

Bail Slip

The Appellants herein/Accused No.2 namely Ezhumalai S/o.Seedevi aged about 31 years (Accused No.2 in S.C.No.24/2009 dated 26/11/2009 on the file of the Additional District of Sessions Judge FTC No.I, Erode) was directed to be released on bail as per order of this court 17/09/2010 made in CrI .MP No.1 of 2010j in CrI.A.No.497/2010 on the file of this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.07.2018

CORAM

THE HONOURABLE Mr.JUSTICE R.PONGIAPPAN

CrI.A.No.497 of 2010

Ezhumalai

.. Appellant/Accused No.2

Vs.

The State by Inspector of Police,  
Karungalapalayam Police Station,  
Erode District.  
Crime No.739 of 2007

.. Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, to call for the records relating to the judgment dated 26.11.2009 made in S.C.No.24 of 2009 on the file of the Additional District and Sessions Judge/Fast Track Court No.I, Erode.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.T.P.Savitha  
Government Advocate (CrI.side)

J U D G M E N T

This appeal has been preferred against the judgment dated 26.11.2009 in S.C.No.24 of 2009 on the file of Additional District and Sessions Judge/Fast Track Court No.I, Erode.

2. The appellant herein is arrayed as 2<sup>nd</sup> accused in

the above said case, he was convicted for the offence under Section 304(ii) IPC and sentenced to undergo 7 years R.I. and to pay a fine of Rs.2,000/- in default to undergo three months R.I. Against which the appellant approached this Court by way of filing this appeal, praying to set aside the conviction and sentence.

3. From the available records, the case of the prosecution in the trial Court is as follows:-

i) P.W.1 Veni, is the wife of the deceased (Palanisamy). They were residing in K.A.S. Nagar, Erode. P.W.2 Gowtham shankar is their son. They were doing the business of selling "Kambang kuzh". On 08.11.2007 at about 11.00 hours in the morning, when P.W.1 and her husband taking the breakfast, the present appellant and one Kumar arrayed as first accused came in to the house of deceased and demanded to pay Rs.500/- consequent to that the other accused in this case quarrelled with deceased and pull the shirt of deceased. Further, he dragged the deceased from his house. At the same time, the present appellant had also attacked the deceased. Due to which the deceased fell down. Thereafter, by using the bricks, the first accused and the appellant assaulted the deceased and went away from the occurrence place through the cycle.

ii) After the occurrence, the brother of the first accused Ramesh and P.W.1 took the injured to the Government Hospital, Erode. After examining him, the Doctor attached to Government Hospital, declared that he is dead.

iii) On the same day at about 12.30 hours P.W.14 Kannan, Sub-Inspector of Police, Karunkalpalayam, received an intimation under Ex.P.5 and went over to the Hospital. He recorded the statement from P.W.1. Thereafter, a case has been registered in Crime No.739/2001 under Section 302 IPC. Ex.P.12 is the printed FIR.

iv) After registration of the case, P.W.14 handed over the case records to Inspector of Police for investigation. P.W.15 Sivakumar, when he was working as Inspector of Police, Karungalpalayam, received the case records on 08.11.2007 at about 2.15 pm, he went to the scene of occurrence and in the presence of P.W.5 Sridhar and one Siva Kumar prepared an observation mahazar under Ex.P.2. Further, he drew a rough sketch under Ex.P.13. In the presence of same witnesses, he recovered broken bricks (MO1) Hawaii Chappals (MO2) blood stained soil(MO3) and sample soil(MO4) under the cover of mahazar. Ex.P.3 is the mahazar prepared by the investigation officer for recovering the above objects. Further, he took the photographs with the help of P.W.6.

v) On the same day at about 3.15 pm, he went to the Government Hospital, Erode. In the presence of witnesses and panchayathars, he prepared an inquest report under Ex.P.14. Further, he made arrangements for taking the photographs of the dead body. After completing the inquest, he sent a request to the Hospital authorities for conducting post-mortem. The requisition letter is marked as Ex.P.4.

vi) P.W.7 Dr.Chandramohan, when he was working as doctor in Government Hospital, Erode, received a requisition from P.W.15 and conducted the autopsy over the dead body and found the following injuries:-

External Injuries:- Crushed injury right side eye socket & eye. 2) lacerated injury over right side forehead extended from right side forehead on the side of eyebrow 3) lacerated injury over right side upper lip 4) lacerated injury over left side cheek 2x2x2 5) loosening of upper & lower joint.

vii) After completing the post-mortem, he gave opinion that the deceased would appear to have died 6 to 8 hours prior to autopsy, due to the injury found in the face, skull, crush injury found in maxilla bone, both side parietal bone with haematomas.

viii) Ex.P.6 is the post-mortem certificate and the final opinion given by doctor is exhibited as P.7.

ix) After completing the process of post-mortem, the blood stained clothes found on the dead body were handed over to P.W.15 along with special report (Ex.P.11).

x) Meanwhile, the appellant herein surrendered before the Magistrate and kept in the judicial custody. Thereby, P.W.15 on 24.11.2007 submitted an application before the judicial Magistrate for handing over the appellant for police custody. Further, he sent requisition to the judicial Magistrate for sending the material objects recovered in this case for chemical examination. Furthermore, he sent another requisition to the Judicial Magistrate for sending the viscera for examination. In the report, received from Forensic Department, it was found that there was no poisonous substance found in the dead body. After receiving the reports from the lab, he examined the doctor and the examiner who conducted the chemical examination and after completing the investigation, he filed the final report against the appellant and against other accused for the offences under Sections 449, 302 read with 34 and 352 IPC.

xi) In the trial Court, before framing charges, it was

reported that the first accused in this case namely Ravi is dead. So, the offence against the said accused is closed as abated.

xii) Having regard to the present appellant, charge has been framed for the offences under Sections 449, 302 read with 34 and 352 IPC, the accused denied the same and opted for trial. During the time of trial, as many as 15 witnesses were examined on the side of prosecution. Besides 19 documents were marked as P.1 to P.19. Further 11 material objects marked as MO.1 to MO.11.

xiii) Out of the said witnesses, P.W.1 Veni is the wife of the deceased Palanisamy. They were residing in K.S.Nagar, Karungal Palayam. They are having the business of selling "Kambang Kuzh" in platform area. On 08.11.2007, since the said day is Deepavali, they continued their business till 4.00 am., and returned to house along with her husband. Further she has stated since the fateful day is Deepavali, she prepared non-veg at about 11.00 am., when the deceased was taking breakfast, both the accused came inside to their house. After entering into the house both of them pulled the shirt of deceased and demanded to pay Rs.500/-.

xiv) She has further stated in the same transaction, the accused Ravi (now deceased) pulled her husband and both of them were quarrelled with each other. In the said occurrence, the deceased bite the face of the accused Ravi. Thereafter, both the accused took the bricks and attacked the deceased on his face. When she has intervened, both the accused pulled the P.W.1 and went away from the scene of occurrence.

xv) After the occurrence, one Ramesh brought ambulance and thereafter, P.W.1 admitted her husband in Erode Government Hospital and thereafter, she lodged a complaint before the police under Ex.P.1.

xvi) P.W.2 Gowtham Shankar is the son the deceased. He has stated during the time of occurrence, the accused Ravi came into his house and quarrelled with the deceased. Further, he stated during the time of occurrence, both the accused pulled the deceased from his house and in the road both of them assaulted the deceased by using the bricks on his face.

xvii) P.W.3 Chitra and P.W.4 Sithayee are the resident of same area has not stated any evidence in support of the prosecution.

xviii) P.W.5 Sridhar has stated on the day of occurrence, the police attached with Karungalpalayam came to the

occurrence place and prepared observation mahazar. Further, he stated from the scene of occurrence they seized one MO1 2 Bricks, MO2 Havai Chappal, MO3 Blood stained soil, MO4 A soil without blood for which the police officer prepared a mahazar in which he signed as a witness.

xix) P.W.6 Mahesh is a photographer, running a studio in the name of style of Mahesh Studio. At request of the Inspector of Police, he took the photos in 4 angles in the scene of occurrence.

xx) P.W.7 Dr.Chandramohan is working as a Doctor in Erode Government Hospital has stated about the injuries found in the dead body and about the process of post-mortem. He collected viscera and send it for chemical examination. He gave final opinion as the deceased would appear to have died 6 to 8 hours prior to autopsy due to the injury in face, skull and crush injury found in the mascila and both side fainted bone fracture.

xxi) P.W.8 Laxhmanan is the another photographer has stated at request of the Inspector of Police, he took the photographs of the dead body in 5 angles.

xxii) P.W.9 Munirasan working as a scientist in Forensic Science Department, Coimbatore has stated on 07.12.2007 through the letter sent by the Judicial Magistrate, Erode he received the material objects collected in this case.

xxiii) P.W.10 is also scientist in Forensic Science Department has stated about the examination of vicera. On examination, he found there is no poisonous substance found in the dead body. P.W.11 is the Grade-1 Constable has stated about the dispatch of FIR to the Court. P.W.12 Karthikeyan also working as a Head Constable he has stated the dead body was entrusted to him for producing the same before the Doctor for post-mortem, he collected the blood stained shirt, towel and underwear which are all removed from the dead body and hand it over to the investigating officer.

xxiv) P.W.13 Sellamuthu has stated about the handing over the material objects for chemical examination. P.W.14 and P.W.15 are the police officers has stated about the registration of the case, details of investigation and about the filing of final report.

xxv) The above incriminating evidences were put to the accused under Section 313 Cr.P.C., he denied the same as false. However, he did not choose to examine any witness nor did he marked any documents.

xxvi) Having considered the above, the learned Additional Sessions Judge found the accused guilty for the offence under Section 304(ii) IPC and sentenced to a term as indicated in the second para of this judgment. Aggrieved by the conviction and sentence, the accused has come up with present appeal.

4. Today when the appeal is taken up for consideration, heard the arguments of Mr.N.Manokaran learned counsel for the appellant and Ms.T.P.Savitha learned Government Advocate for the respondent.

5. The first submission made by the learned counsel for the appellant is in the alleged occurrence, the deceased first accused also sustained injury for which prosecuting agency did not register any case and explain in what circumstances he sustained injury. In this regard, he relied on the judgment of Lakshmi Singh and Others Vs. State of Bihar reported in (1976) 4 Supreme Court Cases 394 in which our Hon'ble Apex Court has held as follows:-

"...in these circumstances, therefore, it was the bounden duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not see any injuries on the person of the accused. Indeed if the eyewitnesses could have given such graphic details regarding the assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this a most important circumstance to discredit the entire prosecution case..."

6. Further, he relied on the judgment of this Court in Ravichandran & others vs. Inspector of Police, Thittakudi reported in 2007-2-L.W.(Crl.) 827. In the said judgment this Court had observed as follows:-

"Our Court has been repeatedly holding that when there is a case and counter, the investigating officer has to investigate both the complaints in a manner known to law and file the final report in one case and exhibit the materials collected by him during investigation in the connected complaint before the Court."

7. So according to the observation of the Hon'ble Apex Court as well as by this Court, non explanation to the injury sustained by the accused is fatal to prosecution. Furthermore, it is the duty of the prosecuting officer to register a case for

the injury sustained by the accused, for the purpose of rendering a real justice. The learned counsel appearing for the appellant further submitted that in this case, the details of injury sustained by the first accused is clearly elicited through the evidence of D.W.1. Accordingly, he prayed to allow the appeal.

8. On the other hand, learned Government Advocate would submit as per the evidence given by doctor, the nature of injury sustained by accused is simple in nature. Further, in this regard, P.W.1 in the chief examination itself clearly stated that there was a quarrel had happened between the deceased and the first accused. Accordingly, the injury sustained by the first accused is properly explained. Thereby, the submission made by appellant is not a ground for allowing the appeal. Further, she relied on the judgment of *Dashrath ALIAS JOLO AND ANOTHER Vs. State of CHHATTISGARH* reported in (2018) 4 Supreme Court Cases 428, in which, our Hon'ble Apex Court has observed as follows:-

"8. The next contention urged by the learned counsel is that the prosecution has not chosen to explain the injuries on the person of the appellants and this is fatal to the case of the prosecution. It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so, the prosecution case should be disbelieved. Before holding that non-explanation of the injuries on the person of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions:

(i) that the injury on the person of the accused was of a serious nature; and

(ii) that such injuries must have been caused at the time of the occurrence in question. (Vide *Takhaji Hiraji v. Thakore Kubersing Chamansing*, SCC p. 154, para17.)"

9. As of now, the judgment relied by either side counsel delivered by co-equal benches. In the judgment of *M.Krishnamoorthy vs. K.Pondeepankar* reported in 2017 (3) CTC 170, this Court has held as follows:-

"24. To conclude on this aspect it has held that where there is a direct conflict between two decisions of the Hon'ble Supreme Court rendered by the Co-equal Benches, the High Court must follow up with the judgment which appears to it to suit the law more elaborately and accurately."

10. Now the task before this Court is to decide as to which of the two views of Co-equal Benches of the Hon'ble Apex Court should follow. In this regard, in the judgment relied by the counsel appearing for the appellant in para No.15 it is observed as follows:-

15. There is yet another important circumstance which completely falsifies the evidence of the eyewitnesses. All the eyewitnesses have consistently deposed that after the deceased Chulhai Singh was assaulted by Lakshmi Singh and fell down, the appellants Chhathu Singh and Ramprasad assaulted him with lathis. Yet the medical evidence of Dr. Ramadhar Singh shows that there was only one solitary injury on the person of the deceased Chulhai Singh and that was on the abdomen. No other injury of any kind was found by the doctor on any part of the body of Chulhai Singh. The absence of lathi injuries on the person of Chulhai Singh completely falsifies the evidence of the eyewitnesses on a most material point.

11. However, according to the observation made by the Hon'ble Apex Court in the said judgment, the evidence of eye witnesses examined on the side of the prosecution is not convincing one. Only due to discrepancies in the evidence of eye witnesses, the Apex Court came to the conclusion that non examination of injuries also fatal to prosecution. But, the case in hand, P.Ws.1 and 2 who are the eye witnesses to the alleged occurrence clearly stated about the manner of assault committed by both the accused. Furthermore, the evidence of P.W.1 gives explanation for the injuries sustained by the accused. Thereby, this Court held, since the reason for injury sustained by the accused is exhibited through the evidence of P.W.1, there is no necessity for registering another one case for the injury sustained by the appellant. Apart from that the injury sustained by the accused is superficial in nature. Accordingly, the first contention raised by the appellant's counsel is rejected.

12. Secondly, the learned counsel appearing for the appellant would submit that except P.Ws.1 and 2, the other independent witnesses examined on the side of the prosecution had not supported the case of the prosecution. Since P.Ws.1 and 2 are the wife and son of the deceased, their evidence alone cannot taken into account for considering the case in favour of the prosecution.

13. It is true that before the trial Court after examining P.Ws.1 and 2, two other witnesses were examined as P.W.3 and P.W.4.

14. According to the prosecution, they are the eye witnesses to the alleged occurrence. But in the trial Court they have not stated anything about the guilt of the appellant. Now a days, all are aware, it is a common problem, except the relatives nobody is willing to come to Court for giving evidence particularly in criminal cases, due to so many reasons.

15. In the said circumstances, on considering the other circumstances, the alleged occurrence, which is the subject matter of this appeal had happened on the day of Deepavali. Further, it took place in broad day light at about 11.30 hours. As per the rough sketch drawn by the investigation officer, the alleged occurrence had happened in a busy road. Around the offence place, so many persons were having their houses. But nobody came to depose about the occurrence.

16. It is settled position that the solitary testimony of single ocular witness is sufficient to uphold the entire prosecution case subject to the condition that the evidence is wholly reliable. In this case, the brief cross examination of P.Ws.1 and 2, in no way, could impeach the evidence given by them in the chief-examination. Accordingly, the second submission made by the appellant's counsel is not justifiable.

17. Having regard to the other facts and circumstances, the testimony of the ocular witness is supported through the evidence given by medical officer who completed the post-mortem and the result of the chemical examination also supports the case of the prosecution.

18. Finally, the learned counsel appearing for the appellant would submit that the alleged occurrence had taken place in the year 2000 subsequently for the past 10 years, the appellant is coming to the Court and facing this case, thereby, he pleaded for the modification of the sentence.

19. Now, the age of the appellant, at the time of occurrence is 30 years. It is true, for the past eight years, he has attended the Court and faces this case. So on considering the above said circumstances, I am inclined to modify the sentence from 7 years to 5 years R.I.

20. In the result, while confirming the conviction for the offence under Section 304(ii) r/w 34 IPC, the sentence awarded is reduced from 7 years to 5 years rigorous imprisonment together with fine of Rs.1,000/- (Rupees thousand only). It is reported that appellant is on bail. Bail bonds, if any, executed by the appellant would remain cancelled forthwith and the trial Court is directed to secure the presence of appellant and commit

him to the prison to serve the rest of the sentence imposed on him.

21. Accordingly, appeal is partly allowed.

Sd/-  
Assistant Registrar (CO)

//True copy//

Sub Assistant Registrar

AT

To

1. The Judicial Magistrate No.I, Erode
  2. The Chief Judicial Magistrate, Erode (for Informantion)
  3. The Additional District and Sessions Judge  
Fast Track Court No.I, Erode.
  4. The Principal Sessions Judge, Erode.
  5. The Superintendent, Central Jail, Coimbatore.
  6. The Inspector of Police,  
Karungalapalayam Police Station,  
Erode District.
  7. The District Collector, Erode.
  8. The Director General of Police, Mylapore, Chennai-4
  9. The Public Prosecutor, High Court, Madras.
- +1cc to Mr.N.Manokaran, Advocate SR.No.42908

CrI.A.No.497 of 2010

GMV (05/10/2018)

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