

Bail Slip

The Appellant/Accused namely Kamal @ Kamalahasan, S/o Gurusamy, was directed to be released on bail as per the order of this court dated 12.08.2010 in CrI.MP No.1 of 2010.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.03.2019

CORAM:

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CrI.A.No. 447 of 2010

Kamal @ Kamalahasan ... Appellant/Accused
Vs.

State Rep.by
The Inspector of Police
Jayamkondam Police Station
Ariyalur District.
(Cr.No.719 of 2009) ... Respondent/Complainant

PRAYER: This Criminal Appeal is filed, under Section 374(2) of the Criminal Procedure Code, against the Judgment of conviction and sentence, dated 30.06.2010, made in S.C.No.35 of 2010, by the learned Additional District and Sessions Judge, Fast Track Court, Ariyalur.

For Appellant : Mr.K.Gandhikumar

For Respondent : Mr.K.Prabakar,
Additional Public Prosecutor

JUDGMENT

This appeal has been filed, against the Judgment of conviction and sentence, dated 30.06.2010, made in SC.No.35 of 2010, by the learned Additional District and Sessions Judge, Fast Track Court, Ariyalur, wherein the Trial Court, found the appellant/accused guilty for the offences under Section 307 IPC and convicted him to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.25,000/-, in default to undergo 6 months Rigorous Imprisonment under Section 307 IPC.

2.The case of the Prosecution is that 24.06.2009, at about 12 noon, the appellant/accused had abused P.W.3-Rajamanickam in an abusive language and P.W.1-Penchamin Jacob, who was nearby had reprimanded him, due to which the appellant/accused had enmity against the P.W.1 and thereby in order to commit murder

him, on the same day at about 04.30 p.m., came in front of the house of P.W.1 and saying so “என்னை எதிர்த்த உனக்கு இது தான் டா தண்டனை, இத்தோடு ஒழிந்து போடா” and caused multiple injuries on the left hand paw, left neck, head and chest with “Aruval” and thereby P.W.1, who suffered injuries was admitted to Government Hospital, Jayankondam and on intimation from the hospital, the Inspector of Police, Jayankondam, after conducting investigation registered a case for the offences under Sections 294(b), 307 IPC in Crime No.719 of 2009. After completion of further investigation he filed final final report against the accused for the offence under Section 307 IPC.

3.On scrutiny of the records, the learned Judicial Magistrate, Jayankondam, having found the charge under Section 307 IPC is exclusively triable by the Court of Sessions committed the case to the Principal District and Sessions Court, Perambalur, and the case was made over to the trial Court for disposal in accordance with law.

4.On appearance of the appellant/accused, on hearing the arguments of the learned Public Prosecutor appearing for the Prosecution and the learned counsel appearing for the accused, the trial Court framed the charges against the appellant/accused for offence under Section 307 IPC and when the ingredients of the charges and the description of the offence were explained and read over to the accused, in the language known to him, he pleaded not guilty and sought to be tried.

5.On the side of the Prosecution P.Ws.1 to 8 were examined. P.W.1-Penchamin Jacob is the injured. P.W.2-Selvaraj, father of P.W.1. P.W.3-Rajamanickam, is the neighbour of P.W.1. P.W.4-Jasmin, wife of P.W.1. P.W.5-Rajan, witness for the Observation Mahazar. P.W.6-Kannan, witness for the Confession statement and Mahazar. P.W.7-Dr.Sivaprakasam Usha, who treated the P.W.1 at Government Hospital, Jayankondam. P.W.8-Thangarasu, Circle Inspector, who conducted the investigation.

6.During the course of examination of the above said witnesses, Exs.P.1 to 9 and M.O.1 were marked. Ex.P.1 dated 24.06.2009 is the complaint. Ex.P.2 dated 24.06.2009 is the Observation Mahazar. Ex.P.3 dated 24.06.2009 is the signature of P.W.6 in a confession statement given by the accused. Ex.P.4 dated 24.06.2009 is the signature of P.W.6 in a Mahazar. Ex.P.5 dated 04.08.2009 is the Accident Register. Ex.P.6 dated 24.06.2009 is the First Information Report. Ex.P.7 dated 24.06.2009 is the Rough Sketch. Ex.P.8 dated 24.06.2009 is the admissible portion of confession statement. Ex.P.9 dated 08.08.2009 is the alteration report. M.O.1 is the 'Aruval'.

7.After completion of evidence when the accused was

questioned under Section 313(1)(b) Cr.P.C., against the evidences which are all available before him and the appellant/accused denied the evidences and though he has stated that there were witnesses available on his side, however no witness was examined.

8.The trial Court, after hearing the arguments advanced on either side and also looking into the materials available on record, found the appellant/accused guilty and awarded punishment, as referred to above, which is challenged in this Criminal Appeal.

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

10.The learned counsel for the appellant/accused has assailed the impugned order of conviction and sentence, on the following infirmities, discrepancies and grounds:-

(a)the Prosecution has miserably failed to prove its case beyond all reasonable doubt. There are so many contradictions between the evidence of P.W.1, P.W.8- Investigating Officer and the evidence of P.W.7-Doctor.

(b)P.W.1 in his evidence contended that the appellant/accused was handed over by P.Ws.1 to 4 to the Police Station, whereas, the Investigating Officer deposed before the trial Court that he arrested the appellant/accused at 21.30 p.m., on 24.06.2009. Which creates doubt on the Prosecution case, whether the appellant/accused was really arrested by the P.W.8-Investigating Officer or not ?.

(c)Further, if the appellant/accused had been produced by P.Ws.1 to 4, to the Police Station, the evidence with regard to arrest of the accused, confession and recovery of material object made by the P.W.8-Investigating Officer, becomes doubtful and loses its merit.

(d) Delay in registering Ex.P.6-First Information Report was not explained by the Prosecution, which is fatal to the case.

11.The learned counsel for the appellant/accused would ultimately contend that the trial Judge erred in convicting the appellant/accused based on the evidences of interested witnesses and he would submit that the independent witnesses who have been examined in respect of preparation of Observation Mahazar-Ex.P2, arrest and confession have turned hostile and they have not supported the Prosecution case. Further, he would submit that there was an existing previous enmity and on a complaint given by the wife of the appellant/accused a case in Crime No.711 of 2009 was registered against P.W.1, by the respondent police in

the very same police station. He would further submit that while P.W.1 was taking treatment in the Government Hospital, Jayankondam, one women police came there and received the statement from P.W.1 and the same was burked by the respondent police. He would further submit that the appellant/accused had sustained injuries in the incident and that no investigation has been done by the respondent police with regard to the same and no explanation has been offered by the prosecution with regard to the injuries suffered by the appellant/accused. He would also submit that the injuries sustained by the P.W.1 are not grievous in nature and the Prosecution has not let in cogent evidence to prove the ingredients of offence under Section 307 IPC.

12.In the alternative, the learned counsel for the appellant/accused would submit that in the event, if this Court finding that the appellant/accused is guilty this Court shall consider the mitigating circumstances that the appellant/accused has lost his wife recently and that he has also suffered grievous injury and he is bedridden and now taken care of by his aged mother.

13.The learned Additional Public Prosecutor vehemently opposed stating that the Prosecution by letting cogent evidences has proved the case beyond all reasonable doubt. Injuries sustained by the P.W.1 are on the vital parts namely, neck, head and also on the chest. P.Ws.1, 2 and 3 have cogently stated about the occurrence and that but for the act of the P.W.1 by warding of the material object, M.O.1-Aruval, by his left hand, he would have been done to death due to the injuries on the neck and head and the appellant/accused had an intention to cause death of P.W.1 and had indiscriminately attacked him causing grievous injury and thereby, the Prosecution has proved the case beyond reasonable doubt. Further he would submit that it is a case were the evidence has been let in by the person, who is injured in the occurrence and thereby the testimony of the said injured witness has to be considered reliable and trustworthy. Further, it is not only the case of oral evidence and it is also supported by medical evidence, Ex.P.5-Accident Register, wherein the Doctor clearly stated that the injury No.1 is grievous in nature and that other injuries were also on the neck and head. Taking into consideration, the case of the Prosecution, P.W.1 is the injured witness, he has by his evidence cogently stated about the incident and the manner in which the assault was made on him and the injuries sustained by him. Further, he was taken to the Government Hospital, Jayankondam immediately and on intimation from the hospital, the respondent had registered a case in Crime No.719 of 2009. Further, the evidences of P.W.2, 3 and 4 are cogent with regard to the incident.

14.I have given my careful and anxious consideration to the rival contentions put forward by the learned counsel on either

side and thoroughly scanned through the entire evidence available on record and also perused the impugned Judgment of conviction and sentence.

15.Now, what is to be considered is whether the prosecution has proved the case beyond all reasonable doubts and whether the trial Court right in convicting the appellant/accused.

16.P.W.1 is the injured witness as per his evidence on 24.06.2009, around 12 noon, there was a fight between P.W.3-Rajamanickam and the appellant/accused and on that day, the appellant/accused was standing near his house and abusing P.W.3 with a filthy words and when P.W.1 had questioned the appellant/accused, he had threatened him stating that he will do away by firing him or curling a bomb on him and that on the same day at 04.30 p.m., saying that “என்னை எதிர்த்த உனக்கு இது தான் டா தண்டனை, இத்தோடு ஒழிந்து போடா” had attempted to attack him with 'aruval' and the same was resisted by his left hand, thereby P.W.1 sustained a cut injury on his left palm and the nerves got detached and he sustained fracture in the middle finger. Thereafter the appellant/accused inflicted a cut injury on the left side of the neck, on the head and on the chest and that his father, P.W.2-Selvaraj intervened and his paternal uncle took him to the Government Hospital, Jayankondam and that he gave a statement before the respondent police. Further he corroborated the evidence of P.W.1. However he had admitted with regard to the counter case filed against them by the wife of the appellant/accused in Crime No.711 of 2009. He had stated that the appellant/accused inflicted injuries by 'aruval' on P.W.1 on his left palm, head and neck. However in his cross examination he had stated that he does not know anything directly and he is only a hearsay witness. P.W.3-Rajamanickam is the relative of the appellant/accused and there used to be some petty quarrels between him and the appellant/accused and that he had corroborated the evidence of P.W.1. P.W.4-Jasmin is the wife of P.W.1, she has corroborated with regard to the incident but she has not stated that as if the appellant/accused had told to P.W.1 that “என்னை எதிர்த்த உனக்கு இது தான் டா தண்டனை, இத்தோடு ஒழிந்து போடா”. P.W.5-Rajan, is the witness for the Mahazar and he has stated about having attested the Mahazar. P.W.6-Kannan has turned hostile. P.W.7-Dr.Sivaprakasam Usha, who given treatment to P.W.1 and she had stated that on 24.06.2009, while she was working as an Assistant Medical Officer in the Government Hospital, Jayankondam, P.W.1 came for treatment for the injuries sustained by him. Further she had stated that P.W.1 was attacked by one known person with 'aruval' and in which he was sustained with the following injuries:

(i) Bone depth cut injury measuring 15x4 cms on the left palm.

(ii)Cut injury measuring 5x3x3 cms on the upper part of the chest.

(iii)Cut injury measuring 10x2x3 cms on the left upper part of the neck.

(iv)Lacerated injury measuring 6x1x1 cms on the right side of the head,

and that she had opined that the 1st injury was grievous injury and the other injuries were simple in nature and the Accident Register was marked as Ex.P.5.

17.P.W.8-Thangarasu, Circle Inspector of Police had stated that on information from the Government Hospital, Jayankondam, he visited the hospital and took statement from P.W.2, based on which a case in Crime No.719 of 2009 was registered for the offences under Sections 294B, 307 IPC. After registering the case, he went to the scene of occurrence, examined the witnesses Rajan, Panchanathan and prepared Observation Mahazar-Ex.P.2 in their presence. Further he prepared Rough Sketch-Ex.P.7, thereafter he examined the other witnesses and arrested the appellant/accused on the same day at 03.15 pm.,. The arrested accused gave a confession statement, which were recorded in the presence of P.W.6-Kannan and one Vimal and the admitted portion of the confession was marked as Ex.P.8. Based on which a knife measuring 12 cms was recovered thereafter P.W.8 altered the case and filed the final report before the trial Court. Final Report was marked as Ex.P.9.

18.On perusal of the evidence, this Court is of the opinion that though there are minor contradictions between the witnesses in the case, the evidence of P.W.1 has been corroborated by the evidences of P.Ws.2 and 3, with regard to the appellant/accused causing grievous hurt to P.W.1 and further it is supported by the evidence of P.W.7-Dr.Sivaprakasam Usha, who had issued the Accident Register-Ex.P.5.

19.In the case of Brahm Swaroop Vs. State of Uttar Pradesh reported in (2011) 6 SCC 288, the Hon'ble Apex Court has held as follows:-

"28.Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone."

20.From the available materials it is seen that earlier on the other complaint given by the wife of the appellant/accused, a case in Crime No.711 of 2009 has been registered against the

witnesses. Further, while analyzing the evidence of P.W.7-Doctor, nothing had been elicited that such injuries would have resulted in the death of the deceased and further, this Court is able to see that there are material contradictions and discrepancies with regard to the FIR and the testimonies given by the witnesses before the Court, with regard to the happenings at the time of the incident. For the purpose of Section 307 what is material is the intention or knowledge, not the consequence of the actual act done for the purpose of carrying out the intention. That section clearly contemplates an act which is done with the intention of causing death but which fails to bring about the intended consequence on account of the intervention of a cause operating independently of the volition of the agent. To determine whether an act falls within the ambit of Section 307, on the wording of this Section, three considerations appear to be essential (i) the nature of the act done,

- (ii) the intention or knowledge of the agent, and
- (iii) the circumstances under which the act is done.

21. What the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of 'attempt to murder'. Under Section 307, the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances; and not merely from the consequences that ensue.

22. However there is evidence to show that the appellant/accused had caused serious injuries on the vital part of the body of the P.W.1 and it cannot be deemed to have been caused with an intention to cause death and the injuries also not sufficient in the ordinary course of nature to cause death. Thereby this Court is of the opinion that though charge has been framed for 307 IPC, the prosecution has not let in cogent evidence, to prove that the act was done by the appellant/accused with such intention or knowledge and under such circumstances, if he by that act caused death, he would be guilty of murder. However, this Court is able to infer that the prosecution has proved the case for offence under Section 326 IPC. Now, coming to the question of sentence it has been stated by the learned counsel for the appellant/accused that the appellant sustained serious injuries in a later incident and he is bedridden and that his wife is also no more and he is taken care by his aged mother. The respondent police also on verification informed that the submission made by the counsel for the appellant/accused is true.

23.In view of the above this Criminal Appeal is partly allowed and the appellant/accused is found guilty for the offence under Section 326 IPC instead of offence under Section 307 IPC and sentence of imprisonment is modified to 3 years Rigorous Imprisonment and the fine of Rs.25,000/- is confirmed. The Trial Court shall take steps to secure the appellant/accused to undergo remaining period of incarceration if any.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

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To

- 1.The Additional District and Sessions Judge
Fast Track Court, Ariyalur.
2. The Judicial Magistrate, Jayamkondam
3. The Chief Judicial Magistrate, Perambalur.
- 4.The The Inspector of Police
Jayamkondam Police Station
Ariyalur District.
(Cr.No.719 of 2009)
5. The Superintendent, Central Prison, Trichy.
- 6.The Public Prosecutor
High Court of Madras.

Copy To

The Section Officer
Criminal Section, (Records)
High Court of Madras.

+1cc to Mr.K.Gandhikumar, Advocate SR.No.26224

Cr1.A.No. 447 of 2010

BR(CO)
GMY(29/05/2019)