

BAIL SLIP

The Appellant/Accused, namely Nallasamy, aged 29 years, S/o.Sivasuriyan, was directed to be released on bail vide order dated 17.02.2011 made in MP No.1 of 2011 in CRL A No.752 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.03.2019

CORAM:

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA
Crl.A.No. 752 of 2010

Nallasamy ... Appellant/Accused

/Vs/

State by: Inspector of Police
Palladam Police Station
Thirupur District.
Crime No.1112 of 2004.

... Respondent /Complainant

PRAYER: Criminal Appeal filed under sections 374 (2) of the Criminal Procedure Code, against the Judgment dated 30.11.2009 made in S.C.No.28 of 2009 on the file of the Additional District and Sessions Court (Fast Track Court No.IV), Coimbatore @ Tiruppur.

For Appellants : Mr.V.Elangovan

For Respondent : Mr.K.Prabakar
Additional Public Prosecutor

J U D G M E N T

The Criminal Appeal has been filed, challenging the order passed by the Additional District and Sessions Court (Fast Track Court-IV), Coimbatore at Tiruppur in S.C.No.28 of 2009 dated 30.11.2009, wherein, the trial Court found the appellant guilty for the offences under Sections 452 IPC (2 counts), 394 and 394 r/w 397 IPC (2 counts), 392 and 392 r/w 397 IPC and convicted him to undergo 3 years Rigorous Imprisonment for the offence under Section 452 IPC (2 counts) for each count, to undergo Rigorous Imprisonment for 10 years for offences under Sections 394 and 394 r/w 397 IPC (2 counts) for each count and to undergo Rigorous Imprisonment for 7 years for offences under Section 392 and 392 r/w 397 IPC and also the sentences were ordered to run concurrently. Period in jail was directed to be remitted under Section 428 Cr.P.C.,. Since the appellant was in jail and was unable to pay fine, the trial Court did not impose any fine on him.

2.The case of the prosecution is that on 30.11.2004, around 08.15 p.m., while one Palanisamy and his wife Deivathal (P.W.5) were in their house, watching television, four persons armed with weapons trespassed into their house. After entering the house, they cut the telephone wire and one of them assaulted the said Palanisamy and thereafter made the couple to sit in the bedroom, searched the steel almirah and took away half sovereign gold earring and snatched 7 sovereigns of thali chain, which was worn by Deivathal (P.W.5), thereafter bolted the door from outside and left the place.

3.In continuance of the same, the same gang trespassed into the house of Rajan (P.W.1), while he and his family members were watching television. Upon entering into the house, the accused had brandished their weapons, threatened and demanded the inmates to part with the jewels. When, Saravanan (P.W.4), brother of Rajan (P.W.1) resisted the accused and hence, one of them attacked him with the Billhook (Aruval) (M.O.1) and when Rajan's mother Kamalam (P.W.2) intervened, she was also attacked by the accused, on seeing this Rajan's wife, Vijayalakshmi (P.W.3) immediately rushed into the bedroom with her infant and bolted from inside. On seeing this, the accused broke open the door of the bedroom, took away a pair of gold earring and the ring worn by the child and they also took away the thali chain from Kamalam (P.W.2) and after committing robbery, the accused persons left the place.

4.On hearing the hue and cry of Rajan (P.W.1) and his family members, Palanisamy and his wife Deivathal (P.W.5) came to the house of Rajan (P.W.1) for help and they came to know about the robbery there. In the incident, since Kamalam (P.W.2) and Saravanan (P.W.4) were injured, Rajan (P.W.1), took them immediately to Rajeswari Hospital at Palladam and thereafter came to Palladam Police Station and lodged a complaint (Ex.P.1), based on which, G.P.Arumugam (P.W.13), Inspector of Police, registered a case in Crime No.112 of 2004 for the offence under Section 394 IPC and prepared the printed First Information Report (Ex.P.18), thereafter he went to the places of occurrence and prepared the Observation Mahazar (Ex.P.2) in the presence of Shanmugam (P.W.7) and one Palanisamy (not examined).

5.While the investigation was in progress, Arumugam (P.W.13), the Investigating Officer, received information from the Inspector of Police, Manamadurai Police Station, about the involvement of Kumar @ Mayakumar, who was arrayed as A3. The Inspector of Police, Manamadurai Police Station had arrested said Kumar @ Mayakumar (A3), in connection with Crime No.56 of

2005, registered by him for offences under Sections 324 and 307 IPC and while during the interrogation of the case, Kumar @ Mayakumar (A3) had disclosed about his involvement in the present case along with other accused.

6. On receipt of the above said information, Arumugam (P.W.13), Investigating Officer, approached the Judicial Magistrate, Palladam and took Kumar @ Mayakumar (A3) into police custody on 24.02.2005 and on the information provided by him, the other accused viz., Anthonyraj @ Soorapuli (A1), Palani @ Palanikumar (A2) and the present appellant-Nallusamy (A4) were identified and arrested.

7. On the disclosure made by the accused, the weapons used during the occurrence and gold ornaments robbed were recovered. The recoveries were not only in respect of this case, but also of other cases in which the accused were involved.

8. During the course of investigation, involvement of Kumar @ Mayakumar, Palani @ Palanikumar and one Rajini in a similar incident that took place on 08.11.2004 and registered in Crime No.984 of 2004 by the Palladam Police Station also came to light.

9. The Investigating Officer made arrangements for conduct of Test Identification Parade of the arrested accused by the witnesses and accordingly, Mr. Kulasekaran, Judicial Magistrate - I, Tiruppur, conducted the Test Identification Parade at Central Prison, Coimbatore on 08.04.2005, and prepared the report.

10. After examining the witnesses, including the Doctor, who treated the injured, the Investigating Officer filed final report before the Judicial Magistrate - I, Palladam, which was taken on file as PRC No.4 of 2008. Since the appellant/accused and Kumar @ Mayakumar (A3) absconded, the case against Anthonyraj @ Soorapuli (A1), Palani @ Palanikumar (A2) were split up committed to Sessions and was taken in S.C.No.188 of 2007 and they were found guilty and convicted. The committal Court issued Non-Bailable Warrant against the appellant/accused and after the arrest of the appellant/accused, copies were furnished to him in due compliance of Section 207 Cr.P.C., and the case was committed to the Principal District and Sessions Judge, Coimbatore, and thereafter made over to the trial Court and tried as S.C.No.28 of 2009.

11.The trial Court framed charges against the appellant/accused for offences under Sections 452 IPC (2 counts), 392 and 392 r/w 397, 394 and 394 r/w 397 (2 counts) and when the appellant/accused was questioned, he pleaded not guilty.

12.In order to prove the guilt of the appellant/accused, the prosecution examined 11 witnesses (P.W.1 to 11), marked 14 exhibits (Ex.P.1 to 14) and 3 material objects (M.O.1 to 3).

13.When the trial Court questioned the appellant/accused under Section 313 Cr.P.C., about the incriminating circumstances appearing against him, he denied the same and neither examined any witnesses nor marked any documents on his side. After considering the evidence on record, the trial Court by Judgment dated 30.11.2009, convicted the appellant/accused as stated above.

14.The learned counsel for the appellant would submit that the appeals filed by the co-accused in Crl.A.No.12 of 2010 and Crl.A.Nos.11 and 186 of 2011 against the Judgment of conviction and sentence arising out of the same case have been disposed of by this Court by Judgments dated 23.11.2010,10.12.2018 respectively. He would further submit that the Criminal Appeal filed by A2, has been partly allowed and the conviction and sentence passed by the trial Court, convicting the appellant under Section 452 (2 counts) and under Section 394 r/w 397 IPC (2 counts) are set aside and instead of that the appellant was convicted under Section 394 IPC (2 counts) and under Section 452 IPC (2 counts) and the sentence of imprisonment was modified to 4 years of imprisonment altogether for both the offences. He would also submit that in the connected appeals filed by other accused in Crl.A.Nos.11 and 186 of 2011, this Court by order dated 10.12.2018 partly allowed the appeals and while confirming the conviction under Sections 394 IPC (2 counts) and 454 IPC (2 counts), the sentence of 10 years Rigorous Imprisonment was reduced to 5 years Rigorous Imprisonment for each count under Section 394 IPC for each appellant and the sentences were ordered to run concurrently.

15.He would submit that the prosecution has failed to prove the case beyond all reasonable doubt against the appellant and there is no material that the appellant caused any injury on the victims and in view of the contradictory versions, the conviction of the appellant/accused under Section 397 cannot be sustained.

16.The learned Additional Public Prosecutor would vehemently oppose the submissions of the learned counsel for the appellant. He would submit that the present appellant does not stand on the same footing as that of the other accused, who have been given lessor sentences by this Court, in the connected CrI.A.No.12 of 2010 dated 23.11.2010 and CrI.A.Nos.11 and 186 of 2011 dated 10.12.2018. He would submit that the other benches of this Court finding that there are no sufficient materials against the accused, regarding recovery of weapons and the injuries sustained by the victims, have partly allowed the appeal and allowed lessor sentence to them. He would further submit that so far as this appellant is concerned he is the person who caused injuries on P.W.2 and 4, by a deadly weapon during the occurrence and though the injury sustained by P.W.2 is simple in nature, the injury sustained by P.W.4 is grievous in nature and the same was supported by the evidences of Doctor (P.W.10) and Wound Certificate of P.W.4 (Ex.P.11). He would submit that the appellant has been duly identified during the Test Identification Parade and also before the trial Court by the witnesses. The weapon used by the appellant had been recovered based on his confession and marked M.O.1. Further, recovery of jewels based on the confession of the appellant has been proved through Ex.P.8, 9 and 10, which have been recorded in the presence of P.W.9 thereby the allegations and other acts of the appellant cannot be equated with that of the other accused, who have been given lessor sentence by this Court in the connected appeals and thereby would submit that the prosecution has by letting in evidences proved the case against the appellant/accused, who committed the offence under Section 397 IPC, requires a minimum sentence not less than 7 years.

17.I have carefully analysed the evidences on record. The case was registered by the respondent against four persons and the appellant/accused had been arrayed as A4. Due to the abscondance of the appellant/accused this case was split up and the case of the appellant was tried separately. On the side of the prosecution 11 witnesses, 14 exhibits and 3 material objects were marked. In this case, as stated by the prosecution, P.W.2 and 4 are the injured witnesses. Immediately after the occurrence they have been taken to the hospital and the Doctor (P.W.10) has examined them and issued Wound Certificates (Ex.P.11 & 12) in respect of P.W.4 and 2. As per Ex.P.11, the Doctor had noted that the injuries sustained by the injuries of P.W.4,

- (i)sutured wound about 15 cms in the (LT). FA upper 1/3 RD.
- (ii)sutured would 2 cm length in the base of LT. F3.
- (iii)sutured would ® FA about 2 cms in anterior aspect.
- (iv)small abrasion ® shoulder.

(v) cut injury extensor LT. Forearm zone IX.

(vi) Fracture upper 1/3 of radius,

and as per the opinion of the Doctor, the injuries are grievous in nature and the injuries sustained by P.W.2 are

(i) cut injury about 6 cms length sutured outside lower 1/3 of (RT) FA about 1 inch below (RT) wrist.

(ii) contusion over lower abdomen (LT) side,

which is opined to be simple in nature. Further it is the categorical evidence of the witnesses that the appellant/accused inflicted the injuries on the witnesses by using the material object "Aruval" (M.O.1). On 21.02.2005, on the confession made by the appellant/accused in the presence of P.W.9 and yet another person, the respondent police recovered M.O.1 and 2 through Mahazar (Ex.P.7). Further jewels have been recovered under Ex.P.8, 9 and 10 in the presence of P.W.9. Thereby, the prosecution has proved the case by ample evidences that while committing robbery, the appellant/accused had inflicted injuries on the witnesses by "Aruval" a deadly weapon and the injury suffered by P.W.4 is grievous in nature.

18. The essential ingredients of Section 397 IPC are as follows:

"(1) Accused committed robbery.

(2) While committing robbery or dacoity

(i) accused used deadly weapon

(ii) to cause grievous hurt to any person

(iii) attempted to cause death or grievous hurt to any person.

(3) "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable under that Section for acts of co-accused."

19. As rightly pointed out by the prosecution, due to lack of materials, regarding usage of deadly weapon and causing injury, sentences of the other accused have been modified to one under Section 394 IPC, whereas as far as this appellant/accused is concerned, the charge against him for offence under Section 397 has been proved beyond reasonable doubt and thereby the case of

the appellant/accused cannot be considered on par with the other accused.

20. In the result, conviction and sentence against the appellant/accused passed by the learned Additional District and Sessions Court (Fast Track Court No.IV), Coimbatore @ Tiruppur, in S.C.No.28 of 2009 dated 30.11.2009 is confirmed. However, the sentence of 10 years Rigorous Imprisonment is reduced to 7 years Rigorous Imprisonment for each count under Section 394 r/w 397 IPC (2 counts). The conviction and sentence for both the offences viz., under Sections 452 and 392 r/w 397 are confirmed. Sentences shall run concurrently. The bail bond stands cancelled and the appellant/accused is directed to surrender forthwith or in the alternative, the respondent shall arrest him and produce before the trial Court, to undergo remaining part of sentence if any.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate, Palladam.
 2. The Chief Judicial Magistrate, Coimbatore.
 3. The Additional District and Sessions Judge,
(Fast Track Court No.4), Coimbatore @ Tiruppur
 4. The Inspector of Police,
Palladam Police Station, Coimbatore District.
 5. The Superintendent,
Central Prison, Coimbatore.
 6. The Public Prosecutor, High Court of Madras.
- +1 cc to Mr.S.Doraisamy, Advocate, Sr.No. 28996

CrI.A.No. 752 of 2010

GJ-II(CO)
CSL/04.06.2019