

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.No.589 of 2008

Erwadi Mohamad Kasim

... Appellant/Accused

Vs

State by Inspector of Police, Law and Order,
P2 Otteri Police Station, Chennai.

...Respondent /Complainant

Prayer:-

This Criminal Appeal is filed, under Section 374 of Cr.P.C, against the judgement of conviction and sentence, dated, 06.03.2008, made in SC.No.7 of 2003, by the Sessions Court for Exclusive Trial of Bomb Blast Cases at Poonamallee, Chennai - 56.

For Appellant : Mr.S.Xavier Felix

For Respondent : Mr.K.Prabakar, APP

JUDGMENT

- 1.This Criminal Appeal is filed, against the judgement of conviction and sentence, dated 06.03.2008, made in SC.No.7 of 2003, by the Sessions Court for Exclusive Trial of Bomb Blast cases at Poonamallee, Chennai - 56, finding the Appellant/accused guilty for the offences under Section 353 of IPC and Sections 4 and 5 of the Explosive Substances Act 1908 and convicting and sentencing the Appellant to undergo two years Rigorous Imprisonment for the offence under Section 353 of IPC and convicting and sentencing the Appellant for the offence under Section 4 of the Explosive Substances Act 1908, to undergo Rigorous Imprisonment for five years and convicting and sentencing the Appellant for the offence under Section 5 of the Explosive Substances Act 1908, to undergo Rigorous Imprisonment for five years and ordering the sentences to run concurrently.
- 2.The facts, in a nutshell, leading to filing of this Criminal Appeal, are as follows:-

- a) On 22.05.1998 at about 12.15 hrs, when PW.1, Madasamy, Inspector of Police, Nungambakkam Police Station was on special duty of checking the movements of militants, he had intercepted and enquired the accused, who came there in a suspicious manner, sitting as a pillion rider in a M-80 Motorcycle at Perambur Highway, near Jamalia Higher Secondary School. When PW.1 had questioned, the accused attempted to do away his life, by suddenly taking out a knife and again when he was over powered, he took out a country explosive and attempted to hurl the explosive on the Police Team and thereby, created a panic among the public and the business people, who rolled down the shutters and thereby finding that the appellant/accused appears to have committed the offences under Sections 353, 332 read with 511 of IPC and Sections 307 and 341 of IPC and Sections 4 and 5 of the Explosive Substances Act 1908, the final report was filed for the offences under the said Sections.
- b) The final report was taken on file in PRC.No.68 of 2001, by the X Metropolitan Magistrate Court, Chennai. Upon summoning and on appearance of the accused, necessary copies of the documents relied on the side of the Prosecution were furnished to the appellant/accused under Section 207 Cr.PC. Since the case was exclusively triable by the Sessions Court for Exclusive Trial of Bomb Blast cases, the case was committed to the Trial Court.
- c) On appearance of the appellant/accused and after hearing both sides necessary charges were framed against the accused under Sections 353 (5 counts), 307 of IPC and under Sections 4 and 5 of the Explosive Substances Act 1908 and the charges framed against the appellant/accused were read over and explained. The appellant/ accused denied the charges and sought to be tried. In order to prove the case of the Prosecution, PW.1 to P.W.16 were examined and Ex.P1 to Ex.P16 were marked and MOs.1 and 2 were marked.
- d) On completion of the evidence on the side of the Prosecution, the accused was questioned under Section 313 Cr.PC as to the incriminating circumstances found in the evidence of Prosecution witnesses and the accused has come with the version of total denial and stated that he had been falsely implicated in this case.
- e) The Trial Court, after hearing the arguments advanced on either side and also looking into the materials available on record, found the accused/appellant guilty and awarded punishments, as referred to above, which is challenged in this Criminal Appeal.

3.This court heard the submissions of the learned counsel on either side.

4.The learned counsel for the Appellant would submit that the entire case is fabricated and foisted on the appellant and that the Prosecution has failed to prove that the explosive substances were recovered from the appellant and that the substance, which was alleged to have been recovered from the appellant was an explosive substance and that the entire case of the Prosecution is embroidered with contradictions and several embellishments. He would further submit that the Trial Court erred in convicting the Appellant/ accused based on the evidence of the official witnesses alone and that the independent witnesses have not supported the case of the Prosecution and they had been treated as hostile. He would further submit that the Prosecution has failed to prove the necessary ingredients of Section 353 of IPC and that the Prosecution has failed to prove the foundational facts regarding the recovery and to prove that the substances, which were recovered, were explosive substances and that the Trial Court erred in convicting the appellant/accused. He would further submit that initially as per the Prosecution, recovered substances were handed over to one Venkatachalam, who was examined as PW.14, who had deposed that he and PW.12 took the substance to a play ground nearby Vysarpadi Jeeva Railway Station and destroyed the alleged bomb, by blasting and collected the remnants/residues of the iron ball and obtained certificate Ex.P8 from PW.12.

5.The learned counsel for the Appellant/ accused would further submit that as per the evidence of PW.12, he had, on the instructions of the Superintendent of Police, visited the Respondent Police Station, where he was informed about a bomb and he was instructed to destroy it and thereby, he visited the Otteri Police Station and took the bomb which was kept in a plastic bucket and he had confirmed it to be a bomb and thereafter, he along with PW.14, went to a place nearby Vyasarpadi Jeeva Railway Station and attempted to defuse the bomb and since he was unable to defuse it, he had destroyed it and he had found the residues of the bomb and he instructed PW.14 to sent it to the Forensic Department for chemical analysis and he had also obtained certificate, Ex.P10 from PW.14, nearly after one year. He would further submit that the Respondent Police have not proved, either by documentary or oral evidence, as to how the residue was sent to the Court and once again, from the Court, how it was sent to the Forensic Department for testing and that when the Respondents are unable to prove the recovery and the manner in which the explosive was recovered and the recovered item was found to be explosive,

the Trial Court erred in convicting the Appellant. He would further submit that none of the witnesses have specifically spoken about the Appellant/accused hurling the bomb and assaulting the police personnel and when there is lack of evidence with regard to the ingredients of Section 353 of IPC, the Trial Court erred in convicting the Appellant/ accused for the offence under Section 353 of IPC and consequently, the Appellant is entitled for acquittal.

6.The learned Additional Public Prosecutor for the Respondent would submit that when the appellant was intercepted, he attempted to hurl the bomb on PW.1 and that the Appellant was apprehended on the same day in the presence of the witnesses and MO.1 and MO.2 were recovered and thereafter, PW.1 had registered a case and on the request made by him, PW.12 attempted to defuse the bomb and he was unable to defuse it and thereby he blasted it and the remnants were taken for forensic test in the presence of PW.14 and thereafter, they were sent to the Court and from the Court, on the request of PW.15, they were sent for forensic examination and that PW.13, Karpagam, had conducted the test and found the presence of explosive substance in it and she had issued a certificate Ex.P9, stating that the substances detected aluminium, magnesium, barium, calcium and nitrate and the constituents detected are those of explosives and that the Prosecution has proved its case beyond all reasonable doubts and that the accused attempted to assault five policemen and thereby, the Trial Court had rightly convicted the Appellant.

7.I have given my careful and anxious consideration to the rival contentions put forward by either side and thoroughly scanned through the entire evidence available on record and also perused the impugned judgement of conviction.

8.To recapitulate, according to the Prosecution, after demolition of the Babri Masjid, there was communal unrest occurred here and there in India in the year 1997-98, more specifically, serial bomb blasts had occurred at Coimbatore in the second week of February 1998. The Police were on hunt to nab the persons, who were responsible for the crime. Pursuant to the order, Ex.P15, of the Commissioner of Police, Chennai, constituting a special wing to nab the militants, in an around Chennai, PW.1, Madasamy, the Inspector of Police, F-3 Nungambakkam Police Station, was appointed as Head of the Team. PW.2, Inspector of Police, Radhakrishnan, PW.3, Sub Inspector of Police, Gurusamy, Grade I Constable Durai, PW.4, Vasudevan, Constables Rajendran were engaged in the assignment to assist PW.1.

9.Accordingly, on 22.05.1998, at around 12.15 p.m., when the

above team was searching for the suspects in the Perambur Highways, adjacent to Jamalia Higher Secondary School, PW.1 had found two persons coming from West to East in a M.80 Motorcycle, without registration number. On seeing the speed and body language of the persons, PW.1 got suspicious and accordingly, directed the rider to stop the vehicle and when the two wheeler was intercepted, the pillion rider got down from it and at that time surprisingly, the rider of the two wheeler suddenly accelerated the vehicle into high speed and disappeared from the place. Some of the Police Team chased the rider of the motorcycle and they were unable to apprehend him.

10. PW.1 had enquired the pillion rider, who disclosed his name to be Abbas. Since, PW.1 had his own doubts about the identity of the person, he conducted search of the person. At that time, the pillion rider suddenly took out a sharp knife and attempted to attack PW.1 and PW.1 evaded from the assault and caught hold of the accused and twisted his hand and disarmed him. Thereafter, the pillion rider taken out a round ball shaped material from his pant pocket and threatened to hurl it on the Police Team. But, the Police Team had over powered him and snatched the bomb and for the purpose of safety, it was left in a plastic bucket with full of water. On enquiry, he had disclosed his name to be Mohamad Kasim @ Erwadi Kasim. PW.1 recovered MO.1 Knife and MO.2 iron ball and brought the Appellant to the Ottery Police Station along with the MO.1 and MO.2 and produced the Appellant/ accused before PW.15, the Inspector of Police, Pulianthope, who had registered a case in Crime No.582 of 1998, against the Appellant/ accused for the offences under Sections 307, 353 (5 counts), 506(ii) of IPC and Sections 4 and 5 of the Explosive Substances Act 1908 and the First Information Report was marked as Ex.P11 and received M.Os.1 and 2 under, Ex.P1.

11. On the basis of special report Ex.P2, given by PW.1, PW.15 enquired the accused in the presence of PW.10 and the witness, Paranthaman and recorded his statement, which included the signature of PW.10 Murali and PW.11 Sugumar in Ex.P6 and Ex.P7. PW.15 went to the scene of occurrence and prepared Ex.P12 observation mahazar and Ex.P13 rough sketch in the presence of the witnesses, Murugan and Murugesan and enquired, PW.7, PW.8 and PW.9 and recorded their statements. PW.15 also enquired PW.1 to PW.5 and recorded their statements and sent the case properties to the Court in Form 95 and sent the Appellant/ accused to Court to get an order of remand.

12. On 23.05.1998 the Court granted custody of the Appellant/ accused to PW.15, who enquired him on 30.5.1998 in the presence of PW.11, Sugumaran and Mohan and recorded the confession of the Appellant/accused. On 23.04.1999, had sent

MO.2 explosive substance to the Court under Form 95, dated 23.5.1998 and the said Form 95 was marked as Ex.P14 and thereafter, he gave a requisition to the Court to send the explosive substances for chemical analysis and thereafter, enquired the witness, PW.7, Easwaran, PW.8 Naina Mohammed and PW.9 Gopi and thereafter, the case was taken up by PW.16 for further investigation and thereafter, PW.16 after completing investigation and after obtaining sanction from the District Collector, had filed the final report against the Appellant/accused for the offences under Section 307, 353 (5 counts) 506 (ii) of IPC and Sections 4 and 5 of the Explosive Substances Act 1908.

13.As stated above, the Appellant/ accused was not found guilty for the offence under Section 307 of IPC and he was found guilty for the offences under Sections 353 of IPC and Sections 3 and 4 of the Explosive Substances Act, 1908.

14.Now, the question to be decided is as to whether the Prosecution has proved that the explosive substance were recovered from the Appellant and that the substances, which were alleged to have been recovered from the Appellants were explosive substances and whether the necessary ingredients of Section 353 of IPC have been proved. It is also to be seen that whether the Prosecution has proved the foundational facts, regarding recovery and seizure.

15.At the outset, on perusal of the materials on record, this Court finds several contradictions, in both, oral and documentary evidence, with regard to the recovery of the bomb from the Appellant/ accused and its seizure and its identification as to whether it is an explosive substance by the Forensic Department. There is also glaring contradiction in the evidence regarding the manner in which the recovered substance was sent to the Court and thereafter the manner in which it was again sent to the Forensic Department for chemical analysis from the Court. Such contradictions found by this Court are dealt with as under.

16.While analysing the entire evidence, it is seen that PW.1 to PW.5 are the Police Officials. PW.6 is the Sanctioning Authority. PW.7 to PW.11 are the independent witnesses for the arrest, recovery and confession of the accused and they have turned hostile. The occurrence was said to have occurred on 22.05.1998 at 12.15 p.m.

17.PW.1 had deposed that he after seizing MO.1 Knife and MO.2 bomb from the Appellant/ accused, had handed over the same to PW.15, the Inspector of Police, Otteri Police Station, for further action, along with the special report, Ex.P2, dated,

22.5.1998, on the day of occurrence itself, i.e. On 22.5.1998,

18.PW.12, Inspector of Police, had deposed that on the directions issued by his Higher Official, namely, Superintendent of Police to him to come to the Otteri Police Station and to destroy a bomb, he went to the Otteri Police Station at 2.00 p.m. and confirmed it to be a bomb. He along with PW.14, Sub Inspector of Police, have brought the bomb to a play ground nearby, Vyasarpadi Jeeva Railway Station and he tried to defuse it and since he was unable to defuse it, he destroyed it by blasting and thereafter, he collected the remnants and handed over it to PW.14, under a certificate, Ex.P8. Thus, it is seen from such evidence that the bomb allegedly said to have been seized from the Appellant/ accused had been destroyed, on the day of occurrence itself.

19.Further, as per Ex.P8, Certificate, on the date of occurrence, 22.05.998 itself, the iron ball like material, weighing 600 gms, after blast, said to be seized from the Appellant/ accused, was handed over by PW.12, Inspector of Police, Chennai-28, to PW.14, Sub Inspector of Police, Otteri Police Station for further action and it was blasted on the day of occurrence itself.

20.Whereas the evidence of PW.13, PW.15 and Ex.P10 are contrary to the above said evidence.

21.PW.13, Scientific Assistant, Grade I, Forensic Department, had deposed that on 23.4.1999, she received a letter dated, 23.4.1999, from the Court concerned, along with the material objects, relating to Cr.No.582 of 1998. Since it was mentioned as a bomb, it was sent for destruction and thereafter, residues were sent for chemical analysis.

22.PW.15, Inspector of Police, Pulianthope, had deposed that on 23.4.1999, he sent the bomb, through the letter dated, 23.5.1998, under Form 95, Ex.P14 to the Court and sent the case file to PW.16, who thereafter registered the First Information Report against the Appellant/ accused.

23.As per Ex.P10, dated 29.4.1999, Explosive Defence Investigation Report, the live bomb like material was received after nearly a year, on 29.4.1999 by the Forensic Department for conducting chemical analysis.

24.As per Ex.P9, Forensic Lab Report, dated, 6.5.1999, given by PW.13, Scientific Assistant, Grade I, it is seen that the item sent for chemical analysis was suspected to be a live bomb and it was sent to the bomb detection and disposal squad for defusal and the residues, received after defusal, was analysed.

25.It is seen from the above contradictory evidence that the seized Bomb was destroyed on two occasions, i.e. on the day of occurrence i.e. 22.5.1998 and and after nearly a year, i.e. on 23.4.1999, which is not possible and unbelievable.

26.Further, no specific evidence has been let in by the Prosecution as to what was the nature of the remnant material, which was seized by them and as to how and in what manner, the recovered substance was sent to the Court and once again from the Court, how and in what manner it was sent to the Forensic Department for chemical analysis and thereby, creating a doubt in the case of the Prosecution with regard to the explosive substance.

27.As stated above, the independent witnesses, PW.7 to PW.11, who had been examined for the purpose of arrest, recovery and confession, have not supported the case of the Prosecution and they have been treated as hostile. There is no other witness to specifically speak about the Appellant/ accused hurling the bomb and assaulting the Police Team.

28.Though PW.11 has accepted that he had attested the confession, the confession has been recorded while the Appellant was in the Police custody and that no recovery has been made pursuant to the confession and thereby, no relevance can be placed on the evidence of PW.11.

29.PW.14 had destroyed the substance on the same day of occurrence, i.e. on 22.5.1998. However, it is not known as to how they were produced before the Court only on 23.5.1999. No proper materials have been produced to show that when they have been taken for examination and none of the Court staff has been examined as to when the substance was sent for chemical analysis.

30.No explanation was offered by the Prosecution, how the iron ball bomb was destroyed by blasting as per the evidence of PW.12 on 22.5.1998. No explanation was offered by PW.14 as to how and when it was handed over to PW.15 on 22.5.1998. Significantly, there is no explanation offered by the Prosecution as to how, where and by whom, the bomb was kept from 22.5.1998 to 23.04.1999 and sent to the Court under Ex.P14. No explanation was offered by whom the bomb was handed over to TNFSL for examination and no explanation was offered how TNFSL further handed over the alleged destroyed bomb to the BDDS. No explanation was offered how and by whom again the bomb was sent to TNFSL as per Ex.P9.

31.At this juncture, now coming to the charge under Section 353

of IPC, a reading of Section 353 of IPC shows that the main ingredients of the offence under Section 353 of IPC are that the person accused of the said charge should have assaulted the public servant or used criminal force with intent to prevent or deter the public servant from discharging his duty as such public servant. Therefore, the main ingredients of the offence is that the accused should be shown to have assaulted the public servant or used criminal force.

32. In this regard, it is relevant to refer to the decision of the Honourable Supreme Court reported in AIR 1966 Supreme Court 1775 (V 53 C 358) (Durgacharan v. State of Orissa), wherein it has been laid down that under Section 353 of IPC, the ingredients of assault or use of criminal force while the public servant is doing his duty as such is necessary. In yet another decision of the Honourable Supreme Court reported in AIR 1967 SC 170 (V 54 C 34) (Chandrika Sao v. State of Bihar), the Honourable Supreme Court has laid down that, mere use of force, however is not enough to bring an Act within the terms of Section 353 of IPC. It has further to be shown that force was used intentionally to any person without that person's consent in order to commit an offence or with the intention or with the knowledge that the use of force will cause injury, fear or annoyance to the person against whom the force is used.

33. In yet another decision of the Honourable Supreme Court reported in 2015 7 SCC 423 (Manik Taneja and another Vs. State of Karnataka, it was held thus:

"A reading of the above provision shows that the essential ingredients of the offence under Section 353 IPC are that the person accused of the offence should have assaulted the public servant or used criminal force with the intention to prevent or deter the public servant from discharging his duty as such public servant. By perusing the materials available on record, it appears that no force was used by the appellants to commit such an offence. There is absolutely nothing on record to show that the appellants either assaulted the respondents or used criminal force to prevent the second respondent from discharging his official duty. Taking the uncontroverted allegations, in our view, the ingredients of the offence under Section 353 IPC are not made out."

34. In the case on hand, if the evidence on record available in this case is analysed, as above, in the light of the aforesaid legal principles laid down by the Honourable Supreme Court, it is clear that the prosecution has not let in legal evidence to

prove the ingredients of the offence under Section 353 of IPC. When there is absolutely no evidence that the Appellant/accused either assaulted PW.1 and the police team or used criminal force to prevent him from discharging his official duty, it cannot be said that the ingredients of the offence under Section 353 of IPC are made out.

35. It is, thus, seen and made out that there are contradictions in the manner in which the recovered substance was sent to Court and then to Forensic Department for chemical analysis. No specific evidence has been let in by the Prosecution as to what was the nature of the remnant material, which was seized by the and as to how and in what manner, the substance was sent for chemical analysis and thereby, creating a doubt in the case of the Prosecution. The Prosecution has miserably failed to prove the recovery and seizure of the bomb, by cogent and convincing evidence. In such view of the matter, this Court is of the opinion that when the recovery and seizure have not been proved and when the necessary ingredients of Section 353 of IPC are not made out, the Appellant/accused is entitled to be acquitted, granting the benefit of doubt.

36. In 2012 2 SCC 34 (Kailash Gour Vs. State of Assam), it was held in paragraph 44 as follows:-

"44. The Prosecution, it is axiomatic, must establish its case against the accused by leading evidence that is accepted by the standards that are known to criminal jurisprudence regardless of whether the crime is committed in the course of communal disturbances or otherwise. In short, there can only be one set of rules and standards when it comes to trials and judgement in criminal cases unless the statute provides for anything specially applicable to a particular case or class of cases."

37. In AIR 1973 SC 2773 (Kali Ram Vs. State of Himachal Pradesh), the Honourable Supreme Court has observed as under:-

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

38. Based on the reasonings as stated above and in the light of the decisions cited supra, this Court finds that the evidence both oral and documentary evidence let in by the Prosecution is

not reliable and do not inspire confidence and thereby, the Trial Court had erred and is not justified in convicting the Appellant/ accused, placing reliance on such contradictory evidence. Consequently, the impugned judgement of conviction and sentence cannot be sustained.

39. In the result, this Criminal Appeal appeal is allowed. The impugned judgement of conviction and sentence is set aside. The Appellant is acquitted of the charges levelled against him. The bail bond, if any executed by him, shall stand cancelled and the fine amount, if any paid by him, shall be refunded to him.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

Srcm

To:

1. The Sessions Court for
Exclusive Trial of Bomb Blast cases at Poonamallee,
Chennai - 56.
2. X Metropolitan Magistrate Court,
Chennai.
3. The Inspector of Police,
(Law and Order), P2 Otteri Police Station,
Chennai.
4. The Superintendent,
Central Prison, Puzhal, Chennai.
5. The Public Prosecutor,
High Court, Madras.

+2cc to Mr.S.Xavier Felix, Advocate in sr.no.54363

Cr1.A.No.589 of 2008

VBA(CO)
CS/27/08/2019