

**BAIL SLIP**

Bangubalan @ Balamurugan, S/o.Chidambaram Servai, (A1), and Ashok @ Ashok Kumar, S/o.Murugan (A2) were released on bail vide the order this Court dated 26.09.2016, made in CrI.MP(MD) No.9192/2016 in CrI.A.[MD].No.349 of 2016.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 13.12.2017
Pronounced on : 09.01.2018

CORAM:

THE HONOURABLE MR .JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CrI.A.[MD].No.349 of 2016

1.Bangubalan @ Balamurugan
2.Ashok @ Ashok Kumar

.. Appellants/
Accused Nos.1 & 2

Vs.

State rep. by the
Inspector of Police,
Sellur Police Station,
Madurai -02.
(Crime No.1789 of 2007)

.. Respondent/Complaint

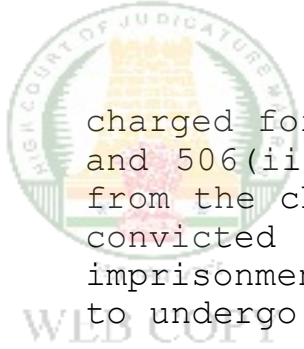
PRAYER: Criminal Appeal filed under Section 374(2) of Cr.P.C. against the conviction and sentence, dated 31.08.2016, made in S.C.No.175 of 2015, by the learned V-Additional District and Sessions Judge, Madurai.

For appellants : Mr.N.Anantha Padmanaban
For respondent : Mr.C.Ramesh,
Additional Public Prosecutor

JUDGMENT

[Judgment of the Court was made by R.SUBBIAH, J.]

This appeal has been filed by the appellants / A1 & A2 against the conviction and sentence, dated 31.08.2016, made in S.C.No.175 of 2015 by the learned V-Additional District and Sessions Judge, Madurai. There are totally two accused in this case and they were



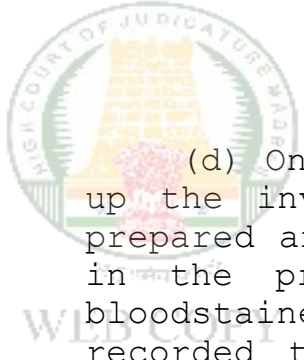
charged for the offences punishable under Sections 302 r/w 34, 307 and 506(ii) IPC. After trial, both the accused were acquitted from the charges under Sections 307 and 506(ii) IPC, but they were convicted under Section 302 r/w 34 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for one month.

2.The case of the prosecution is consciously narrated below:

(a) The first and second accused in this case are close friends. The deceased, in this case, is the brother-in-law of PW1. The deceased Sangaiah was running a sweet stall and a computer shop in the name and style of Sathya Sweets and Sathya Kids Sports World. Before that, the deceased was working in a Kerosene shop as a Coolie. A1 and A2 are rowdy elements and they used to threaten the deceased and extract money. Three days prior to the occurrence, while the deceased Sangaiah and PW1 was conversing in front of Sathya Sweets Stall, A1 and another person came there and threatened the deceased to give money. But, the deceased had stated that he has no money and thus, refused to give money. A1 threatened the deceased stating that his death would be only at his hands and went away.

(b) On 29.09.2007 at 5.45 p.m. A1 and A2 with a common intention to murder the deceased, trespassed into the Sathya Kids Sports World shop of the deceased and threatened him to give them money. Since the deceased refused to give money, A1 and A2 took knives and stabbed the deceased indiscriminately. One Sundaramoorthy, who was in the shop, obstructed the accused persons from inflicting injuries on the deceased. The 2nd accused inflicted injuries on the left elbow and right hand thumb of the said Sundaramoorthy with the same knife. When one Amutha, who was working in the said shop of the deceased tried to obstruct the accused persons from inflicting injuries on the deceased, the 1st accused with the same knife inflicted simple injury on the right upper-arm of Amutha. At that time, PW1, along with his wife Dhanalakshmi, came there to visit the deceased. While so, the said Amutha came out of the shop with injuries and informed about the occurrence to PW1. At that time, A1 and A2, who came out of the shop after commission of crime, threatened PW1 saying that "if you come near, you will also face the same consequences". Then, A1 and A2 ran away from the occurrence. PW1 immediately took the deceased through an auto to the Government Rajaji Hospital, Madurai, where it was informed that the deceased succumbed to the injuries.

(c) On the same day at 7.30 p.m., PW1 went to the Police Station and lodged a complaint - Ex.P1. On receipt of the said complaint, PW13 - the then Sub Inspector of Police registered a case in Crime No. 1789 of 2007 under Sections 307 and 302 IPC, and forwarded the complaint (Ex.P1) and FIR (Ex.P12) to the Court and to PW21 - in-charge Inspector of Police for investigation.



(d) On receipt of the copy of the complaint and FIR, PW21 took up the investigation, proceeded to the place of occurrence and prepared an observation mahazar (Ex.P17) and rough sketch (Ex.P18) in the presence of PW8 and PW9. Thereafter, he recovered bloodstained cement slab and sample cement slab. PW21, thereafter, recorded the statements of PW1, PW2, PW8 and PW9. Then, PW21 handed over the investigation to the regular Inspector of Police - PW22.

(e) On 30.09.2007, PW22 took up the investigation and went to the hospital at 7.00 a.m. and conducted inquest on the dead body of the deceased in the presence of panchayatars and forwarded the dead body of the deceased to the hospital through one Head Constable for postmortem.

(f) PW20 - Dr.Natarajan conducted postmortem on the dead body of the deceased on 30.09.2007 at 10.45 a.m. He found the following injuries on the body of the deceased:

"1.An oblique stab injury 3 x 1 cms x pleural cavity deep noted on the front of left side of chest, 1cm above the nipple.

2.An oblique stab injury 3.5 cms x 1 cm x cavity deep noted on front of left side of chest 1 cm medial to nipple.

3.An oblique stab injury 3 x 1 cm x cavity deep noted on the front of left side of chest, 1 cm below the nipple.

4.An oblique stab injury 3 x 2 cms x cavity deep noted on front of left side of chest, 3 cms below the nipple.

5.An oblique stab injury 4 x 1.5 cms peritoneal cavity deep noted on the left loin.

6.An oblique stab injury 4 x 1.5 cm x 2 cm along the muscle plane noted on the middle of right side of neck.

7.An oblique stab injury 4 x 2 cms x muscle deep noted on the margins of right lower jaw.

8.An oblique stab injury 5 x 2 cms x 2 cm along the muscle plane noted on the outer aspect of right elbow.

9. An oblique stab injury 5 x 2 x 2 cms along the muscle plane noted on the inner aspect of right hand.

10. An oblique stab injury 4 x 2 x 1 cm along the muscle plane noted on the front of right side chest in the costal margin.

11. An oblique stab injury 3 x 1 x 1 cm along the muscle plane noted on the left side of neck.

12. An oblique stab injury 3 x 1 x 1 cm along the muscle plane noted on the left side of margin



of mandible.

13. An oblique stab injury 5 x 1 x 2 cms along the muscle plane noted on the left side of chest, 5 cms above and medial to nipple.

14. An oblique stab injury 4 x 1 x 1 cms along the muscle plane noted on the left side of chest, 1 cm below the nipple.

15. An oblique stab injury 5 x 2 cms x muscle deep noted on the middle of left upper arm.

16. An oblique stab injury 4 x 1 cms x muscle deep noted on the middle of left upper arm."

PW20 opined that the deceased would appear to have died of shock and hemorrhage due to external injuries No.1 to 6 and its corresponding internal injuries and cumulative effect of all other injuries, 16 to 20 hours prior to autopsy.

(g) On 30.09.2007 at 2.10 p.m. the said Sundaramoorthy and Amutha (PW3) were brought to the Government Rajaji Hospital. PW17 - Dr. Amalraj was informed by them that they were attacked by two known persons with knives on 29.09.2007 at 5.30 p.m. PW17 found the following injuries on the said Sundaramoorthy:

"1. Incised wound 5 cm x 0.5 cm over left elbow sutured S & D outside.

2. Abrasion 2 cm x 2 cm right thumb."

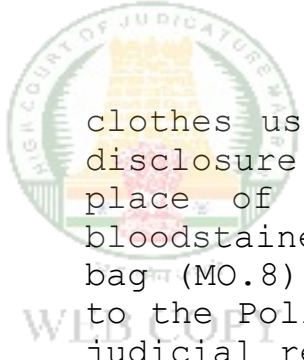
Ex.P13 is the Accident Register of the said Sundaramoorthy. PW17 has found the following injury on PW3:

"A lacerated injury 6cm x 2 cm x 0.5 at the right arm sutured and dressed outside."

Ex.P14 is the Accident Register of PW3

(h) During the course of investigation, PW22 enquired PW3, PW5, PW6 and others and recorded their statements. A2 surrendered before the Court. On 10.10.2007, PW22 took A2 under custody for investigation by filing a petition. On enquiry, A2 gave a voluntary confession statement in the presence of PW10 and PW11, in which he disclosed the place where he had hidden out the weapon and the clothes used at the time of occurrence. In pursuance of the said disclosure statement, he took the Police and witnesses to the place of hide out and produced a bloodstained pant (MO.2), bloodstained shirt (MO.1), yellow colour plastic bag (MO.3) and bloodstained knife (MO.4). PW22 recovered the same under a mahazar. On returning to the Police Station, PW22 forwarded the accused to the Court for judicial remand and handed over the material objects under Form 95 to the Court. The admissible portion of the voluntary confession statement of A2 is marked as Ex.P21.

(i) On getting information that A1 surrendered before the Court, on 23.10.2007, PW22 took A1 under custody for investigation by filing a petition. On enquiry, A1 gave a voluntary confession statement in the presence of PW12 and one Lakshmanan, in which he disclosed the place where he had hidden out the weapon and the



clothes used at the time of occurrence. In pursuance of the said disclosure statement, he took the Police and witnesses to the place of hide out and produced a bloodstained knife (MO.5), bloodstained shirt (MO.6), Lungi (MO.7) and black colour plastic bag (MO.8). PW22 recovered the same under a mahazar. On returning to the Police Station, PW22 forwarded the accused to the Court for judicial remand and handed over the material objects under Form 95 to the Court. The admissible portion of the voluntary confession statement of A1 is marked as Ex.P24.

(j) At the request of PW22, the learned Judicial Magistrate conducted identification parade and the report of the same is marked as Ex.P25. PW22, thereafter, handed over the investigation to his successor - PW23.

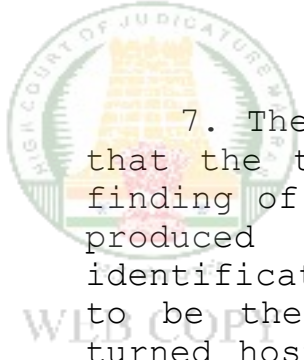
(k) During the course of investigation, PW23 collected the medical records and examined medical witnesses and few more witnesses, and recorded their statements. PW23, after completion of investigation, laid charge sheet against both the accused.

3. Based on the above materials, the trial Court had framed as many as four charges against the accused. When the accused were questioned in respect of the charges, they pleaded innocence. In order to prove the charges, on the side of the the prosecution as many as 23 witnesses were examined as PWs.1 to PW23 and Exs.P1 to P25 were exhibited, besides eight Material Objects (MOs.1 to 8).

4. When the accused were questioned under Section 313 of Cr.P.C. with reference to the incriminating materials adduced by the prosecution, the accused denied their complicity in the crime and pleaded innocence. On the side of the accused, no one was examined and no document was marked.

5. The trial Court, after considering the oral and documentary evidence, has acquitted both the accused from the charges under Sections 307 and 506(ii) IPC. But, the trial Court found A1 and A2 guilty of the charge under Section 302 IPC and accordingly, convicted and sentenced the accused, as stated supra. Challenging the said conviction and sentence, the appellants / A1 and A2 have come up with this appeal.

6. The learned counsel for the appellants / A1 and A2 would submit that except the official witnesses, all the witnesses, including PW3, who is, according to the prosecution, injured eyewitness, have turned hostile. They did not support the case of the prosecution. The trial Court has convicted the accused basing reliance on the statements of the witnesses recorded under Section 161 Cr.P.C. by the Police, medical witnesses and the recovery of weapons from the possession of the accused. But the recovery witnesses have also turned hostile. Therefore, the conviction and sentence passed by the trial Court are not legally sustainable.



7. The learned counsel for the appellant would further submit that the trial Court has committed grave error in recording the finding of guilt as against the accused on the basis of the record produced by the investigating officer with regard to identification parade, whereas PW1, PW2 and PW3, who are supposed to be the participants in the test identification parade, had turned hostile before the Court and not supported the prosecution case.

8. The learned Additional Public Prosecutor would submit that though the eyewitnesses and recovery witnesses have clearly stated in their 161 statements against the accused, they have turned hostile for the reasons best known to them. But, the official witnesses have clearly deposed against the accused. The accused are rowdy elements. Al had been involved in various heinous crimes of similar nature and in most of the cases he was acquitted since the witnesses turned hostile. The trial Court, taking into account the bad antecedents of the accused and also relying upon the evidences of the official witnesses and 161 statements of the witnesses, has convicted and sentenced the accused. Thus, he prayed for dismissal of the appeal.

9. We have given our anxious considerations to the rival submissions made on either side and perused the materials available on record.

10. According to the prosecution, it is a case of brutal murder and there are totally four eyewitnesses, including two injured eyewitnesses. But, the prosecution has examined only three witnesses as eyewitnesses PW1 to PW3. One of the injured eyewitness viz., Sundaramoorthy, was not examined by the prosecution for the reason best known to them. PW1 is the brother-in-law of the deceased and author of Ex.P1 - complaint. PW2 is the sister of the deceased. PW3, who is the injured eyewitness, was the employee of the deceased. But, all the eyewitnesses, including the injured eyewitness, have turned hostile for the reasons best known to them and they did not support the case of the prosecution. PW4, who is the wife of the deceased, was examined to speak about the motive for the occurrence. But, she also turned hostile for the reasons best known to her. The other witnesses, who were examined to speak about the case of the prosecution and also recovery of the material objects, have also turned hostile. Virtually, except the official witnesses, none of the witnesses have spoken about the case of the prosecution.

11. As rightly contended by the learned counsel for the appellants, the trial Court only based on the statements of witnesses and relying upon the evidences of official witnesses and recovery of the material objects from the possession of the accused after



their confession, has convicted the accused. It is a rudimentary principle of law that the statement of witnesses recorded under Section 161 Cr.P.C. is not a substantive piece of evidence and reliance cannot be placed on such statements, unless they are corroborated or strengthened by the testimony of such witness in the witness box. It is also a well settled principle that the First Information Report is not a substantive piece of evidence and it can be used only to discredit the testimony of the maker thereof.

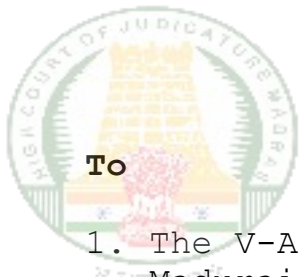
12. So far as the recovery is concerned, as per the provision of Section 27 of the Indian Evidence Act, it is not a material recovery which has to be proved, but the disclosure statement based upon which the recovery is made. As the recovery witnesses have turned hostile in this case, no statement disclosing the fact/material discovered was proved before the Court and hence, there is a missing link between the accused and the weapons / material objects. Mere recovery of weapons / material objects does not create any offence against the accused.

13. As stated earlier, except the official witnesses, none of the witnesses have spoken about the case of the prosecution. A perusal of the records would go to show that all the occurrence witnesses backed out from what was stated during investigation for the reasons best known to them. Considering the antecedents of the accused, this Court is of the view that there is every possibility of the witnesses being threatened by the accused. It is the duty of the Police to protect the witnesses from being threatened by the accused. But, for that reason, the Court cannot go beyond the well settled principle of criminal jurisprudence to convict any person forming opinion based on conjectures and surmises, and on legally inadmissible evidence. The occurrence witnesses could alone point out about the culprit involved in the commission of the offences. They are like the root of a tree. If root eroded by itself, the tree cannot stand. In such a way, based on the inadmissible evidences, the trial Court ought not to have imposed conviction and sentence on the appellants / accused and hence, the same are liable to be set aside.

14. In the result, this criminal appeal is allowed; the conviction and sentence passed by the trial Court against the appellants /A1 and A2 in S.C.No.175 of 2015 under Section 302 IPC are set aside and the appellants are acquitted from the said charge. The bail bond, if any, executed by the accused shall stand cancelled. The fine amount, if any, paid by the appellants are directed to be refunded forthwith.

Sd/-

Assistant Registrar (Cr.side)



To

1. The V-Additional District and Sessions Judge,
Madurai.

2. The Judicial Magistrate No.II, Madurai.

3. The Chief Judicial Magistrate, Madurai.

4. The Inspector of Police,
Sellur Police Station,
Madurai -02.

5. The Superintendent, Central Prison,
Madurai.

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

7. The Record Keeper,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

GCG

TE/MR/SAR-4 : 02/02/2018 : 8P/9C

Judgment made in
Crl.A.[MD].No.349 of 2016
Dated: 09.01.2018