

BAIL SLIP

The Appellants/Accused Nos. namely 1.Senthil @ Senthilkumar, S/o.Kandasamy and 2.Kumar @ Satheesh Kumar, S/o.Kanda Samy were directed to be released on bail as per the order of this Court dated 17.03.2011 in CRL MP No.1 of 2011 in CRL A No.188 of 2011 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.03.2019

PRONOUNCED ON : 02.04.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.188 of 2011

1.Senthil @ Senthilkumar  
2.Kumar @ Satheesh Kumar

.. Appellants

Vs

State by Inspector of Police,  
Tiruchengode Rural Police Station,  
Crime NO.17 of 2008,  
Namakkal District.

.. Respondent

Prayer:- This Criminal Appeal is filed under Section 378 Cr.P.C., against the conviction imposed in the judgment dated 09.03.2011 made in S.C.No.47 of 2009 on the file of the learned Principal Sessions Judge, Namakkal.

For Appellants : Mr.N.Manokaran

For Respondent : Mrs.Kritika Kamal.P,  
Government Advocate (crl.side)

JUDGMENT

The criminal appeal is preferred by the appellants aggrieved by the judgment of conviction passed against them in S.C.No.47 of 2009 by the learned Principal Sessions Judge, Namakkal.

2.The appellants were tried for offence under section 302 r/w 34 IPC. The trial court after appreciating the evidence, held them guilty for offence under section 304 IPC. Challenging the said finding of the trial Court, this Criminal Appeal is filed by the appellants.

3.The case of the prosecution, is as follows:-

Senthil @ Senthil kumar (A-1) and Kumar @ Satish Kumar ( A-2) are the appellants herein. The appellants are brothers. They are the residents of Cithallandur village. They own agricultural land and Tractor. They used to hire the Tractor for rent. They also run a meat shop at Cithallandur village by name, K.K.S Broilers. On 06/01/2008 at about 6.00 pm when Gunasekaran of Pokkampalayam village parked his Tractor in front of their meat shop and went to drink tea in the near by tea shop run by one Murugesan. The appellants thought that Gunasekaran has wantonly parked his Tractor in front of thier shop to disturb their business. Therefore, when Gunasekaran returned back to take his Tractor after having tea with his cousin Manokaran (P.W.3), Senthil @ Senthil kumar (A-1) questioned Gunasekaran, 'why he parked the Tractor in front of their shop and spoiled their business. He slapped Gunasekaran on his cheek. Gunasekaran took his Tractor, went home and reported the incident to his father - Muthusamy. At about 7.00 pm, Muthusamy along with his son Gunasekaran came to the shop of the appellants and questioned them why A-1 (the frist appellant) slapped his son. In retortion, Sathish Kumar (A-2) slapped Muthusamy and kicked him on his stomach. Suresh Kumar (A-1) hit Muthusamy on his head with a wooden log. Muthusamy fell on the floor and become unconscious. Gunasekaran informed his brother-in- law Palanisamy over phone. On his arrival to the spot, Muthusamy was taken to the hospital at Thiruchengodu Government Hospital. The duty doctor examined the patient, intimated the matter to the Police and after providing first aid, referred the patient to Erode General Hospital. Muthusamy was taken to the Erode Hospital and he was admitted as inpatient. He died on 07/01/2008 at 12.35 hours. The FIR registered on 07/01/2008 at about 6.30 am in Crime No.17/2008 for offences under sections 294(b), 323, 341 and 506(ii) of IPC was altered to sections 294(b), 341 and 302 IPC.

4.Investigation was taken up by the Inspector of Police Mr.Gnanaprakasam (P.W.20). The accused were arrested on 10/01/2008. Based on the information given by Senthil kumar, the wooden log used by him to assault Muthusamy was recovered from his meat shop concealed under the chicken waste. After obtaining

the accident report, post mortem report and the statements of the witnesses, the investigation was completed and final report was filed against the appellants.

5.The District and Session Court on committal, framed charge under section 302 r/w 34 IPC. Examined 20 witnesses (P.Ws.1 to 20) as prosecution witnesses. 24 documents were marked as Exs.P-1 to P-24. The wooden log and white colour polyester dhoti of the deceased were marked as M.O.1 and M.O.2. On the side of the defence, the General Diary entries of the respondent police station for 07/01/2008 and 10/01/2008 were marked as Ex D-1 and Ex D-2 respectively.

6.The trial court concluded the trial holding that, A-1 and A-2 committed culpable homicide and caused the death of Muthusamy, for trivial reasons. Convicted both the accused for offence under section 304 IPC. Sentenced A-1 to undergo 10 years Imprisonment and to pay fine of Rs.10,000/- in default, one year imprisonment. Sentenced A-2 to undergo 5 years imprisonment and fine of Rs.5,000/- in default 6 months imprisonment.

7.The gist of the appeal, is as follows :-

The learned counsel for the appellants would submit that the alleged motive for the incident not been substantiated by the prosecution though, it is contended that there was previous enmity between the appellants and P.W.1 regarding hiring their Tractors for farmers, no materials is placed before the Court that the appellants own Tractor and there was enmity. The time of occurrence also not been consistently spoken by the prosecution witnesses. The variants in the time of occurrence and the place of occurrence, cause grave doubt about the entire prosecution version.

8.Regarding the injury, the material contradiction, 'whether the deceased sustained injury due to the overt act of the first appellant or due to fall on the ground' is uncertain. Whether the injury caused bleeding or not, is also uncertain. No blood stained cloth or mud from the scene of occurrence recovered and sent for serology test. While the accident report indicates that there was only swelling on the head, the post mortem certificate indicates that there was a lacerated wound on the parietal region. When there is no medical record or evidence to prove the factum of treatment given to the deceased in the Government hospital, Erode, it cannot be presumed that the death of Muthusamy was only due to the head injury. To buttress his submission, the learned counsel for the appellants relied upon

the following judgments:-

- (i) In Jabamalai Royappan vs. State (CDJ MHC 398) and
- (ii) In Selvaraj vs. State (2019 (1) MWN (Cr.) 234 (DB))

The learned counsel for the appellants would submit that in any event, the appellants had no intention of causing death of Muthusamy and there is no evidence to show that the death of Muthusamy was due to the injury caused by the appellants.

9. Per contra, the learned Government Advocate (crl.side) would submit that the motive for the attack is spoken by P.W.1, the son of the deceased Muthusamy. Through the evidence of P.W.1, the prosecution has proved that the first accused slapped P.W.1 on 06.01.2008 at about 6.00 pm for parking his Tractor in front of the shop of the accused and spoiling their business. P.W.3 - Manokaran who was present at the scene of occurrence, has corroborated the evidence of P.W.1 that after parking the Tractor, near the shop of the appellants/accused, P.W.1 came to the shop of Murugesan (P.W.6) on seeing him, they both had tea. On the date of occurrence, the weekly chandy was on in the village. Therefore, all the shops were kept open. This incident was reported to the deceased by P.W.1. Thereafter, the deceased along with P.W.1 had come to the shop of the appellants and questioned them. The evidence of P.W.1 in this aspect is spoken by P.W.3 as well as P.W.14 - Senthil. The Investigating Officer though collected the blood stained dhoti of the injured person, which is marked as M.O.2, he has failed to send it to serology test. However, the said omission does not lead to any interference that there was no incident occurred, or, the deceased never sustained wound on the scalp.

10. The post mortem Doctor report is reliable and no reason to suspect the entries made in the post mortem report. Whereas, the superficial examination of Muthusamy when he was taken to the Government Hospital, Tiruchengode for first aid and the entry found in the accident report - Ex.P.4 is only a casual entry by the Doctor and has very less bearing to the case. To buttress his submission, the learned Government Advocate (crl.side) would rely upon the judgment of the Hon'ble Supreme Court in B.Bhadriah and others v. State of A.P (AIR 1995 SC 564), wherein, in paragraph No.4, it has been held as follows:-

"4. Since this is a regular appeal we have heard the learned Counsel at length and have gone through the evidence of P.Ws. 1 to 4 carefully and also other material aspects. It is a case where because of an earlier incident during which the car of the deceased knocked down A-1's motor-cycle, led

to the attack on the deceased on the same night in his arrack shop. The presence of P.Ws. 1 to 4 at the scene of occurrence is natural. P.W.1 who is an injured witness and P.W.4 who is also a relation of the deceased took prompt steps to shift the deceased to the hospital. P.W.1 was also examined for his injuries. Naturally he was not expected to give a report to the Doctor. The casual way of filling up the column in the medical certificate does not in any manner amount to recording a statement of the injured witness....."

(Emphasis added)

11. The learned Government Advocate (crl.side) would submit that the subdural and cerebral hematoma which has caused due to the attack on the deceased is the cause for the death. The patient died within 24 hours of the incident. Therefore, there was no much scope to treat him and the non production of case sheet no way prejudice to the defence.

12. The accident report - Ex.P.4 would clearly indicate that the patient was brought unconscious and injury was found on the occipital region. Due to the gravity of the injury, he was shifted to Government hospital, Erode. While so, the appellants cannot take a plea that they did not cause injury with intention or knowledge to cause death of the deceased. The proximity between the occurrence and the death is so close. But for the injury caused by the appellants, Muthusamy ought not to have died.

13. The defence documents regarding the entries found in the general diary even if it creates doubt regarding the time of arrest and examination of witnesses, it is now well settled preposition of law that, the evidence collected illegally, will not vitiate the trial. In this connection, the learned Government Advocate (crl.side) would rely upon the observation made by the Hon'ble Supreme Court in State represented by Inspector of Police and others vs. N.M.T Joy Immaculate (2004 (5) SCC 729) wherein, the Hon'ble Supreme Court has held that, confession and alleged recovery consequent to a confession obtained illegally, will not render the evidence inadmissible if, the evidence is otherwise relevant.

14. In the above said judgment, relying upon the Constitutional Bench judgment of the Hon'ble Supreme Court rendered in Pooran Mal v. Director of Inspection (Investigation) (1974 (1) SCC 345), it was held that:

"So far as India is concerned its law of evidence is modeled on the rules of evidence which prevailed in English Law, and Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. Where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out."

The learned Government Advocate (crl.side) would submit that Exs.D.1 and D.2 does not indicate any infirmity in the prosecution evidence or in the course of their investigation.

15.Heard the learned counsel for the appellants and the learned Government Advocate (crl.side) appearing for the state. Records perused.

16.In this case, the criminal law has been set into motion, based on the statement given by P.W.1 to Gnanaprakasam, the Inspector of Police (P.W.20) and to Manickkam, Head Constable attached to Tiruchengode Police Station (P.W.16). In the said statement given by P.W.1, he has mentioned the assailants as Senthil @ Senthil Kumar and Kumar @ Satheesh Kumar who are the appellants herein. The statement has been recorded by the Head Constable (P.W.16). Initially, on receipt of the assault information from the said hospital at about 1.30 am in the morning, Manickkam (P.W.16) has gone to Tiruchengode Government Hospital. On reaching Tiruchengode Hospital, he came to know that the patient was referred to Erode Government Hospital. Therefore, from Tiruchengode, he has left to Erode at about 2.30 am. Reached the Government Hospital at Erode at about 4.00 am. Between 4.00 and 5.00 am, he has recorded the statement of P.W.1 and came back to the station for registering F.I.R., at about 6.30 am, on 07.01.2008. The sequence of event clearly establishes that there is no delay on the part of the Investigating Agency in registering the F.I.R.

17.The F.I.R., has reached the learned Jurisdictional Magistrate on the same day at about 6.15 pm. It is contended by the learned counsel for the appellants that P.Ws.1 to 3 have deposed contrarily about the information conveyed to the Police. The conflicting version of the prosecution witnesses regarding the manner in which the criminal law set into motion, creates doubt and it is highly improbable the statement Ex.P.1 given by P.W.1 to be the first information. P.Ws.1, 2 and 14 had deposed

that they intimated about the incident to the police individually. As per the record, it was the intimation given by the Doctor - Thenmozhi Nambi (P.W.10), from Tiruchengode Government Hospital is the authenticated information for the Police to act upon.

18.Manickkam - P.W.16, Head Constable attached to Tiruchengode Rural police station has cogently deposed about the manner in which he received the information and further course of action, he took in this case. The evidence of P.W.19 and the evidence of P.W.16 in the light of Ex.P.1 complaint and Ex.P.12 F.I.R., it is clear that there is no lacuna or delay in registering the F.I.R., and forwarding the same to the concerned Jurisdictional Magistrate at the earliest.

19.Therefore, the contention of the learned counsel for the appellants raising doubt regarding the information from an informant, is devoid of merits. The learned counsel for the appellants would also raise doubt that there is inconsistency in the case of the prosecution regarding the scene of occurrence. In this connection, it is to be noted that, as per the complaint, the incident had taken place near the Shop of the appellants when the deceased Muthusamy and P.W.1 went to their shop to question them as to why A.1 attacked P.W.1 earlier on the day. In the F.I.R., recorded based on the complaint, it is shown as opposite to the shop of the appellants. The sketch prepared show the scene of crime and it is marked as Ex.P.14. The sketch indicates that the occurrence was in front of the accused shop which is in between row of shops and the bus stop is also shown in the sketch which is on the same road South of the scene of occurrence. The prosecution has examined some of the shop owners. They are P.W.9 - Jegaveeran, P.W.14 - Senthil and P.W.8 - Krishnan. P.W.8 - Krishnan though turned hostile, he has supported the case of the prosecution, so far as the fact that, on the date of occurrence, just before the occurrence, P.W.1 came to his shop and exchanged the tyre of his Tractor. This corroborates the evidence of P.W.1 that he went to Chithalathur to change the deflated tyre of his Tractor and after repair while proceeding, he saw Manokaran - P.W.3 near tea shop. So, he parked his Tractor near the shop of the appellants. The other witness - Jegaveeran - P.W.9 who turned hostile admits that, he was running a petty shop and he know the accused who are running chicken meat stall and he has also acquaintance with the deceased Muthusamy. Since, he did not speak about the occurrence, he was treated as hostile by the prosecution.

20.Though, these witnesses have turned hostile, the sketch as prepared by the prosecution to show the location of scene of crime gets proved through the evidence of these witnesses.

P.W.14 - Senthil is the person who has informed the Police about the accused and identified them to the Police to enable them to arrest. He in the cross examination, has specifically stated that he saw the appellants assaulting Muthusamy (deceased). He assisted P.W.1 and others to shift Muthusamy to the hospital. So, through the prosecution witnesses, it is proved that P.W.1 son of the deceased was present during the occurrence and he was in a way cause for the fight. He has cogently spoken about the incident how the appellants attacked his father.

21.P.W.3 - Manokaran was present with P.W.1 at the time of occurrence. He has also specifically stated about the scene of crime and overt act of A.1 and A.2. As far as the overt act of the accused persons, the evidence of P.Ws.1 to 3 are corroborative to each other and they both being the eye witnesses to the occurrence, their evidence are highly reliable. P.W.2, brother-in-law of P.W.1 has reached the scene of occurrence only after the incident. He has taken the deceased to hospital.

22.P.W.4 - V.S.Mani has turned hostile; P.W.5 - Selvam, the witness to observation mahazar; P.W.6 Murugesan tea shop owner has also turned hostile. But the fact remains that, near the accused shop, Murugesan (P.W.6) was running a tea shop. As per the evidence of appellants, P.W.1 stopped his Tractor in front of the accused shop and gone to Murugesan (P.W.6) tea shop to have tea where Manokaran was already there.

23.The learned counsel for the appellants would take a strong exception the manner in which the investigation was conducted. He would point out when P.W.1 (Gunasekaran) son of the deceased; P.W.2(Palanisamy) son-in-law of the deceased and P.W.7 (Rukmani) wife of the deceased had deposed that there was blood injury found on the body of the deceased Muthusamy, but Dr.Thenmozhi (P.W.10), Assistant Medical Officer, Government Hospital, Tiruchengode has said that there was no blood injury. She was the first independent witness who has examined the deceased, after the incident. The Police has also not recovered any blood stained clothes of the deceased from P.Ws.1, 2 or 7 and not collected blood soil from the scene of crime also failed to send the blood stained Dhoti marked as M.O.2 worn by the deceased at the time for serology test. While so, the very foundation of the prosecution case gets demolished. The injury found on the occipital region of the deceased subdural hematoma; cerebral hematoma and cerebular hematoma cannot be attributed to any of the overt act attributed against A.1 and A.2.

24.This contention of the learned counsel for the appellants has very less effect. In the light of the evidence available on

record which overhaul the minor lapse on the part of the investigation. It is a fact that P.W.10 Dr. Thenmozhi had not noticed any lacerated wound on the occipital region of the deceased. She has recorded only a contusion on the occipital region. Whereas, the post mortem Doctor has externally found there was lacerated injury found on the occipital region of the deceased and internally subdural hematoma; cerebral hematoma and cerebellar hematoma.

25. The evidence of P.Ws.1 & 3 is that, when the deceased questioned A.1 why he slapped his son P.W.1, A.1, retorted saying are you a support for your son, and started hitting him. A.2 joined A.1 and kicked Muthusamy (deceased) on his stomach. Soon after A.1 went into his shop took a wooden log and hit Muthusamy on his head. Soon Muthusamy became unconscious and fall down.

26. The next day around 12.35 pm, Muthusamy died without gaining his conscious. On 10.11.2008, the accused persons were arrested. The trial Court after considering the circumstances under which the incident has taken place has rightly held that Muthusamy has died due to shock and hemorrhage due to multiple injuries sustained. Those injuries were sustained by Muthusamy due to the indiscriminate attack by the appellants. Since, the prosecution did not prove that the appellants caused the death of Muthusamy with intention of causing death therefore, it falls within the definition of culpable homicide not amounting to murder. The opinion of the post mortem Doctor about the injuries found on the deceased reveals that the assault on the head of Muthusamy has caused a lacerated wound and the hematoma (blood clotting) in between pia and dura (subdural). Subdural Hematoma (blood clot in between pia region and dura region) which has caused the death of Muthusamy. This injury was caused by A.1. Therefore, the trial Court had imposed lesser sentence for A.2 and higher sentence for A.1.

27. In the evidence of P.W.1, we find that after the attack, the appellants have threatened P.W.1 and his father to leave the place or else, they will kill them. If really, they had any intention of causing death, they would not have warned P.W.1 and his father Muthusamy to leave the place. So, there is only intimidation. This establishes the fact that the accused had no intention to cause death. However any prudent man will have the knowledge that causing injury on the head with heavy object (wooden log - M.O.1) will likely to cause death. In the said context, while this Court holds that the conviction of A.1 held by the trial Court is correct and in consonance with law and evidence. As far as A.2 is concerned, he neither had intention to cause death nor caused any injury which was cause for the death.

28.From the evidence, this Court finds that it was A.1 who has caused the grievous injury on the deceased. There is no common intention shared by A.1 and A.2 to cause the said injury on the deceased. From the ocular evidence, while there was heated arguments between the deceased party and Accused party, A.1 has suddenly gone inside the shop, brought the wooden log and had hit Muthusamy (deceased) on his head. Therefore, A.1 alone can be held guilty for offence under Section 304 I.P.C. A.2 is guilty only for offence under Section 323 I.P.C., for causing hurt on the deceased.

29.In the result the Criminal Appeal is partly allowed in the following terms:-

(i)The conviction imposed by the trial Court for offence under Section 304 I.P.C., is confirmed however, sentence is modified. A.1 is sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.10,000/- in default to undergo one year rigorous imprisonment.

(ii)The conviction and sentence imposed on A.2 for offence under Section 304 I.P.C., is set aside and instead, he is convicted for offence under Section 323 I.P.C., A.2 is sentenced to undergo two months rigorous imprisonment and to pay a fine of Rs.5,000/- in default to undergo two weeks rigorous imprisonment.

(iii)The trial Court is directed to secure the presence of the appellants/A.1 and A.2 to undergo the remaining period of sentence, if any. The bail bonds, shall stand cancelled. The period of sentence already undergone shall be given set off as provided under Section 428 Cr.P.C.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

jbm

To

1.The Principal Sessions Judge,  
Namakkal.

2.The Public Prosecutor,  
High Court, Chennai.

3.The Section Officer,  
Criminal Section, High Court, Madras.

4.The Inspector of Police,  
Tiruchengode Rural Police Station,  
Namakkal District.

5.The Judicial Magistrate,  
Tiruchengode.

6.The Chief Judicial Magistrate,  
namakkal.

7.The Superintendent,  
Central Prison, Coimbatore.

8.The District Collector/District Magistrate,  
Coimbatore.

9.The Director General of Police,  
Tamil nadu, Mylapore, Chennai 4.

+1 cc to Mr.N.Manokaran, Advocate, Sr.No. 31826

judgment made in  
Crl.A.No.188 of 2011

BR(CO)  
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