

Bail Slip

The Appellants/Accused 1 to 3 viz, namely 1.Karuna @ Karunakaran A1 S/o Govindasamy, 2.Sugumar A2 S/o.Subramanian, 3. Shanmugam A3 S/o Govindasamy, (in SC.NO.264 of 2009 on the file of the Additional District and Sessions Judge, Fast Track Court No.I, Chengalpattu) were directed to be released on bail dated 16.08.2011 in CRL MP.NO.1/11 IN CRL A.NO.490/2011 on the file of this Hon'ble court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 28.01.2019

CORAM

THE HONOURABLE MR. JUSTICE P.N.PRAKASH

CRL. APPEAL NO. 499 OF 2011

1. Karuna @ Karunakaran
2. Sugumar
3. Shanmugam

... Appellants

- Vs -

State rep. by
Inspector of Police
S-8, Adambakkam Police Station
Chennai 600088
Chengalpet Dist.

... Respondent

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure, to set aside the conviction and sentence dated 05.08.2011 passed by the learned Addl. District & Sessions Judge (Fast Track Court No.1), Chengalpet in S.C. No.264 of 2009.

For Appellants : Mr. R.John Sathyan

For Respondents : Ms. Kritika Kamal.P., GA
(Crl. Side)

Reserved on	Pronounced on
22.01.2019	28.01.2019

JUDGMENT

The present appeal has been preferred by the appellants challenging the conviction and sentence passed

by the learned Addl. District & Sessions Judge (Fast Track Court No.I), Chengalpet, in S.C. No.264 of 2009.

2. It is the case of the prosecution that on 14.11.04 around 11.30 a.m., the accused party were playing cricket in the Secretariat Colony ground, where the deceased party were also playing cricket in one corner. On account of previous enmity, Karunakaran (A-1), Sugumar (A-2) and Shanmugam (A-3) picked up a quarrel with the deceased party for playing cricket in that ground. In the quarrel, Karunakaran (A-1) attacked Senthilvel (deceased) with a cricket bat and Sugumar (A-2) belaboured Senthilvel with a cricket stump. On seeing this, when Senthilvel's brother Thanikachalam (P.W.1) intervened, Shanmugam (A-3) assaulted him with a stump. Senthilvel and Thanikachalam (P.W.1) suffered injuries. They were immediately taken by their grandmother, Raji (P.W.3), Kumudha (P.W.5) and one Shanthi (not examined), who are neighbours, to S.P. Hospital, where they were examined by Dr.Sumathi (not examined), who treated Thanikachalam (P.W.1), but referred Senthilvel to the Government Royapettah Hospital for further treatment. From the Government Royapettah Hospital, Senthilvel (deceased) was referred to Rajiv Gandhi Government General Hospital (for short 'General Hospital'), where he was examined by Dr.Fernandas (P.W.10). Senthilvel was admitted as in-patient on 14.11.04 at General Hospital and surgery was performed on his head.

3. On the complaint lodged by Thanikachalam (P.W.1), Samraj (P.W.11), the Inspector of Police, registered a case in Crime No.463/04 on 14.11.04 at 2200 hours u/s 341, 324 and 307 IPC against Karuna @ Karunakaran (A-1), Shanmugam (A-2) and known, but unnamed person (A-3) referred to as friend of Karunakaran and prepared the printed FIR (Ex.P-15) and took up investigation of the case. He went to the place of occurrence and in the presence of one Prakash (P.W.6) and Vijayakumar (not examined), prepared the observation mahazar (Ex.P-2) and drew the rough sketch (Ex.P-16). On 15.11.04, at about 1400 hours, Senthilvel succumbed to the injuries at the Government Hospital, which was communicated vide death report (Ex.P-17). On receipt of the death report, the investigating officer altered the FIR from Section 307 to Section 302 IPC and sent the alteration report (Ex.P-18) to the jurisdictional Magistrate.

4. The investigating officer proceeded to the Government Hospital and in the presence of panchayatadars, conducted inquest over the body of the deceased and prepared the inquest report (Ex.P-19). After post-mortem, the body of the deceased was handed over to the relatives on 16.11.04. On 18.11.04, the investigating officer arrested Karunakaran, Sugumar and Shanmugam at 1100 hours

and recorded their confession statements. The admissible portion of the confession statements of Karunakaran (A-1) is Ex.P-20; Sugumar (A-2) is Ex.P-21 and Shanmugam (A-3) is Ex.P-22. Based on the disclosures made by the arrested accused, the investigation officer seized the cricket bat (M.O.1) from the residence of Karunakaran (A-1) under the mahazar (Ex.P-23) in the presence of Mohan (P.W.7) and Karthik (P.W.8). Similarly, he recovered the cricket stump (M.O.2) from the house of Sugumar (A-2). After completing the investigating on 30.6.05, the investigation officer filed the final report in P.R.C. No.27/09 before the Jurisdictional Magistrate, Alandur.

5. On appearance of the accused, provisions of Section 207 Cr.P.C., were complied with and the accused were committed to the Court of Session in S.C. No.264/09 and the case was made over to the Addl. District & Sessions Court (FTC-I), Chengalpet, for trial. The trial court framed the following charges against the accused :-

S. No.	Accused	Charge
1	A-1, A-2 & A-3	U/s 341 IPC
2	A-1 & A-2	U/s 302 IPC (for causing the death of Senthilvel by attacking him with a cricket bat and stump)
3	A-3	U/s 302 r/w 34 IPC (for sharing the common intention with A-1 and A-2 in the attack on Senthilvel)
4	A-3	U/s 307 IPC (for attempting to cause the death of Thanikachalam (P.W.1) by attacking him with a stump)
5	A-1 & A-2	U/s 307 r/w 34 IPC (for sharing the common intention with A-3 in the attack on Thanikachalam (P.W.1))

6. When questioned, the accused pleaded not guilty. To prove the case, the prosecution examined 11 witnesses (P.W.s 1 to 11), marked 26 exhibits (Exs.P-1 to P-26) and 2 material objects (M.O.s 1 & 2). When the accused were questioned u/s 313 Cr.P.C. on the incriminating circumstances appearing against them, they denied the same. No witness was examined nor any document was marked on

behalf of the accused. After hearing either side and considering the evidence on record, the trial court, by judgment dated 5.8.11 in S.C. No.264/09, acquitted all the accused of the offence u/s 341, 302 and 307 IPC. However, the trial court convicted A-1 and A-2 of the offence u/s 304 (II) IPC and A-3 of the offence u/s 304 (II) r/w 34 IPC and sentenced them as under :-

S. No.	Accused	Sentence
1	A-1, A-2 (U/s 304 (II) IPC	Convicted and sentenced to rigorous imprisonment for a period of seven years and to pay a fine of Rs.1,000/- each, in default to undergo rigorous imprisonment for a period of six months.
2	A-3	Convicted and sentenced to rigorous imprisonment for a period of seven years and to pay a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for a period of six months.

Challenging the conviction and sentence, the appellants have preferred the present appeal.

7. Heard Mr. John Sathyan, learned counsel appearing for the appellants and Ms. Kirtika Kamal, learned Government Advocate (Crl. Side) appearing for the respondents.

8. It may be necessary to state here that the trial court has not convicted the accused for the attack on Thanikachalam (P.W.1), but has convicted the accused for causing the death of Senthilvel. The State has not filed any appeal against the acquittal of the accused of the charge u/s 307 and 341 IPC.

9. Before advertng to the rival submissions, it may be necessary to recount the evidence of the prosecution witnesses. There are three eye witnesses in this case, viz., Thanikachalam (P.W.1), Vinodh Kumar (P.W.2) and Raj @ Rajasekaran (P.W.4).

10. Thanikachalam (P.W.1), in the examination in chief on 10.1.11 has stated that the deceased Senthilvel is his brother; he knows the accused; on every Sunday, he would play cricket with his friends in the Secretariat Colony grounds in Adambakkam; one week prior to the incident, i.e., on 7.11.04, while they were playing cricket, the

accused came there and questioned them as to why they are playing there by saying that the ground is in their area; he told them that they are after all playing in one corner of the ground, but the accused chased them from there; on 14.11.04, around 9.30 a.m., he went along with his friends, including his brother, Senthilvel, and was playing cricket in the ground; around 11.30 a.m., the three accused came there and questioned them; at that time, Karunakaran (A-1) pulled the shirt of Senthilvel; when P.W.1 intervened, Karunakaran (A-1) belaboured Senthilvel with a cricket bat and hit him on the back side of the head; Sugumar (A-2), who was having a cricket stump also hit Senthilvel causing injury near his right eye; Shanmugam (A-3) hit P.W.1 with a stump and caused injuries on his head; Senthilvel fell down and lost consciousness; therefore, his friends took both of them to the nearby S.P. Hospital for treatment; at the hospital he was treated for his head injuries, but his brother was referred to the Government Royapettah Hospital for treatment; on coming to know of it, Shanthi (not examined), Kumudha (P.W.5) and his grandmother, Raji (P.W.3) came to the hospital and they took Senthilvel to Government Royapettah Hospital for treatment; he went to the Government Hospital and saw his brother and learnt that he had to undergo a brain surgery; he came to the police station at night and lodged a complaint (Ex.P-1); on the next day, around 1.30 p.m., Senthilvel died and this was informed to the police; he identified the cricket bat (M.O.1) and stump (M.O.2) that was used by A-1 and A-2 in the attack.

11. In the cross examination on 16.3.11, P.W.1 stated that though he was not acquainted with the accused, yet he knows them as they also would come to the same ground for playing cricket; before the incident, he did not know their house address; however, he knows the father's name of Karunakaran (A-1); he does not know as to where A-1's father was employed; while they were playing, the accused party came to the ground; the accused party were not playing in the ground; he did not state in the complaint that the accused party were playing; he has stated in the complaint about the earlier incident that took place on 7.11.04; at the S.P. Hospital, he told the doctor as to how he sustained injuries; the doctor did not refer him to the Government Hospital; Senthilvel was half conscious, but was not in a position to completely speak; when Senthilvel was admitted to the General Hospital, he had lost his consciousness; how Senthilvel suffered injuries was known to his grandmother Raji (P.W.3), Kumudha (P.W.5) and Shanthi (not examined); from S.P. Hospital, he returned home; since he had suffered head injury, he did not accompany his brother Senthilvel to the Government Royapettah Hospital; on the same day, at 3.00 p.m., he went to the Government Hospital; he did not give any complaint

till then.

12. At this juncture, it may be relevant to extract this particular answer of Thanikachalam (P.W.1) in cross examination verbatim :-

சம்பவத்திற்கு பின் நான் அரசு பொது
மருத்துவமனைக்கு செல்லும் வரையில் புகார்
கொடுக்கவில்லைனா வேண்டும் என்று எனக்கு
தோன்றவில்லையா என்றல் எனக்கு தலையில் அடிபட்ட
காரணத்தால் புகார் கொடுக்க செல்ல இயலவில்லை

(Since I suffered head injury, I was not in a position to go to the police station and give complaint).

13. P.W.1 has stated in his complaint about the attack by all the three accused on his brother; P.W.1 has stated about the weapon used by each of the accused in his complaint; ultimately, it was suggested to him that on the date of the incident, two teams were playing cricket and during the match, a small boy, who was batting, tried to hit the ball, but the bat slipped and hit Senthilvel and caused head injury to Senthilvel; P.W.1 denied this suggestion.

14. Vinodh Kumar (P.W.2) has stated in his chief examination on 10.1.11 that he knows P.W.1 and his brother, Senthilvel; he also knows the accused; every Sunday he would play cricket with Senthilvel, P.W.1 and others in the Adambakkam ground; sometime in the year 2004, on a Sunday around 11.00 a.m., while they were playing cricket, all the three accused came there and questioned them and picked up a quarrel; Karunakaran (A-1) hit Senthilvel with a cricket bat; P.W.1 went to the rescue of his brother; Shanmugam (A-3) hit P.W.1 with a stump; Sugumar (A-2) attacked P.W.1 with a bat; this was informed to the family members of Senthilvel; his grandmother Raji (P.W.3) and others came there and took Senthilvel to the hospital for treatment and, thereafter, Senthilvel died.

15. In the cross examination on 16.3.2011, he stated that the incident had taken place around 12.00 noon and 1.00 p.m.; while the deceased group was playing in the ground, the accused group was not playing; P.W.1 was attacked by Sugumar (A-2) on the head and apart from which no one else attacked P.W.1; after the attack, Senthilvel swooned and became unconscious; it did not occur to him to inform the police; he did not accompany Senthilvel to S.P.

Hospital; on the date of incident, around 3.00 to 4.00 p.m., he went along with Thanikachalam (P.W.1) to the police station to give complaint; from the police station he returned home; he has also signed in the complaint; it was ultimately suggested to him that while playing cricket, a bat from the hand of a young boy slipped and hit Senthilvel on the head, which suggestion he denied.

16. Raj @ Rajasekaran (P.W.4) in his examination in chief on 11.1.11 has stated that he knows the deceased and the accused party; on 14.11.04, while he was playing cricket along with deceased and P.W.1, the accused came there and questioned them; Karunakaran (A-1) pulled Senthilvel by his shirt; P.W.1 intervened and at that time, Karunakaran (A-1) hit Senthilvel with a bat; Sugumar (A-2) also attacked Senthilvel with a stump; when P.W.1 went to the rescue, Shanmugam (A-3) attacked P.W.1 with a stump; Senthilvel fainted; Senthilvel was taken to the S.P. Hospital and since his condition was serious, he was referred to the Government Royapettah Hospital for treatment; Thanikachalam (P.W.1) was treated in the hospital as in-patient; 8 stitches were put on his head; Senthilvel's grandmother Raji (P.W.3) also came to the hospital and from there took him to Government Royapettah Hospital; thereafter he came with P.W.1 and gave complaint to the police; on the next day at 1.30 p.m., Senthilvel died.

17. In the cross examination on 7.4.11, P.W.4 stated that he did not tell the police that P.W.1 prevented Karunakaran (A-1) from assaulting Senthilvel; on the date of the incident, between 6.00 and 7.00 p.m., police enquired him; it was suggested to him that while playing cricket, a bat slipped from the hands of a boy and hit Senthilvel on his head and caused the injury, which suggestion he denied.

18. Raji (P.W.3), the grandmother of Senthilvel and Kumudha (P.W.5), the neighbour were not eye witnesses to the occurrence, but they had taken Senthilvel to the hospital. In her evidence P.W.5 stated that while they were taking Senthilvel to the hospital, he told his grandmother (P.W.3) that he was assaulted by Karunakaran (A-1), Shanmugam (A-3) and Sugumar (A-2) with cricket bat.

19. In the cross examination, P.W.5 has reiterated that Senthilvel was conscious while he was being taken to the hospital in an autorickshaw. She has further stated that before going to the hospital, they gave complaint to the police.

20. Mohan (P.W.7), the mahazar witness for the recovery of the cricket bat and stump based on the

disclosure of the accused was declared hostile for reasons best known to the prosecution. On a reading of his examination in chief, it is seen that he has clearly stated that he was called by the police to be a witness for recording the statements of the accused and from the house of the accused the bat and stump were recovered.

21. Similarly, Karthik (P.W.8), the recovery witness has also been declared hostile though in the examination in chief he has spoken about the confession statements and recovery of the cricket bat and stump from the house of the accused.

22. Dr.Fernandes (P.W.10) has stated that on 14.11.04, while he was on duty at the Rajiv Gandhi Government General Hospital, he examined one Senthilvel at 1.45 p.m.; Senthilvel was brought by his neighbour Shanthi; she told him that Senthilvel was attacked by a known person with cricket bat; Senthilvel was not conscious; he was already examined by the Doctors at the Government Royapettah Hospital and was given first aid; since his condition was serious, he was given first aid and was admitted as in-patient; the Accident Register copy was marked as Ex.P-14.

23. In the cross examination, P.W.10 has stated that he was informed that one known person has attacked Senthilvel; he has not recorded in which part of the head the injuries were found; he has recorded only one injury on the head; to the suggestion that while playing cricket if the cricket bat slips and hits another, such an injury could be caused, he has stated in the affirmative.

24. Mr.John Sathyan, learned counsel for the appellants contended that the delay in the registration of the FIR inasmuch as the incident had occurred at 11.30 a.m. on 14.11.04, but the complaint had been given by P.W.1 only at 10.00 p.m. on that day, strikes at the veracity of the complaint. Thanikachalam (P.W.1), in cross examination, has clearly stated that he himself had suffered head injury and, therefore, he was not able to give the complaint to the police promptly. This explanation has been invited by the accused in the cross-examination.

25. Mr.John Sathyan, contended that the prosecution has suppressed the earlier complaints given to the police and, therefore, the prosecution case becomes suspect. To buttress this contention, he brought to the notice of this Court the deposition of Vinodh Kumar (P.W.2), in cross-examination, that he went to the police station between 3.00 and 4.00 p.m. on the date of the incident and gave the complaint along with P.W.1. Mr.John Sathyan also relied upon the statement of Kumudha (P.W.5), who has stated in cross-examination that before going to the hospital, they

gave complaint to the police. Based on these two statements, he contended that the police have suppressed the genesis of the case. Though this submission appears to be attractive at the first blush, on close scrutiny of the facts, this Court is unable to attach much significance to these two stray statements of the witnesses, who were examined in cross on 16.3.11 and 24.3.11 in respect of an incident that took place on 14.11.04. Though Vinodh Kumar (P.W.2) was present, he did not suffer any injuries nor is he related to P.W.1. It was not suggested to Thanikachalam (P.W.1) that he had given a complaint between 3.00 and 4.00 p.m. on 14.11.04 giving a different version of the incident and that complaint had been suppressed. In the absence of any suggestion to Thanikachalam (P.W.1) in these lines, this Court cannot disbelieve the testimony of P.W.1 with regard to the kernel of the occurrence.

26. Time and again it has been held by the Supreme Court that minor discrepancies in the evidence are not to be given undue emphasis and evidence is to be considered from the point of view of trustworthiness. In this regard, useful reference can be had to the judgment of the Apex Court in Yogesh Singh - Vs - Mahabeer Singh (2017 (11) SCC 195), wherein it has been held as under :-

"29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. (See Rammi v. State of M.P. [Rammi v. State of M.P., (1999) 8 SCC 649 :

2000 SCC (Cri) 26], Leela Ram v. State of Haryana [Leela Ramv. State of Haryana, (1999) 9 SCC 525 : 2000 SCC (Cri) 222] , Bihari Nath Goswami v. Shiv Kumar Singh [Bihari Nath Goswami v. Shiv Kumar Singh, (2004) 9 SCC 186 : 2004 SCC (Cri) 1435], Vijay v. State of M.P. [Vijay v. State of M.P., (2010) 8 SCC 191 : (2010) 3 SCC (Cri) 639], Sampath Kumar v. Inspector of Police [Sampath Kumar v. Inspector of Police, (2012) 4 SCC 124 : (2012) 2 SCC (Cri) 42], Shyamal Ghosh v. State of W.B. [Shyamal Ghosh v. State of W.B., (2012) 7 SCC 646 : (2012) 3 SCC (Cri) 685] and Mritunjoy Biswas v. Pranab [Mritunjoy Biswas v. Pranab, (2013) 12 SCC 796 : (2014) 4 SCC (Cri) 564] .)"

(Emphasis supplied)

27. At the risk of repetition, it is to be pointed out that Vinodh Kumar (P.W.2) was very much present at the place of occurrence and had corroborated the version given by P.W.1. It is also not the case of the defence that P.W.2 is related to the deceased party, or is inimical to the accused party. P.W.4 has also corroborated the version of P.W.s 1 and 2. It is to be stressed that witnesses are not robots or recording machines to give parrot-like versions. In fact, the testimony of the witnesses will become suspect if they were to give parrot-like versions of an incident. Therefore, minor contradictions, inconsistencies or embellishments in the evidence of the witnesses not affecting the truthfulness or creditworthiness of their evidence does not materially affect the case of the prosecution.

28. Mr. John Sathyan further contended that no one has been examined from S.P. Hospital for having given treatment to the deceased Senthilvel and P.W.1 nor was any doctor examined from the Government Royapettah Hospital. It is true that the prosecution had failed to examine the doctor from S.P. Hospital, who treated Thanikachalam (P.W.1) and examined Senthilvel (deceased), but can that by itself lead to the inference that the case is a foisted one?

29. In this case, the investigating officer has examined Dr. Sumathi, the medical officer of S.P. Hospital and her name has been included in the memorandum of evidence. Therefore, it is not a case where the investigation was faulty. However, the Public Prosecutor in-charge of the trial has failed to examine Dr. Sumathi during trial. Similarly, the Public Prosecutor has not examined Dr. Srinivasa Raghavan, who gave treatment to the deceased in the Government Royapettah Hospital and also the

doctor, who conducted autopsy on the body of Senthilvel. The post-mortem report has been marked as Ex.P-25 through the investigating officer. This Court, need not dilate much on those lapses for the simple reason that the accused have not denied the death of Senthilvel and it is their specific case that while playing, a cricket bat slipped from the hand of some person and hit Senthilvel on his head. That apart, the accused have been acquitted u/s 302 IPC and have been convicted only u/s 304 (II) IPC because the prosecution has not been able to prove that the injury suffered by the deceased would have caused death in the ordinary course. The State has also not filed any appeal against the acquittal of the accused of the offence u/s 302 IPC. The death of Senthilvel has been established beyond cavil by marking the death report (Ex.P-17) and the inquest report (Ex.P-19).

30. The Court is ordained with the duty of testing the veracity of the prosecution story and the evidence of the witnesses, when it is in variance with the medical evidence. In this regard, reference can be had to the decision of the Supreme Court in Mohan Singh - Vs - State of M.P. (1999 (2) SCC 428), wherein the Apex Court held as under :-

"11. The question is how to test the veracity of the prosecution story especially when it is with some variance with the medical evidence. Mere variance of the prosecution story with the medical evidence, in all cases, should not lead to the conclusion, inevitably to reject the prosecution story. Efforts should be made to find the truth, this is the very object for which courts are created. To search it out, the courts have been removing the chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long as chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limit, to find out the truth. It means on one hand, no innocent man should be punished but on the other hand, to see no person committing an offence should get scot-free. If in spite of such effort, suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused. For this,

one has to comprehend the totality of the facts and the circumstances as spelled out through the evidence, depending on the facts of each case by testing the credibility of eyewitnesses including the medical evidence, of course, after excluding those parts of the evidence which are vague and uncertain. There is no mathematical formula through which the truthfulness of a prosecution or a defence case could be concretised. It would depend on the evidence of each case including the manner of deposition and his demeanors (sic), clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So courts have to proceed further and make genuine efforts within the judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt. Under this sphere, we proceed now to test the submission of the learned counsel for the accused with reference to the blackening found by the doctor under the injuries in the post-mortem report."

31. This Court has no reason to disbelieve the evidence of P.W.1, P.W.3, P.W.4 and P.W.5 that Thanikachalam (P.W.1) and Senthilvel were first taken to the nearby S.P. Hospital for treatment just because Dr.Sumathi was not examined. Similarly, the non-examination of Dr.Srinivasa Raghavan, who gave treatment to Senthilvel (deceased) at the Government Royapettah Hospital cannot lead to the inference that the deceased was not taken there at all. Dr.Fernandes (P.W.10), who treated Senthilvel in the Government Hospital has stated that Senthilvel was brought to the Government Hospital along with the medical records from the Government Royapettah Hospital. Even in the AR copy (Ex.P-14), the Reference No.345 of Government Royapettah Hospital for the treatment given there finds place. Senthilvel was not conscious then. This Court can take judicial notice of the fact that in Chennai City the Rajiv Gandhi Government Hospital has the state of the art facilities than Government Royapettah Hospital. That is why the Doctor had referred the deceased to Rajiv Gandhi Government Hospital for advanced treatment after giving some initial treatment. The head of Senthilvel (deceased) has obviously undergone treatment at the S.P. Hospital, Government Royapettah Hospital and in Rajiv Gandhi Government General Hospital where brain surgery was performed according to P.W.1. Therefore external marks of the injuries sustained by him in the attack could have got obliterated in the treatment.

Therefore, the reference to only an injury in Ex.P-14 is not very significant so as to discard the testimony of P.W.1, one of the injured witness, P.W.2 and P.W.4, the eye witnesses.

32. Mr. John Sathyan contended that had the prosecution examined the doctor, who conducted post-mortem, the defence would have had the opportunity to show that the death had occurred on account of the surgery performed on the head of the deceased. This question would be relevant only if the prosecution had endeavoured to establish that the injury caused by the accused is sufficient in the ordinary course of nature to cause death. When the prosecution themselves had failed to address this aspect, it will be preposterous for the defence to argue that they had lost a golden opportunity to prove the cause of death.

33. Mr. John Sathyan further contended that though Thanikachalam (P.W.1) and Vinodh Kumar (P.W.2) have spoken about Karunakaran (A-1) and Sugumar (A-2) attacking Senthilvel with cricket bat and stump, in which event two injuries should have been found on the person of the deceased, however, the post-mortem certificate as well as the Accident Register (Ex.P-14) reveals only one injury on the back of the head and, therefore, the testimony of P.W.s 1 and 2 becomes susceptible. Though such a contention is advanced, the same does not gain much weight in the light of the discussion in para-30 and 31 above and in the light of the fact that treatment was given for the head injuries in three hospitals.

34. The Apex Court, in the case of Thaman Kumar - Vs - State (UT of Chandigarh) (2003 (6) SCC 380) has laid down the basis on which the variance in oral testimony vis-a-vis medical evidence needs to be appreciated. For better appreciation, the relevant portion is extracted hereunder :-

"16. The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eyewitnesses. The same kind of inference

cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

35. From the evidence of Thanikachalam (P.W.1) and Vinodh Kumar (P.W.2), it is evident that the attack has been perpetrated on the deceased Senthilvel by Karunakaran (A-1) and Sugumar (A-2), which stands fortified by the post-mortem certificate (Ex.P-25), which reveals injury on the parietal region. Further, the occurrence had happened in broad daylight in an open area, which was clearly witnessed by P.W.s 1 and 4. Further, it is not in dispute that surgery has been performed on the head of Senthilvel on account of the head injury. Therefore, the prosecution has established through acceptable evidence that Senthilvel suffered head injury in the manner as spoken to by Thanikachalam (P.W.1), Vinodh Kumar (P.W.2) and Raja @ Rajasekar (P.W.4). In such circumstances, mere non mentioning of another injury on the head of Senthilvel in the Accident Register (Ex.P-14), would in no way discredit the testimony of Thanikachalam (P.W.1), Vinodh Kumar (P.W.2) and Raja @ Rajasekar (P.W.4). Therefore, discrepancy in the ocular testimony vis-a-vis the medical testimony, which is trivial, cannot be claimed to be a material discrepancy in favour of the accused.

36. Mr. John Sathyan also contended that Dr.Fernandes (P.W.10) has admitted in cross-examination that the injury suffered by the deceased could have been caused by a cricket bat slipping out of the hand of the batsman and hitting another person and, therefore the defence have probabalised their version and, hence, the appellants deserve to be acquitted. The evidence of the doctor on this aspect is only an opinion evidence, which is relevant u/s 45 of the Evidence Act. His evidence is not for the fact in issue, but only for a relevant fact. We have the evidence of three witnesses, viz., Thanikachalam (P.W.1), Vinodh Kumar (P.W.2) and Raj @ Rajasekaran (P.W.4), who have all seen the attack and they have no axe to grind

against the accused. Therefore, their evidence deserves acceptance vis-a-vis the opinion of the doctor. In the absence of an acceptable defence, the testimony of P.W.1, P.W.2 and P.W.4 cannot be rejected based on the opinion expressed by Dr.Fernandes (P.W.10). That apart, if the version, as projected by the defence is accepted, then the deceased would have suffered injury only on the front portion of the head and not on the parietal region, as is evidenced from the post-mortem certificate. Moreover, the defence have not even given the name of the batsman from whose hand the bat is said to have slipped and hit Senthilvel while putting the said suggestion to the injured witness and eye witnesses.

37. While appreciating the evidence of witnesses, the Court should bear in mind the following sagely advice of the Supreme Court in the case of State of Haryana - Vs - Bhagirath (1999 (5) SCC 96) :-

"7. Abundant caution is always desirable in all spheres of human activity. But the principle of benefit of doubt belongs exclusively to criminal jurisprudence. The pristine doctrine of benefit of doubt can be invoked when there is reasonable doubt regarding the guilt of the accused. It is the reasonable doubt which a conscientious judicial mind entertains on a conspectus of the entire evidence that the accused might not have committed the offence, which affords the benefit to the accused at the end of the criminal trial. Benefit of doubt is not a legal dosage to be administered at every segment of the evidence, but an advantage to be afforded to the accused at the final end after consideration of the entire evidence, if the Judge conscientiously and reasonably entertains doubt regarding the guilt of the accused."

38. Now coming to the role of Shanmugam (A-3), the allegation against him is that he had attacked Thanikachalam (P.W.1) with a stump. However, he has been acquitted of the said charge. He has been convicted u/s 304 (II) IPC with the aid of Section 34 IPC for the attack on Senthilvel. Even the charge itself reveals that he had not attacked Senthilvel. Of course, it is not necessary that for invoking Section 34 IPC, the accused should have exhibited any overt act of violence. It would suffice if he had shared the common intention with others. In this case, Shanmugam (A-3) had accompanied his brother Karunakaran (A-1) and others to play cricket in the ground. Even in the complaint (Ex.P-1), it is stated that the

accused party were also playing cricket in the same ground. On seeing the deceased party playing cricket, Karunakaran (A-1) and Sugumar (A-2) questioned them and picked up a quarrel. In the overall facts and circumstances of the case, this Court is unable to infer that Shanmugam (A-3) shared the common intention with Karunakaran (A-1) and Sugumar (A-2) to cause the death of Senthilvel.

39. In the result, the criminal appeal is allowed in part. The conviction and sentence imposed on Karunakaran (A-1) and Sugumar (A-2) is confirmed. The fine imposed on Karunakaran (A-1) and Sugumar (A-2) is also confirmed. The conviction and sentence imposed on Shanmugam (A-3) is set aside and he is acquitted. It is reported that the appellants are on bail. The trial court shall take all steps to secure the presence of the Karunakaran (A-1) and Sugumar (A-2) and commit them to prison to serve the balance portion of sentence imposed on them as above. Bail bonds executed by Shanmugam (A-3) shall stand cancelled.

Sd/-
Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

GLN

To

- 1.The Judicial Magistrate ,Alandur.
- 2.The Chief Judicial Magistrate, chengalpattu
3. The Public Prosecutor
High Court, Madras.
- 4.The Adiitonal District and Sessions Judge,Fast Track
Court No.I, Chengalpattu
- 5.The Inspector of Police
S-8, Adambakkam Police Station
Chennai 600088
Chengalpet Dist.
- 6.The Superintendent, Central Prison,
Puzhal , Chennai.
- 7.The Deputy Registrar(Crl Side)
High Court, Madras.

CRL. A. NO. 499 OF 2011

A.SK(01/03/2019)