

Bail Slip

Crl.A.581 of 2011

The Appellant/Petitioner Accused namely Biyaskan, S/o. Ravupkan, was directed to be released on bail as per the order of this Court dated 22.9.2011 made in MP.No.1 of 2011 in Crl.A.No.581 of 2011.

Crl.A.648 of 2011

The Appellant/Petitioner Accused namely Vijayakumar, S/o.Kunjiraman, was directed to be released on bail as per the order of this Court dated 18.10.2011 made in M.P.No. 1 of 2011 in Crl. A.No.648/2011.

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
DATED: 09.01.2019

CORAM:  
THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

Crl.A.Nos.581 and 648 of 2011

Biyaskan

... Appellant/A2  
in Crl.A.No.581 of 2011

Vijayakumar

... Appellant/A1  
in Crl.A.No.648 of 2011

Vs.

State represented by  
The Inspector of Police,  
B-14 Kuniyamuthur Police Station,  
Coimbatore.

.. Respondent  
in Crl.A.No.581 of 2011

State represented by  
The Inspector of Police, Pile,  
Kuniyamuthoor Police Station,  
Coimbatore.

.. Respondent  
in Crl.A.No.648 of 2011

Criminal Appeals filed under Section 374 Cr.P.C. against the judgment dated 26.08.2011 in S.C.No.26 of 2011 on the file of the Additional District and Sessions Court (Fast Track Court No.1), Coimbatore.

For Appellant  
in CrI.A.No.581/2011 : Ms.Nathiya  
for Mr.Pugalenth

For Appellant  
in CrI.A.No.648/2011 : Mr.R.Md.Nasurullah  
for Mr.K.V.Shanmuganathan

For Respondent  
in both appeals : Mrs.P.Kritika Kamal  
Government Advocate  
(CrI. Side)

#### COMMON JUDGMENT

These criminal appeals have been preferred seeking to set aside the conviction made by the judgment dated 26.08.2011 in S.C.No.26 of 2011 on the file of the Additional District and Sessions Court (Fast Track Court No.1), Coimbatore.

2 The brief facts leading to the filing of these criminal appeals are as under:

2.1 It is the case of the prosecution that on 16.05.2006, around 3.00 a.m., Sundharam (PW1), Sub-Inspector of Police and Ayyasami (PW2), Head Constable of Police, both attached to B14, Kuniyamuthur Police Station, were conducting a regular vehicle check along with other police personnel in the Coimbatore-Palakkad Highway; at that time, they saw a Tempo Van proceeding towards Palakkad and signalled Vijayakumar (A1), the Tempo Van driver to stop; Vijayakumar (A1), instead of stopping the vehicle, raised the speed of the vehicle and tried to mow down the police; the policemen ran for cover and escaped death by a whisker. However, the police chased the Tempo Van and intercepted it. Vijayakumar (A1) was on the wheels and Biyaskan (A2) was in the cabin. Apart from Vijayakumar (A1) and Biyaskan (A2), A3 to A5 were in the carriage portion of the Tempo Van. On checking the Tempo Van, it was found to have 100 bags of rice, which the police suspected to be PDS (Public Distribution System) rice. The Tempo Van and the 100 bags of rice were seized under the cover of Mahazar (Ex-P1). The Tempo Van, along with the five accused was brought to the jurisdictional Police Station viz., B13 Pothanur Police Station.

2.2 On a complaint lodged by Sundharam (PW1), the Sub Inspector of Police, a case in Crime No.631 of 2006 was registered on 16.05.2016 under Section 6(iv) of the Tamil Nadu Civil Supplies (RDSCS) Order, 1982 (for brevity "the TNCS (RDSCS) Order"), r/w Section 7(a)(11) of the Essential Commodities Act, 1955 ( for brevity "the EC Act") and Section 307 IPC.

2.3 The investigation of the case was taken over by Vivekanandhan (PW7), the Investigating Officer, who recorded the statement of Biyaskan (A2) in the presence of Balasubramaniam (PW3), Village Administrative Officer. Based on the disclosure made by Biyaskan (A2), 40 bags of rice were seized from his residence under the cover of Mahazar (Ex-P4), attested by Balasubramaniam (PW3), Village Administrative Officer and Vivekanandhan (PW4). All the five persons were arrested and were produced before the jurisdictional Magistrate for remand.

2.4 At the request of the police, Dhandapani (PW5), Quality Inspector of Civil Supplies Department, took samples from the 140 seized bags and the same were examined by Muthupillai (PW6), Deputy Manager, Coimbatore Region, Tamil Nadu Civil Supplies Corporation, who, in his evidence and in the certificates (Exs-P7 and P8), has opined that the seized rice was PDS rice. Vivekanandhan (PW7), the Investigating Officer, completed the investigation and filed final report in P.R.C.No.34 of 2008, before the Judicial Magistrate No.VII, Coimbatore, against Vijayakumar (A1), Biyaskan (A2), Mohammed Ali (A3), Gabair (A4) and Mohammed Sherif (A5) for the offences under Sections 6(iv) of the TNCS (RDCS) Order, r/w Section 7(a) (11) of the EC Act and Section 307 IPC.

2.5 On the appearance of the accused, they were furnished with the copies of the relied upon documents under Section 207 Cr.P.C and the case was committed to the Court of Session in S.C.No.26 of 2011 and was then made over to the Additional District and Sessions Court (Fast Track Court No.1), Coimbatore, for trial.

2.6 The Trial Court framed charges against the accused under Sections 147 and 307 IPC and Section 6(iv) of the TNCS (RDCS) Order, 1982, r/w 7(a) of the EC Order and when questioned, the accused pleaded "not guilty".

2.7 To prove the case, the prosecution examined seven witnesses and marked eight exhibits.

2.8 When the accused were questioned under Section 313 Cr.P.C, about the incriminating circumstances against them, they denied the same. On behalf of the accused, no witness was examined nor was any document marked.

2.9 After hearing either side and considering the evidence on record, the trial Court, by judgment dated 26.08.2011 in S.C.No.26 of 2011, acquitted A3 to A5 of all charges and convicted and sentenced Vijayakumar (A1) and Biyaskan (A2) as follows:

| Accused         | Provision under which convicted | Sentence                                                                                                         |
|-----------------|---------------------------------|------------------------------------------------------------------------------------------------------------------|
| Vijayakumar(A1) | Section 307 IPC                 | One year rigorous imprisonment and fine of Rs.1,000/-, in default to undergo three months rigorous imprisonment. |
| Biyaskan(A2)    | Section 307 r/w 109 IPC         | One year rigorous imprisonment and fine of Rs.1,000/-, in default to undergo three months rigorous imprisonment. |

2.10 Challenging the conviction and sentence, Vijayakumar (A1) has filed Crl.A.No.648 of 2011 and Biyaskan (A2) has filed Crl.A.No.581 of 2011.

3 Heard Mr. R.Md.Nasurulla, learned counsel on behalf of Mr.K.V.Shanmuganathan, learned counsel on record for Vijayakumar (A1) in Crl.A.No.648 of 2011 and Ms.Nathiya, learned counsel on behalf of Mr. P.Pugalenth, learned counsel on record for Biyaskan (A2) in Crl.A.No.581 of 2011 and Mrs.P.Kritika Kamal, learned Government Advocate (Crl. Side) appearing for the State/respondent.

4 Sundharam (PW1), Sub-Inspector of Police, in his evidence, has stated that on 16.05.2006, around 3.00 a.m., he, along with the police party comprising Head Constables 1554 and 1728, was conducting vehicle check in Coimbatore-Palakkad Highway in P.K.Pudhur Bus Stop; they saw a 407 Tempo Van coming from North to South; they signalled the Tempo Van driver to stop; instead of stopping the Tempo Van, the driver raised the speed and tried to run over the police; Sundharam (PW1), along with the policemen, ran for cover and thereafter, chased the vehicle and intercepted it at Kovai-Pudhur Junction; Vijayakumar (A1) was on the wheels and Biyaskan (A2) was beside him in the cabin; when Sundharam (PW1) questioned Vijayakumar (A1) rebukingly, as to why, he had tried to run them over, Vijayakumar (A1) told him that it was Biyaskan (A2), who had asked him to do so; on checking the vehicle, A3 to A5 were there and 100 bags of rice were found in the Tempo Van; when Sundharam (PW1) questioned the accused, they told him that they had procured the rice from a ration shop at a low price and were taking them to Walayar for sale at a profit. This piece of evidence, in the opinion of this Court, amounts to a confession to a police officer under Section 25 of the Evidence Act and is therefore inadmissible. Sundharam (PW1) further stated that he seized the vehicle and the 100 bags of rice under the Mahazar (Ex-P1) in the presence of Head Constables 401 and 1554;

Sundharam (PW1) took the accused along with the seized articles to B13 Pothanur Police Station and registered a case in Crime No.631 of 2006.

5 In the cross-examination of Sundharam (PW1), he has stated that there were no independent witnesses available at the time when the chase, interception and seizure took place, since, the incident occurred in the wee hours of the morning in the Coimbatore-Palakkad Highway. He has further stated that he did not have any special authorisation from the Inspector to conduct vehicle checks and that he was conducting the check as a regular part of his duty along with other Police Constables. He denied the suggestion that a false case has been slapped on the accused.

6 Iyyachami (PW2), Head Constable in his evidence, has stated that he was part of the police party along with Sundharam (PW1); on 16.05.2006, while conducting vehicle check in Coimbatore-Palakkad Highway around 3.00 a.m., he saw a van coming from Coimbatore side and when the police signalled the driver to stop the vehicle, the driver tried to run them over; the Police ran for cover and thereafter, chased the vehicle and intercepted it near Kovai-Pudhur Junction; when Sundharam (PW1), questioned Vijayakumar (A1), the driver, as to why he drove the vehicle in such a manner, Vijayakumar (A1) said that, it was Biyaskan (A2), who had asked him to do so. He has further stated that on checking the vehicle, they found 100 bags of rice and the same was seized under the cover of a Mahazar (Ex-P1) and that the accused, along with the seized articles, were brought to Pothanur Police Station and a case in Crime No.631 of 2006 was registered.

7 In the cross examination, Iyyachami (PW2) has stated that, on the instructions of the superior officers, he went for the vehicle check. He has stated that, he does not know the correct measurement of the rice in each bag. He denied the suggestion that the incident had not taken place at all and that a false case has been registered for the purpose of statistics.

8 As regards the evidence of Balasubramaniam (PW3) and Vijayakumar (PW4), they have spoken to about the confession statement given by Biyaskan (A2) and the recovery of 40 bags of rice from his residence.

9 Dhandapani (PW5) and Muthupillai (PW6), the officials of the Tamil Nadu State Civil Supplies Corporation have given evidence about the drawal of samples from 140 bags of rice and testing of the same and issuance of the certificates (Exs-P7 and P8), to the effect that the rice is PDS rice.

10            Though the prosecution have satisfactorily proved the seizure of such a huge quantity of PDS rice, strangely, the trial Court has dropped the charges under Section 6(iv) of the TNCS(RDCS) Order, 1982 r/w 7(a) of the EC Act, on the ground, that the District Collector has confiscated the rice and the vehicle in adjudication proceedings and had imposed a fine of Rs.40,000/- on the owner of the Tempo Van. This decision of the trial Judge, is indubitably, erroneous and illegal, because, the order of confiscation passed by the District Collector is an order in rem. [See Collector of Customs, Madras and others vs. D.Bhoormall (1974) 2 SCC 544]. The Supreme Court, in Shambhu Dayal Agarwala Vs. State of West Bengal [(1990) 3 SCC 549], has held that an order of confiscation under the EC Act, does not prevent the infliction of punishment under other provisions (Section 7 to 10) of the Act. Confiscation proceedings are not in lieu of punishment, but, are in addition to the penal consequences set out in Section 7 of the EC Act. Without understanding this fundamental legal distinction, the trial Court has dropped the charge under section 6(iv) of the TNCS (RDCS) Order r/w 7(a) of the EC Act, by giving specious reasons, against which, the State has also not chosen to file any appeal.

11            The learned counsel for the appellants contended that there is no legal evidence to show that Vijayakumar (A1) and Biyaskan (A2) attempted to commit the murder of the police inasmuch as no one had suffered any injury. It is not necessary that someone should have suffered injury for sustaining a charge under Section 307 IPC. For instance, if 'A' opens fire at 'B' and 'B' ducks, thereby avoiding the bullet, no injury would have befallen 'B'. Can 'A' on the other hand, be acquitted for attempt to murder? The answer is an emphatic "no". In this case, the evidence of Sundharam (PW1) and Iyyachami (PW2) is that when they signalled Vijayakumar (A1), driver of the Tempo Van to stop, he did not stop, and instead, he increased the speed and tried to run over the police party. These testimonies cannot be rejected as fanciful.

12            It must be borne in mind that the police party were on vehicle check duty around 3.00 a.m. in Coimbatore-Palakkad Highway and smuggling of rice from Tamil Nadu to Kerala was a regular feature, because, Tamil Nadu is a rice bowl and Kerala is a rice consuming state, where the demand for rice is high. It would be peurile to contend that the police would have anticipated that such an event would happen to them for them to have independent witnesses in wait. After the incident, the Police chased the Tempo Van and intercepted it at Kovai-Pudhur Junction. Sundharam (PW1) and Iyyachami (PW2) saw Vijayakumar (A1) on the wheels and Biyaskan (A2) beside him. Apart from Vijayakumar (A1) and Biyaskan (A2), three other persons were in the van and 100 bags of rice were recovered from the van. Therefore, Vijayakumar (A1) and Biyaskan (A2) were not innocent

caravan travellers, but were consciously smuggling 100 bags of PDS rice in their van.

13 The learned counsel for the appellants contended that the statement made by Vijayakumar (A1) to the police, that it was Biyaskan (A2) who had asked him to mow down the police, is hit by Section 25 of the Evidence Act. This Court is unable to countenance this argument because the said statement is not confessional in nature. What is hit by Section 25 of the Act, is proof of an admission of the commission of an offence to a police officer. Here, Vijayakumar (A1) has not admitted the commission of any offence when Sundharam (PW1) questioned him. He has merely stated that it was Biyaskan (A2), who asked him to speed up the vehicle and run over the police. This statement of Vijayakumar (A1) to Sundharam (PW1) was prior to the commencement of investigation, because, only after questioning Vijayakumar (A1) and getting his reply, Sundharam (PW1) and the police party inspected the vehicle and noticed the smuggled rice bags. Only then, it must have struck them that the motive of the accused in attempting to run over the police party was to avoid getting caught with the rice bags. This motive must have sown the seed of intention followed by the overt act of speeding the van recklessly. Only from that point of time, investigation can be said to have begun.

14 As stated above, from the evidence of Sundharam (PW1) and Iyyachami (PW2), it is clear that, Vijayakumar (A1) was on the wheels and his conduct in not stopping the vehicle when signalled by the police, increasing the speed of the vehicle and trying to mow down the police, has been established beyond doubt. From the evidence of Sundharam (PW1) and Iyyachami (PW2), it has also been established that Biyaskan (A2) was beside Vijayakumar (A1) in the cabin.

15 In the opinion of this Court, the statement of Vijayakumar (A1) to Sundaram (PW1) that it was Biyaskan (A2) who exhorted him to mow down the Police will be relevant under Sections 6 and 8 of the Indian Evidence Act. Section 6 of the Indian Evidence Act reads as under:

"Relevancy of facts forming part of same transaction.- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places."

A reading of Section 6 shows that the connecting link between a fact that is in issue and a fact which is not in issue is whether the fact that is not in issue formed part of the same transaction for it to be relevant. Section 6 embodies the principle of res gestae which makes a hearsay statement relevant

if the statement forms a part of the same transaction.

15.1 In this case, there are two facts in issue:

- a) whether Vijayakumar (A1) attempted to run over the police; and
- b) whether Biyaskan (A2) instigated Vijayakumar (A1);

The fact that Biyaskan (A2) told Vijayakumar (A1) to mow down the police was revealed by Vijayakumar (A1) to the police immediately on interception, so as to form a part of the same transaction. There was no significant time difference between Biyaskan (A2) instigating Vijayakumar (A1) and Vijayakumar (A1) revealing that fact to the police. The principle of res gestae which even permits reception of hearsay evidence rests on the premise that, when something is spontaneously stated, the possibility of it being false will be remote.

16 In this case, after the Tempo Van tried to run over the police, it was chased and intercepted and when questioned by the police, Vijayakumar (A1) spontaneously stated that it was Biyaskan (A2), who had instigated him to run over the Policemen. Therefore, the said statement of Vijayakumar (A1) to the police is relevant under Section 6 of the Evidence Act.

17 Section 8 of the Indian Evidence Act, reads as under:

"Motive, preparation and previous or subsequent conduct: Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceedings, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influence by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.- This word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but his explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.- When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant."

(emphasis supplied)

18 Normally, a statement simpliciter is not relevant under Section 8 of the evidence Act. However, Explanations (1) and (2) carve out certain exceptions. Explanation (2) provides a direct answer to the issue under discussion. In this case, the conduct of Vijayakumar (A1) in attempting to mow down the police is relevant, under Explanation (2). If not for the instigation of Biyaskan (A2), Vijayakumar (A1), by himself, may have stopped the Tempo Van when signalled by the police. Therefore, the statement of Biyaskan (A2) exhorting Vijayakumar (A1) to run over the police has affected the conduct of Vijayakumar (A1) and has caused him to increase the speed of the vehicle to mow down the Police party. This statement of Biyaskan (A2), as spoken to by Vijayakumar (A1), falls within Explanation (2) to Section 8 and is therefore, relevant.

19 Having noticed that the aforesaid statement of Vijayakumar (A1) is relevant and admissible under Sections 6 and 8 of the Evidence Act, the next question is whether the said statement would be hit by any of the exclusionary rules barring its admissibility and proof. As pointed out supra, the statement of Vijayakumar (A1) to the police is not a confession and is, therefore, outside the purview of the bar against proof contained in Section 25 of the Indian Evidence Act. As the statement was made prior to the commencement of investigation by the police, it is not hit by the bar against admissibility under Section 162 Cr.P.C. either. This brings us to the concept of "proof" which is the cumulative effect of the evidence led and is defined under Section 3 of the Evidence Act.

20 The prosecution have satisfactorily established that at the time of the incident, the tempo van was illegally smuggling 100 bags of PDS rice from Tamil Nadu to Kerala; the search conducted at the house of Biyaskan (A2) led to the discovery of another 40 bags of PDS rice. These circumstances, viewed cumulatively, lead to the conclusion that Biyaskan (A2) had a strong motive to somehow prevent the smuggled rice from falling into the hands of the police, and in furtherance of that motive, he had instigated Vijayakumar (A1) to speed the tempo van to mow down the police party who had attempted to intercept the vehicle. Ex-consequenti, this Court is of the opinion that the prosecution have brought home the charges against Vijayakumar (A1) and Biyaskan (A2) beyond reasonable doubt.

21 In view of the aforesaid discussion, this Court does not find any infirmity in the conviction and sentence imposed upon the appellants by the trial Court, warranting interference.

In the result, these appeals are dismissed as being devoid of merits. The trial Court is directed to secure the

appellants and commit them to prison for undergoing the remaining period of sentence.

Sd/-  
Assistant Registrar (CS VIII)

//True Copy//

Sub Assistant Registrar

dua/nsd

To

- 1.The Inspector of Police,  
B-14 Kuniyamuthur Police Station,  
Coimbatore.
- 2.The Inspector of Police,Pile,  
Kuniyamuthoor Police Station,  
Coimbatore.
- 3.The Additional District and Sessions Court,  
(Fast Track Court No.1),  
Coimbatore.
- 4.The Public Prosecutor,  
High Court, Madras.
- 5.The Judicial Magistrate No.VII,  
Coimbatore.
- 6.The Chief Judicial Magistrate,  
Coimbatore.

Crl.A.Nos.581 and 648 of 2011

KAN (CO)

RRS (16/04/2019)

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