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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders Reserved on	09.01.2018
Orders Pronounced on	10.01.2018

CORAM:

THE HONOURABLE DR.JUSTICE S.VIMALA
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

Cr1.A.(MD)No.262 of 2016

Mohammed Rafiq

... Appellant/PW2

-VS-

1. Madhan
2. Subramani

... Respondents/A1 & A2

3. The State Rep. By
The Inspector of Police,
Alanganallur Police Station,
Madurai District.
(Crime No.219 of 2013)

... Respondent No.3/Complainant

Prayer: Appeal filed under Section 372(2) of the Code of Criminal Procedure praying to call for the record in S.C.No.252 of 2015 on the file of the VI Additional District and Sessions Judge, Madurai dated 29.03.2016 and set aside the judgment of acquittal and allow the appeal and convict the accused according to law.

For Appellant : No Appearance

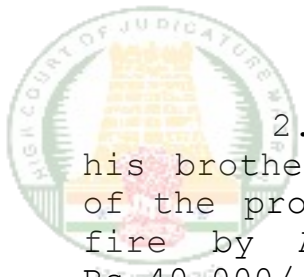
For R1 & R2 : Mr.M.Jegadeesh Pandians

For R3 : Mr.C.Ramesh
Addl. Public Prosecutor

J U D G M E N T

[Judgment of the Court was made by S.VIMALA, J.]

By the judgment dated 29.03.2016 rendered in S.C.No.252 of 2015, the VI Additional Sessions Judge, Madurai had acquitted A1 and A2 / R1 and R2 herein of the charges framed under Section 3 (1) of the TNPPDL Act and Section 436 of IPC. Challenging the <https://hservices.pco.nic.in/hservices/> ~~judgment~~ order of the VI Additional Sessions Judge, Madurai, the so-called victim has filed this appeal under proviso to Section 372 Cr.P.C.



2. The case of the prosecution is that the appellant and his brother Mohamed Haja Nizamudeen were functioning as Trustees of the property, in which they had put up a shed, which was set fire by A1 and A2, thereby caused loss to the extent of Rs.40,000/-. Apart from that, it is also stated that A1 and A2 set fire to the shed put up by one Natarajan also.

3. The prosecution, in order to substantiate the offences against the accused persons, has relied upon the evidence of P.Ws.1 to 6, Exhibits 1 to 5 and M.Os.1 & 2. Out of six witnesses, P.Ws.4 to 6 are the official witnesses. P.W.6 (Sub-Inspector of Police) has received the complaint (Ex.P1) preferred by P.W.1 / Mohamed Haja Nizamudeen and has registered a case against A1 and A2 under Section 436 IPC and Section 3(1) of PPDL Act under Ex.P3 / FIR. In the presence of P.W.3 / Arumugam, he prepared Ex.P1 / Observation Mahazar and Ex.P4 / Sketch and he recovered M.O.1 / Ashes. He also recovered the Motor Cycle (M.O.2) under Form 91 / Ex.P5. Accepting the investigation done, P.W.6 / Inspector of Police has filed the final report against the accused persons.

4. The Trial Court, after considering the oral and documentary evidence adduced by the prosecution, has chosen to acquit the accused persons giving reasons. The justifiability of the reasons given by the Trial Court is under challenge in this appeal.

5. Before going into the merits of the case, it is necessary to consider the relevant provisions, under which A1 and A2 have faced the trial.

Offences	Description
Section 436 IPC	Mischief by fire or explosive substance with intent to destroy house, etc.—Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Section 3(1) of TNPPDL Act	3. Punishment for committing mischief in respect of property. "Whoever," (i) Commits mischief by doing any act in respect of any property and thereby causes damage or loss to such property to the amount of one hundred rupees or upwards;



6. In order to prove the offence under Section 436 IPC, the prosecution has to establish the following ingredients:

- i) there must be commission of mischief by fire or by explosive substance;
- ii) it should have been committed intending to cause or knowing it to be likely that the accused will thereby cause the destruction of any building;
- iii) the building should be one, which is ordinarily used as a place of worship or as a human dwelling or as a place for custody of property.

6.1. Mischief has been defined under Section 425 IPC. Section 425 IPC reads as under:

"425. Mischief.—Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief". Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not. Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

6.2. Mischief by fire is generally called in common parlance as Arson. It is not simply an offence, as it has a personal impact on the owner or the occupier of the premises. The extent of damage caused is relevant, but it is the offender's intention, which characterizes the seriousness of the offence.

7. The next issue is, with regard to the right of the victim to file the appeal against acquittal. Section 372 Cr.P.C. provides for the right of appeal to the victim.

"372. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such

8. The definition of victim was inserted by way of Section 2(wa) of the Code of Criminal Procedure so as to assign an



active role to a victim of an offence in the judicial process arising from the offence and the definition reads as under:

"2(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

9. As per this definition, the appellant has to show that he has suffered loss or injury caused by reason of the act / omission committed on the part of the accused persons, i.e., respondents 1 and 2.

10. The various dimensions of the proviso to Section 372 inserted by the Criminal Procedure Code amendment Act 2008, has been elaborated by the Division Bench of Patna High Court in the case of **Parameshwar Mantal vs. State of Bihar [2014 Cr1.L.J.1046 (Pata Div.Bench)]** and it will be in fitness of things to consider the scope of the proviso in the light of the dictum laid down in Chapter XXIX-Appeals (Pg.No.1570) by Ratanlal and Dhirajlal - 20th Edition, as follows:

(i) Status of the victim - By virtue of the proviso a 'victim' has been put at a higher pedestal, than a prosecuting agency or a complainant in the matter of preferring an appeal against any order of a criminal Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation.

(ii) Unqualified right to victim - The proviso gives an unqualified right to a victim to prefer an appeal in its terms as against the enabling provisions in S.377 and S.378 which only give liberty to a District Magistrate, the State Government, the Central Government and the complainant. No 'leave to appeal' or 'Special leave' is required to be obtained by the victim.

(iii) No period of limitation provided - For filing appeal by victim, no period of limitation is provided. In the facts and circumstances of each case, the Court has to determine as to whether the appeal was entertainable or not.

(iv) Same yardsticks to apply as in S.378 - The yardsticks laid down by judicial pronouncements for consideration of appeals under S.378 of the Code would also apply to appeals filed by victim under the proviso.

(v) Accrual of rights to victim - The rights of the victim to file appeal accrues to him/her in all cases in which judgment and order of the Court is passed after the enforcement of the proviso irrespective of the date



of occurrence and any subsequent event in the case prior to such judgment / order.

(vi) Where victim is dead or incapacitated - Where the victim is dead or incapacitated to file appeal, his/her next of kin can file appeal on proof of 'loss' or 'injury' caused to him/her by the crime.

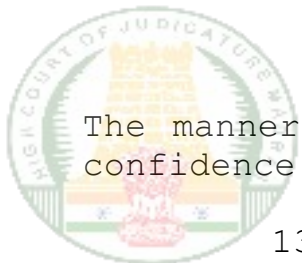
(vii) Appeal as 'guardian' or 'legal heir' - Where an appeal is filed solely on the basis of his status as 'guardian' or 'legal heir', he/she has to establish the legal status of his/her such status.

(viii) No second appeal under the proviso - Once an appeal is filed in terms of the proviso and is entertained by an Appellate Court, no second appeal should be entertained.

(ix) No distinction between police case and complaint case - No distinction can be made between a case instituted by informant with police and by a complainant before the Court directly, and an absolute right of a victim to file an appeal under the proviso does not get fettered by any other section of the Code continued in Chapter 29, which includes S.378."

11. The grievance of the appellant is that the action of the accused in setting fire to the building of him and that of one Natarajan has not been considered by the Trial Court. The appellant claims that he is a Doctor and there is no necessity for him to give false evidence against the accused. The appellant claims to be a person interested in the Trust created and his right as a Trustee got affected on account of the damage caused. May be it is true that the appellant is a Doctor and that he is interested in the Trust created and the property involved in the occurrence. But, the question is, whether it is proved by the prosecution that it is only the accused who set fire to the property of the appellant and that the appellant suffered damage?

12. When it is claimed that the shed belonging to one Natarajan was also set on fire, but Natarajan has not been examined before the Court. It is for him to come and say that in what way, he suffered damages? No explanation has been given as to why he was not examined before the Trial Court. He ought to have been examined especially in the light of the fact that there is a link between the first incident, where the property belonging to the P.Ws.1 and 2 are stated to have been set on fire and the second incident (follow up incident) in which the property belonging to Natarajan is allegedly set on fire. In the evidence, it is stated that A1 and A2 gave a previous threat before setting fire to the shed of Natarajan and this was intimated to Natarajan over phone even though the cell phone was in a switch off mode.



The manner in which the evidence has been let in does not create confidence that what is stated must be true.

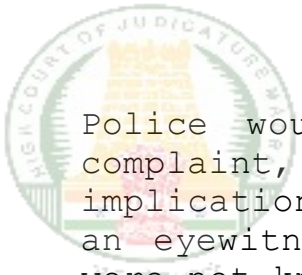
13. In a case like setting fire, which involves life sentence, the Court will expect the evidence to be cogent, convincing and authentic. Here is a case where there is an allegation that the damage caused to the property is worth Rs.40,000/-, which includes the articles found inside the shed. The sketch drawn does not show the existence of any burnt articles / objects. Excepting the word "SOC" in all other respects, it is equivalent to a sketch drawn by a learning school student. None of the article has been recovered also.

14. The best evidence would be the photograph of the place of occurrence. It is not explained why not even a photograph has been taken or filed?

15. It is in evidence that P.Ws.1 & 2 were trying to put out fire by exerting themselves and also using the services of the entire villagers and still, it could not be put out. Even then, they have not chosen to inform the Fire Rescue Officials. Under normal circumstances, one would think of seeking the services of the Fire Ambulance to put off the fire. In this case, it is stated that the Fire services were not sought even after, but no reason has been stated as to why it was so. This circumstance coupled with other facts and circumstances create a doubt as to whether there could have been a fire incident at all.

16. When the incident was at about 8.30 in the night and when the villagers participated in putting up the fire, then why nobody has been examined excepting P.Ws.1 and 2, who claimed to have interest in the property fired, has not been explained by the prosecution.

17. Then, the only consideration left out is the complaint preferred by P.W.2 and the evidence of P.Ws.1 and 2. The appellant expresses the grievance that the Trial Court did not consider the reasons given for the delay involved in preferring the complaint. There is a vital contradiction between the evidence of P.Ws.1 and 2 and unbelievable contradictions in the evidence adduced during chief and cross examinations. Both of them have stated that they have seen the property on fire and they did not see when the property was actually set on fire. There may be circumstances where if there is no previous warning, they would have the opportunity of seeing the fire and not how the property is set on fire. This factor assumes importance in the light of the delay involved. The witness Mohamed Rafi would state that after the incident, he went to Madurai along with P.W.1 out of fear and ~~there was no discussion on 14th along with others, who are in the~~ helm of administration and thereafter, the complaint was preferred on 15th. This explanation is not acceptable. The Inspector of



Police would state that there was a delay in preferring the complaint, because the defacto complainant was out of station. The implication is that, the defacto complainant could not have been an eyewitness to the occurrence and only because the assailants were not known, there had been a delay in the complaint.

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18. There are no details as to how the damages were worked out as Rs.40,000/-. The details of articles burnt have also not been furnished. The cumulative circumstances do not establish the offence under Section 436 IPC or Section 3(1) of TNPPDL Act.

19. The yet another contention is that charges should have been framed under Section 4 of TNPPDL Act and not under Section 3(1) of the Act. The framing of charge under Section 4 of TNPPDL Act could not make a difference, as the ingredients to be proved with regard to fire is also covered under Section 436 IPC.

20. In the result, the Criminal Appeal is dismissed, thereby the judgment dated 29.03.2016 passed in S.C.No.252 of 2015 by the learned VI Additional District and Sessions Judge, Madurai is confirmed, though for different and additional reasons.

Sd/-

Assistant Registrar(RTI)

/True Copy/

Sub Assistant Registrar

To:

1. The VI Additional District and Sessions Judge, Madurai.
2. The Principal District Judge, Madurai.
3. The Judicial Magistrate, Madurai.
4. The Chief Judicial Magistrate, Madurai.
5. The District Collector, Madurai.
6. The Director General of Police, Mylapore.
7. The Superintendent, Central Prison, Madurai.
8. The Inspector of Police, Police Station, Madurai District.



9. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 cc TO Mr.I.Mohammed Srajudeen Meera, Advocate in SR No.41661

+1 cc TO Mr.M.Jegadeesh Pandian , Advocate in SR No. 41908

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AE/MR/SAR4/19.01.2018/8P/12C

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