation Mahazar (Ex-P2) and rough sketch (Ex-P10) in the presence of Muthu (PW3) and Rajesh (not examined). He recorded the statements of some of the witnesses and arrested all the three accused on 16.04.2010. On the disclosure made by the accused, he recovered two boxes of Gold filter cigarette, one tin of Cashewnut, six boxes of All Clear Shampoo worth Rs.1.50/-, 200 packets of Kings cigarette and two Samsung Cell Phones under the cover of Mahazar (Ex-P6). On the disclosure of Ravikumar (A2), the Investigating Officer recovered two boxes of Hamam soap (100 gms) and one Nokia Cell Phone under the cover of Mahazar (Ex-P7). After completing the investigation, he filed final report in PRC.No.23 of 2010 before the Judicial Magistrate, No.1, Tirupur.

2.4 On the appearance of the appellants, the documents relied upon by the prosecution were furnished to them under Section 207 Cr.P.C. and the case was committed to the Court of Session in S.C.No.248 of 2010 and was made over to the Additional Sessions Court (Fast Track Court, No.5), Coimbatore, for trial.

2.5 The Trial Court framed charge under Section 394 IPC against Kadhiravan (A1) and Ravikumar (A2) and under Section 394 read with 34 IPC against Prabakaran (A3). When questioned, the accused pleaded "not guilty".

2.6 To prove the case, the prosecution examined nine witnesses and marked ten exhibits and three material objects.

2.7 When the appellants were questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against them, they denied the same. On behalf of the appellants, no witness was examined nor any document marked.

2.8 After considering the evidence on record, the Trial Court, by judgment dated 31.03.2010, in S.C.No.248 of 2010, convicted Kadhivaran (A1), Ravikumar (A2) and Prabakaran (A3) under Section 394 IPC and sentenced them as follows:

Provision under which convicted	Sentence
394 IPC	One year rigorous imprisonment and fine of Rs.1000/- in default to undergo three months rigorous imprisonment

2.9 Challenging the conviction and sentence, the accused are before this Court.

3 Heard Mr.S.N.Arun Kumar, learned counsel appearing for the accused/appellants and Mr.G.Ramar, learned Government Advocate (Crl. Side) appearing for the respondent/State.

4 Mr.S.N.Arun Kumar, learned counsel appearing for the appellants formulated and submitted the following points:

(a) No test identification parade was done to identify the accused before dock identification.

(b) There was delay in lodging the FIR;

(c) In the wound certificate, it is stated that the alleged history of the road accident is around 4.00 a.m.

(d) There is no corroboration to the evidence of Gopal (PW1) from any other independent source.

5 Per contra, Mr.G.Ramar, learned Government Advocate (Crl.Side) appearing for the respondent/State refuted the contentions put forth by the learned counsel for the appellants.

6 This Court gave its anxious consideration to the rival submissions.

7 Before advertng to the submissions of Mr.S.N.Arun Kumar, learned counsel appearing for the appellants, it may be necessary to discuss the evidence on record.

8 Gopal (PW1) has stated that he was working as Watchman in Saraswathi Provision Stores at the time of the incident; on

06.02.2010, he reported to duty at 8.00 p.m.; on 07.02.2010, around 4.00 a.m., he heard some weird sound from the roof of the store and focused the battery torch light over the roof; there, he saw a person who was throwing down articles to the two persons standing down; on seeing him, they attacked him with an iron rod on his head; when he raised his hand to defend the attackers, he suffered injuries on his hand and also on the center portion of his head; then, they tied his hands and carried him to a nearby water tank and dropped him there. He identified Kadhivaran (A1) as the person who attacked him with the iron rod; Kadhivaran (A1) and Ravikumar (A2) tied his hands; Prabakaran (A3) was the person standing on the roof and was dropping the stolen goods on the ground; though he raised alarm, no one came to his rescue; around 7.30 a.m., Sellamuthu (PW4), owner of the adjacent fish stall rescued him from the water tank; thereafter, Sridhar (PW2), his employer was informed and he came there and took Gopal (PW1) to Kumaran Hospital for treatment where he was admitted as in-patient; the police came there and recorded his statement (Ex-P1). In the complaint (Ex-P1), Gopal (PW1), he has stated that he can identify the accused.

9 In the cross-examination by the accused, Gopal (PW1) has stated that he saw the accused not only in the light of the battery torch light but also in the brightness of the street light. He has further stated that he even blew the whistle with him but to no avail. To the suggestion that the compound wall would be sixty to seventy feet high, he stated that the height of the wall would be only thirty feet and there is a tree hovering above the roof and one can reach the roof by climbing over the tree.

10 The evidence of Gopal (PW1) has been adequately corroborated by the evidence of Sellamuthu (PW4) who has stated that at the time of incident, he was working in the fish stall near Saraswathi Provision Stores; his job was to clean the fish before sale; on 07.02.2010, around 7.30 a.m., he opened the fish stall and went to the tank to fetch water; there, he found Gopal (PW1) lying with injuries; Gopal (PW1) told him that three thieves gained entry into the store from the roof and when he saw them, they attacked him and dumped him in the water tank; on information, Sridhar (PW2), the owner of Saraswathi Provision Stores came there and took Gopal (PW1), Watchman to the hospital.

11 In the cross-examination by the defence, Sellamuthu (PW4) has specifically stated that there was only half foot water in the water tank and when he saw, Gopal (PW1) was in an inclined position inside the water tank. The defence was not able to make any serious dent in his evidence.

12 Sridhar (PW2) has, in his evidence, stated that he is the owner of Saraswathi Provision Stores; on 06.02.2010, after business hours, he locked the store at 10.00 p.m. and went home leaving Watchman Gopal (PW1); on 07.02.2010, around 7.30 a.m., he received a phone call from Sellamuthu (PW4) and immediately came to the store and found Gopal (PW1) with injuries; he immediately took him by car to Kumaran Hospital and after admitting him, went back to the store and took inventory of the missing articles; he found the following articles missing:

- (i) Gold filter cigarette,
- (ii) one tin of Cashewnut,
- (iii) six boxes of All Clear Shampoo worth Rs.1.50/-,
- (iv) 200 packets of Kings cigarette,
- (vii) Hamam soap (100 gms),
- (viii) Samsung Cell Phones, and
- (ix) one Nokia Cell Phone

He has further stated that on 16.04.2010, the police brought three persons to his shop and he identified the recovered articles in the police station. He has also stated that he obtained interim custody of the seized articles from the Magistrate and was keeping them in the shop, however, the Food Inspector, who conducted inspection in his shop, advised him not to keep the expired goods and therefore, he destroyed the expired ones. However, he produced three mobile phones which were marked as MO1, MO2 and MO3.

13 In the cross-examination, Sridhar (PW2) has specifically stated that he had provided an Eveready torch light to his Watchman Gopal (PW1). He has further stated that Prabakaran (A3) was working in his shop and came to work even after the incident until he was arrested.

14 Coming to the submissions of Mr.S.N.Arun Kumar, learned counsel appearing for the appellants, it is true that no test identification parade was conducted by the police in this case. In Daya Singh vs. State of Haryana [(2001) 3 SCC 468], the Supreme Court has clearly held that the failure of the police to conduct test identification parade will not vitiate the case of the prosecution in toto.

15 In this case, the evidence of Gopal (PW1) who has identified the accused in dock does not suffer any infirmity for this Court to reject his testimony. He has very clearly stated that he saw Prabakaran (A3) standing on the roof and dropping the goods on the ground and the other two accused viz., Kadhiravan (A1) and Ravikumar (A2) were collecting them. He has seen all the three accused not only in the brightness of his torch light but also in the brightness of the street light. Only thereafter, Kadhiravan (A1) attacked Gopal (PW1) with an iron

rod and along with Ravikumar (A2), he tied Gopal (PW1), carried him to the water tank and dumped him there. Thus, Gopal (PW1) had sufficient opportunities to see the accused at close quarters for him to remember them. The fact that he was rescued from the water tank around 7.30 a.m. has been spoken to by Sellamuthu (PW4). After the arrival of Sridhar (PW2), inventory of the lost items was taken and the same was informed to the police. Most of the items were recovered by the police within two months. The mobile phones which were kept in the shop for sale were brand new ones and they have been identified with the IMEI code numbers.

16 As regards the entry in the wound certificate (Ex-P8) referred to above, no great significance can be attached to it in the teeth of the evidence of the injured himself which has been generally corroborated by the evidence of Sridhar (PW2) who has spoken to about the loss of articles from his stores and the evidence of Sellamuthu (PW4) who rescued Gopal (PW1) from the water tank. There is no reason for Gopal (PW1) to cause injuries to himself, tie his hands himself and fall into the water tank suo motu unless he was mad, which is not the case of the defence either. In *B.Bhadriah & Others vs. State of Andhra Pradesh*

[1945 Supp. (1) SCC 262], the Supreme Court has held as follows with regard to the entries in the Accident Register which proposition will be applied to the case at hand:

"5.

The casual way of filling up the column in the medical certificate does not in any manner amount to recording a statement of the injured witness....."

17 Dr.Padmanaban (PW6), in his evidence, has clearly stated that on 07.10.2010, around 8.30 a.m., one Gopal (PW1), aged about 60 years, was brought to Kumaran Hospital with serious injuries; on examination, he was found to have a cut injury on his head and a fracture in the middle finger of his left hand; he was admitted as in-patient and was given treatment; the injuries suffered by him were grievous in nature.

18 In the cross-examination, Dr.Padmanaban (PW6) has denied the suggestion that such injuries will happen if the person had fallen on the ground. He has also denied the suggestion that such injury would occur if a person bangs his head on the wall. He has specifically stated that the injury could have been caused when attacked with an iron rod. In the teeth of the evidence of Dr.Padmanaban (PW6), the entry in the wound certificate (Ex-P8) to the effect that Gopal (PW1) told him that he met with an accident pales into insignificance.

19 Next, this Court is unable to agree with the conclusion of the Trial Court that for the failure of the prosecution to recover the iron rod, the accused can be convicted only under Section 394 IPC. The recovery of the weapon and the identification of it by Gopal (PW1) would have undoubtedly strengthened the prosecution case. Nevertheless, the non-recovery of the iron rod cannot weaken the charge under Section 397 IPC.

20 In the light of the facts proved in this case, since the State has not filed any appeal against the acquittal of the accused under Section 397 IPC, there cannot be interference by this Court. The sentence imposed on the accused is also not disproportionate to the gravity of the offence.

In the result, the appeal is dismissed as being devoid of merits. The trial Court is directed to secure the accused/appellants to undergo the remaining period of sentence, if any.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

nsd

To

1. The Inspector of Police,
Tiruppur North Police Station, Tiruppur District.
2. The Additional District and Sessions Court,
Fast Track Court No.V, Coimbatore at Tiruppur.
3. The Public Prosecutor,
Madras High Court, Chennai - 104.
4. The Chief Judicial Magistrate,
Coimbatore (For Information)
5. The Superintendent, Crime Prison, Coimbatore.

Copy To

The Section Officer,
Criminal Section, High Court,
Madras-104

Cr1.A.No.445 of 2011

SSV(CO)
CS/15/02/2019