

Bail Slip

The Appellant/Accused, namely Thomas@Rajan S/o.Yacoup Sole Accused in SC .NO.38/08 was directed to be released on bail as per order dated 06.01.2010 in MP.NO.1/09 IN CRL A.NO.662/2009 on the file of this Hon'ble court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2018

DELIVERED ON : 02.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.662 of 2009

Thomas (A) Rajan ... Appellant /Accused

Vs

State By : Inspector of Police,
Villianur Police Station, Puducherry.

... Respondent/Compalainant

(Crime No.341/2005)

Prayer: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, against the judgment passed in Session Case No.38 of 2008 dated 09.09.2009, on the file of the learned Principal Sessions Judge, Puducherry.

For Appellant : Mr.V.Santharam
for Mr.N.Balaji

For Respondent : Mr.D.Bharatha Chakravarthy
Public Prosecutor (Pudhucherry)

सत्यमेव जयते

JUDGMENT

This criminal appeal is preferred by the appellant/accused against the judgment of conviction and sentence passed by the learned Principal Sessions Judge, Puducherry, in Sessions Case No.38 of 2008 dated 09.09.2009.

2.The brief case of the appellant:

The case of the prosecution is that the deceased Gowri @ Prabhavathi was originally married to one Rajan and later

on she deserted him and thereafter married the Appellant viz, Thomas @ Rajan and both were residing at Pillaiayar Koil Street, Venniesamy Nagar, G.H.N.Palayam, Villiyanur. The deceased Gowri @ Prabhavathi through her 1st husband gave birth to Jenifer @ Vimala (PW3) and through the Appellant the said deceased Gowri @ Peabhavathi had got one son namely Prabakaran. On the date of occurrence i.e. on 14.10.2005 the said Prabakaran was away at Madras and the accused had gone to attend his work and at that time after returning to her house, the said Gowri @ Prabhavathi had taken drinks in the evening and she was in an unconscious state lying on her bed. PW1 Daisi Rani is the younger sister of the deceased Gowri @ Prabavathi and PW2 Premanandh is the younger brother of the said Gowri @ Prabavathi and they were residing at nearby places. On the date of occurrence at about 6.00 pm, PW5 Jenifer @ Vimala went to the house of PW1 Daisi Rani and informed her about the state of her mother and asked her to come to her house and PW1 Daisi Rani came to the house of the deceased Gowri @ Prabavathi along with PW3 Jenifer @ Vimala. At about 8.00 pm both of them were sitting outside the house and at that time the accused is alleged to have returned from his work and asked them as to why they were sitting outside and for that she replied that the deceased Gowri @ Prabavathi was lying on her bed in the state of intoxication and that the appellant got angry regarding the state of the deceased Gowri @ Prabavathi and PW1 Daisi Rani is said to have pacified and informed the appellant that the matter would be discussed in the next day morning and thereafter she returned to her house and gave food for PW3 Jenifer @ Vimala and the accused from her house through PW3 Jenifer @ Vimala. The next day morning PW1 is said to have know that her sister deceased Gowri @ Prabavathi has expired and then she went to the house of the deceased Gowri @ Prabavathi and in the mean time after knowing the death of the deceased Gowri @ Prabavathi PW2 Premanandh came there and PW3 Jenifer @ Vimala is said to have informed them that in the night at about 10.00 pm there was a wordy quarrel between her mother and the Appellant and in that quarrel the said Gowri @ Prabavathi scolded the Appellant in filthy language and hence the appellant is alleged to have taken a fire-wood stick M.O.1 from the house and attacked the deceased Gowri @ Prabavathi repeatedly including on her head which is said to have cause bleeding injury to her and that when PW3 Jenifer @ Vimala intervened the appellant is alleged to have attacked her also, causing injury. Thereafter the deceased Gowri @ Prabavathi was lying on the bed and in the morning at about 04.00 am the appellant along with PW3 Jenifer @ Vimala tried to wake up the deceased Gowri @ Prabavathi from her bed and that they came

to know that she was dead. Thereafter, at about 10.30 am on 15.10.2005 PW1 Daisi Rani accompanying with PW2 Premanandh went to Villianur Police Station and gave an oral complaint Exhibit P1 against the appellant for causing death of the said Gowri @ Prabavathi.

3. Based on the complaint Exhibit P1 PW 10 Sub Inspector of Police, Villianur Police Station registered this case under section 304 of IPC and went to the occurrence place and noted the surroundings and at about 12.30 pm he prepared Observation Mahazar Exhibit P17 and rough sketch Exhibit P 18 in the presence of PW5 Thirumurugan and PW6 Natarajan and at about 01.45 p.m. he recovered one blood stained blanket M.O.2 one blood stained pillow M.O.3 and one blood stained gunny bag from the bed room of the house where the said Gowri @ Prabavathi was dead and he also collected blood stained cement pieces MO.5 and controlled cement pieces M.O.6 from the place of occurrence under Exhibit P19 seizure mahazar in the presence of the above said two witnesses. In the said two documents namely Exhibit P17 Observation Mahazar and Exhibit P19 Seizure Mahazar PW5 and PW6 have put their signatures which are marked as Exhibits P3 and P5 and P4 and P6 respectively. At about 02.00 pm he conducted inquest enquiry over the dead body of the deceased Gowri @ Prabavathi in the presence of the witnesses and prepared inquest Report Exhibit P26 and thereafter examined the witnesses and recorded their statements and sent the dead body to Government General Hospital Puducherry for postmortem examination and also sent PW3 Jenifer @ Vimala to the Primary Health Centre at Villianur for treatment to the injuries. Dr.Thilagam PW4 gave treatment to PW3 Jenifer @ Vimala and thereafter issued Exhibit P2 wound certificate. On 16.10.2005 on information PW10 Sub Inspector of police arrested the appellant Thomas @ Rajan at the Junction of Nallavadu and Cuddalore Road and brought him to the police station and on enquiry with him the presence of PW7 Oliveth and PW 8 Devasakayam had put their signatures in the confession statement allegedly given by the appellant Thomas @ Rajan, Exhibit P20 and Seizure Mahazar Exhibit P21 and the same have been marked as Exhibits P7 and P9 and P8 and P10 respectively found in confession statement of the appellant Exhibit P20 as well as Seizure Mahazar Exhibit P21. PW9 Chief Medical Officer Department of Forensic Medicine, Government General Hospital Puducherry conducted autopsy on the dead body of the deceased Gowri @ Prabavathi on 16.10.2005 between 10.30 am and 11.30 am and thereafter issued Postmortem Examination Report Exhibit P12 regarding viscera of the dead body of the deceased and issued final report Exhibit

P13 and also entrusted the blood stained saree M.O.7 petticoat M.O.8 Jacket M.O.9 and sample blood of the deceased Gowri @ Prabavathi collected in a filter paper M.O.10 to PW10 under cover of the Seizure Mahazars Exhibits P14 and P15 respectively. Thereafter PW10 examined the remaining witnesses and recorded their statements and sent a requisition Exhibit P22 to the Judicial Magistrate for forwarding the material objects to the Central Forensic Science Laboratory at Hyderabad to get a report and accordingly, the material objects were sent to the C.F.S.L at Hyderabad from the Court under covering letter Exhibit P23 and thereafter the reports Exhibits P23 and P24 were received from the CFSL and after completing investigation. PW10 filed charge sheet against the accused for the offence under section 304 of IPC.

4.The appellant pleaded not guilty to the charges and was therefore tried by the session's court, wherein the respondent police examined 10 prosecution witnesses and marked 26 Exhibits and 10 material objects in support of the prosecution case.

5.The learned Trial Judge after due trial found the accused guilty and passed the impugned judgment of conviction and sentence of imprisonment to undergo seven years rigorous imprisonment and imposed fine of Rs,2,000/- in default to undergo six months rigorous imprisonment for the offence under section 304 part 1 of IPC.

6.The learned counsel for the appellant submits that the learned Trial Judge erred in basing the conviction of the Appellant on the statement of PW3 Jenifer @ Vimala being the lone eye witness to the case, even though she was treated hostile at the time of trial and had not implicated the Appellant to the commission of offence. Merely because the said PW3 Jenifer @ Vimala allegedly admitted in her confession statement before the police during investigation that the Appellant hit the deceased and admitted to the fact that the wooden log produce in the court was the same with which the deceased was hit cannot be conclusive proof for basing the conviction on the Appellant.

7.The learned counsel for the appellant submits that the learned Sessions Judge failed to consider the evidence let in the cross examination of PW4 Dr.Thilagam who is said to have treated PW3 Jenifer @ Vimala for injuries sustained on her and issuance of wound certificate Exhibit P2. Though

the treatment of PW3 Jenifer @ Vimala and issuance of wound certificate Exhibit P2 is not denied, it is vital that in the evidence of PW3 Jenifer @ Vimala she has categorically stated that the said wound was sustained by her when she went running to the house of her aunt PW1 Daisi Rani for informing her about the state of intoxication of her deceased mother Gowri @ Prabavathi. From the evidence of PW4 Dr.Thialgam suggestions have been put to the effect that the injuries could also have been sustained by PW3 Jenifer @ Vimala by falling on a rough surface, which was answered in affirmative. Further, all these aspects raised in favour of the defense have not been taken note of while passing the judgment.

8.The learned counsel for the appellant submits that the learned Sessions Judge also erred in noting that PW5 and PW6 who were the mahazar witnesses to the observation mahazar Exhibit P3 and property seizure mahazar dated 15.10.2005. Exhibit P4 had not supported the case of the prosecution and were treated hostile by the trial Court. Such being the case, the evidence of the prosecution with regard to the Exhibit P3 observation mahazar and Exhibit P4 property seizure mahazar cannot be relied upon against the Appellant as the same lacks corroboration from independent witness. Further, when the said mahazar witnesses had not supported the prosecution case with respect to the seizure of the property, then in such circumstances, the weapon allegedly used for assault, itself become dubious and cannot be caused to implicate the Appellant.

9.The learned counsel for the appellant submits that the learned Sessions Judge also erred in noting that the confession statement of the Appellant is recorded under section 161 of the Cr.P.C. which cannot be made use of against the Appellant, unless recorded in evidence before the Trial Court. Further, the said confession statement of the Appellant is said to have been recorded in the presence of PW7 Olivet and PW8 Devasaghayam, who also have not supported the case of the prosecution and were treated hostile. Such being the case, the confession statement of the accused and the statements of the said witnesses PW7 and PW8 cannot be made use of by the prosecution, for coming to a conclusion against the Appellant.

10.The learned counsel for the appellant submits that the learned Sessions Judge also failed to note that the deceased Gowri @ Prabavathi was found in a completely intoxicated stage in her bed even prior to the arrival of

the Appellant to the house. This fact is well borne and supported by the evidence of PW3 Jenifer @ Vimala. Further it is also the case of the prosecution that despite efforts of the Appellant and PW3 Jenifer @ Vimala, they could not wake up the deceased Gowri @ Prabavathi on 14.10.2005 due to her complete intoxicated state. Further, it also cannot be ruled out that the said deceased could have died due to over dosage of alcohol and could also have sustained injury and abrasions by repeatedly falling on the ground due to intoxication, which suggestion has also not been noted by the Learned Session Judge in favour of the Appellant.

11.The learned counsel for the appellant submits that the trial Judge has wrongly come to the conclusion in convicting the appellant, basing the evidence of PW1 Daisi Rani and PW2 Premanand who are none other than the younger sister and younger brother of the deceased respectively. Further, there is every reason for them to have deposed against the appellant since the appellant was closely related to them; as such the Learned Judge should have viewed their evidence with an eye of caution as they happened to be interested witnesses. Further it may also be seen that the said witness PW1 and PW2 are not the eye witnesses to the case and have merely deposed on the basis of hear say evidence said to have been narrated by PW3 Jenifer @ Vimala, who had not supported the case of the prosecution and was treated hostile. It is relevant to point out and note that when PW3 herself has not supported the case of the prosecution being the sole eye-witness then in such circumstances, the evidence of the PW1 and PW2 on the basis of events narrated by PW3 who had disowned the said statement also should not have been relief.

12.The learned counsel for the appellant submits that the Hon'ble Sessions Judge failed to consider the inherent contradictions in the evidence of every single witness who deposed on behalf of the prosecution in this case and ought to have rejected their evidence as not proved. Further, the Hon'ble Judge has in fact gone on the premise that the appellant is liable to prove his innocence rather than the prosecution proving the guilt of the appellant beyond all reasonable doubts. None of the charges as framed against the appellant in this case entails a burden on the appellant to prove his innocence and the trial Judge has lost sight of this fundamental proposition of law while holding the appellant guilty in this case.

13.The learned counsel for the respondent supported

the findings of the trial court and cited the decision reported in (2018) 2 SCC 69 in support of his submission.

14. In the facts and circumstances of the case and in the light of the submissions made on both sides, points that arise for my consideration in this appeal are:

(1). Whether the learned Sessions Judge is justified in convicting the appellant for the offences punishable under Section 304 part I of IPC? If so, whether the sentence of imprisonment and fine is harsh or excessive?"

15. I have heard Mr. V. Santharam for M/s. N. Balaji, learned counsel for the appellant and Mr. D. Bharatha Chakravarthy, learned Government Pleader (Pudhucherry) for the respondent and perused the records secured from the trial Court.

16. According to the case of the prosecution and also from the evidences adduced by the Prosecution witnesses, the deceased Gowri @ Prabavathi was found in a completely intoxicated stage in her bed even prior to the arrival of the Appellant to the house. This fact is well supported by the evidence of PW3 Jenifer @ Vimala. Further it is also the case of the prosecution that despite efforts of the Appellant and PW3 Jenifer @ Vimala, they could not wake up the deceased Gowri @ Prabavathi on 14.10.2005 due to her complete intoxicated state. Further PW1 and PW2 are not the eye witnesses to the case and have merely deposed on the basis of hearsay evidence said to have been narrated by PW3 Jenifer @ Vimala, who had not supported the case of the prosecution and was treated hostile.

17. It is relevant to point out that when PW3 herself has not supported the case of the prosecution being the sole eye-witness, the evidence of the PW1 and PW2 cannot be taken in to consideration. From the aforesaid evidences adduced, I find that apart from PW 3, there is no either eye witness of the incident, and the learned trial Judge has relied solely upon her deposition to convict the accused.

18. It is a well settled law that a witness may be wholly reliable, may not be wholly reliable or may be unreliable but the law is equally settled that in order to convict a person on the basis of a sole eyewitness, the

Court must be satisfied that the said witness was wholly reliable. At this stage, I may profitably quote and refer to the well-known judgment of the Supreme Court in the case of V.Thevar v. State of Madras reported in AIR 1957 SC 614. The Supreme Court made the following observations in paragraphs 11 and 12.

"11. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that "no particular number of witnesses shall, in any case, be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after the consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England both before and after the passing of the Indian Evidence Act 1872, there have been a number of statutes as set out in Sarkar's 'Law of Evidence' - 9th Edition, at pages 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized on Section 134 quoted above. The section enshrines the well recognized maxim that "Evidence has to be weighed and not counted." Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single

witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have therefore, no reasons to refuse to act upon the testimony of the first witness, which is the

only reliable evidence in support of the prosecution."

19. Bearing in mind the aforesaid principle of law, I now propose to consider whether from the evidences given by PW 3 coupled with the related witnesses PW1 and PW2, she can be said to be wholly unreliable so as to uphold the conviction on the basis of her evidence.

20. From the evidence of PW 3 narrated above, it appears that quarrel arose between the appellant and the deceased. PW3 Jenifer @ Vimala being the lone eye witness to the case, even though she was treated hostile at the time of trial had not implicated the Appellant to the commission of offence. Merely because the said PW3 Jenifer @ Vimala allegedly admitted in her confession statement before the police during investigation that the Appellant hit the deceased and admitted to the fact that the wooden log produce in the court was the same with which the deceased was hit cannot be taken as conclusive proof for basing the conviction against the Appellant. Further PW4 Dr. Thilagam who is said to have treated PW3 Jenifer @ Vimala for injuries sustained on her and issuance of wound certificate Exhibit P2 categorically stated that the said wound was sustained by her when she went running to the house of her aunt PW1 Daisi Rani for informing her about the state of intoxication of her deceased mother Gowri @ Prabavathi. From the evidence of PW4 Dr. Thilagam suggestions have been put to the effect that the injuries could also have been sustained by PW3 Jenifer @ Vimala by falling on a rough surface, which was answered in affirmative. PW5 and PW6, who were the mahazar witnesses to the observation mahazar Exhibit P3 and property seizure mahazar dated 15.10.2005 not supported the case of the prosecution and were treated hostile by the trial Court. Such being the case, the evidence of the prosecution with regard to the Exhibit P3 observation mahazar and Exhibit P4 property seizure mahazar cannot be relied against the Appellant as the same lacks corroboration from independent witness. Further, when the said mahazar witnesses had not supported the prosecution case with respect to the seizure of the property, then in such circumstances, the weapon allegedly used for assault itself become doubtful.

21. Thus, the evidence given by the alleged sole eyewitness, PW3, cannot be considered at all since she was declared as hostile witness and replete with inconsistencies. It is, therefore, very difficult to treat

the said witness as wholly reliable so as to uphold the conviction of the accused on the basis of such evidence as held by the learned trial court.

22.The prosecution has also failed to prove other circumstances in this case because of the missing chain of link since the material witnesses did not support the prosecution case.

23.On consideration of the entire materials on record, I am of the view that the prosecution has failed to prove the charges framed against the appellant. It appears that the learned trial Judge placed reliance upon the inadmissible portion of PW 3 taking corroboration with the hearsay evidences of PWs.1 and PW2, convicted the appellant erroneously.

24.In a criminal case, it is for the prosecution to prove the case by adducing convincing evidence. Merely on the basis of a suggestion given by some of the hearsay witnesses, the appellant cannot be held to be guilty. Under the Code of Criminal Procedure even on the basis of a confession of the accused under Section 164 of the Code of Criminal Procedure, a person cannot be convicted if it appears that such confession is not consistent with the case made out by the prosecution. If, on the sole basis of the confession a person could be convicted, in that case, many guilty persons could avoid punishment by setting up some other persons as accused and by obtaining such person's confession by getting such confession on payment of money. In other words, law does not permit a person to protect the guilty person by taking burden on himself. Such being the law of the land, a mere suggestion made by the related witnesses for the purpose of proving the case of the prosecution, cannot be a ground for holding the appellant/accused as guilty.

25.In view of what is stated hereinabove, I am unable to uphold the conviction against the appellant and the learned trial Judge erred in law in holding that the accused was guilty for the offense u/s.304 part 1 of IPC. The facts of the present case would show that the provisos contained in Exception 1 of section 304 of IPC, which take out an act from the ambit of the defence of grave and sudden provocation, are not attracted in the instant case.

26.In the result:

(a) this Criminal Appeal is allowed by setting aside the order dated 09.09.2009 passed by the learned Principal Sessions Judge, Puducherry in S.C.No.38 of 2008 convicting and sentencing the appellant;

(b) the appellant/accused is acquitted of the charges levelled against him;

(c) the appellant is ordered to be set at liberty forthwith, if not required in any other criminal case;

(d) the bail bond, if any, executed by him shall stand cancelled and the fine amount, if any paid by the appellant/accused shall be refunded to the appellant.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

vs

To

1.The Judicial Magistrate No.I,
Villianur Puducherry.

2.do Thro'The Chief Judicial Magistrate, Puducherry.

3.The Principal Sessions Judge,
Puducherry.

4.The Inspector of Police,
Villianur Police Station, Puducherry.

5.The Superintendent ,
Central Prison, Puducherry.

6. The Public Prosecutor, (Puducherry), High Court ,Madras.

+1 CC TO GOVERNMENT PLEADER SR.NO. 255

Criminal Appeal No.662 of 2009

A.SK(13/02/2019)