

Bail Slip

The Petitioner namely Senthil @ Senthil Kumar, S/o.Perumal aged 36 years, and B.Manikandan, S/o.Balasubramanian aged 35 years is directed to be released on bail as per order of this Court in Crl.M.P.NO.1 of 2011 in Crl.A.No.843/11 dated 09.01.2012 and Crl.MP.No.1 of 2011 in Crl.A.784 of 2011 dated 20.12.2011 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.07.2019

Pronounced on : 30.08.2019

CORAM:

THE HONOURABLE Mr.JUSTICE M.M.SUNDRESH
and
THE HONOURABLE Mr.JUSTICE M.NIRMAL KUMAR

Crl.A.Nos.784 & 843 of 2011
and
Crl.R.C.No.1039 of 2012

1.B.Manikandan ... Appellant/A4 in Crl.A.No.784 of 2011

2.Senthil @ Senthil Kumar ... Appellant/A1 in Crl.A.No.843 of 2011

3.Amudhavalli ... Petitioner/Defacto Complainant (PW1)
in Crl.R.C.No.1039 of 2012

-Vs-

1.STATE rep. by,
INSPECTOR OF POLICE,
Sankari Police Station,
Salem District.

... Respondent in Crl.A.No.784 of 2011

2. Inspector of Police,
Sankagiri Police Station,
Salem
(Crime No.1329 of 2001)

... Respondent in Crl.A.No.843 of 2011

3. State rep by,
Inspector of Police,
Sankari Police Station,
Crime No.1329 of 2001.

4. Senthil @ Senthilkumar

5. Sekar @ Kullasekar @ Gunasekaran

6. Subramani

7. Manikandan ... Respondents/Accused
in Crl.R.C.No.1039 of 2012

PRAYER in Crl.A.No.784 of 2011 : Criminal Appeal filed under Section 374 of Code of Criminal Procedure, against the Judgment dated 17.11.2011 in S.C.No.225 of 2005 on the file of the Additional Sessions Judge and Special Judge for EC Act cases, Salem, convicting the appellant/accused for 2 years rigorous imprisonment and also to pay a fine of Rs.2,000/- in default to undergo R.I for 6 months for offence under Section 147 of IPC to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs.5,000/- in default to undergo R.I for 2 years for the offence u/s.364 IPC and to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs.10,000/- in default to undergo R.I for 3 years for the offence u/s.304 part II IPC.

PRAYER in Crl.A.No.843 of 2011 : Criminal Appeal filed under Section 374 of Code of Criminal Procedure, to set aside the Judgment in S.C.No.225 of 2005 on 17.11.2011 passed by the learned Additional Session Judge and Special Judge for EC Act Cases, Salem.

PRAYER in Crl.R.C.No.1039 of 2012 : Criminal Appeal filed under Section 397 r/w 401 of Code of Criminal Procedure, to set-aside the Judgment of S.C.No.225 of 2005 dated 17.11.2011 on the file of Additional Sessions Judge and Special Judge for EC Act Cases, Salem and enhance the sentence imposed on the respondents 2 to 5 and allow the above revision.

For Appellants : Mr.A.S.Balaji in Crl.A.No.784 of 2011

Mr.R.C.Paul Kanagaraj in Crl.A.No.No.843 of 2011

M/s.N.Premalatha for Mr.R.Nalliyappan
in Crl.R.C.No.1039 of 2013

For Respondents: Mr.R.Prathap Kumar
Additional Public Prosecutor in all cases.

COMMON JUDGMENT

[Judgment of the Court was made by M.NIRMAL KUMAR, J.]

Crl.A.No.784 of 2011 is filed by the 4th accused, Crl.A.No.843 of 2011 is filed by the 1st accused and Crl.R.C.No.1039 of 2012 is filed by the defacto complainant/PW1. All the above cases arise out of the impugned Judgment dated 17.11.2011 in S.C.No.225 of 2005 passed by the learned Additional Sessions Judge and Special Judge for EC Act Cases, Salem, hence disposed of by way of a common Judgment.

2. There are totally four accused in S.C.No.225 of 2005, in which the appellants are A1 and A4. The appellants were charged for the offence under Sections 147, 364 and 302 r/w 149 of IPC. On conclusion of trial, the trial Court convicted them under Sections 147, 364 and 304 (ii) of IPC and sentenced them to undergo R.I for 2 years and also to pay a fine of Rs.2,000/- in default to undergo R.I. For 6 months each for the offence under Section 147 of IPC and sentenced to undergo R.I for 10 years and also to pay a fine of Rs.5,000/- in default to undergo R.I for 2 years each for the offence under Section 364 of IPC and to undergo R.I for 10 years and also to pay a fine of Rs.10,000/- in default to undergo R.I for 3 years each for the offence under Section 304 (ii) of IPC. All the above sentences were ordered to run concurrently.

3. Crl.R.C.No.1039 of 2012 has been filed by the defacto complainant/PW1 against altering the Section 302 of IPC to Section 304 (ii) of IPC and prayed to convict the appellants under Section 302 of IPC.

4. Brief facts:

4.1. On 23.09.2001 at about 04.30 p.m the deceased was in his house. At that time, the accused who are his friends came and called him to drink liquor. The deceased was not interested to go along with them. The accused forcibly took him and kidnapped

the deceased in Ambassador Car/MO3 to remote area. PW1 has also attempted to stop the accused from kidnapping the deceased. In the remote place, the deceased was hit by the accused in his abdomen and other parts of his body by using hands and legs. At about 06.30 p.m the accused left back the deceased in his house and he was in drowsy state and was laid in the cot. When PW1 questioned the accused about the reason for her husband's drowsiness, the accused informed that it was due to consumption of liquor. Thereafter on the night hours, the deceased suffered from severe abdomen pain. Since he was unable to bear the pain, the deceased was taken to Government Hospital, Sankagiri on 24.09.2001 at about 06.30 a.m, wherein the Doctors gave treatment and informed to PW16. He reached the place at about 07.30 a.m since the deceased was not in a position to talk, he received the complaint [Ex.P1] from PW1. On receipt of the complaint from PW1, PW16 registered a case in Crime No.1329 of 2001 at about 09.30 a.m and thereafter on receipt of the death intimation [Ex.P5] from PW10 altered the case for the offence under Section 302 of IPC. PW17 after receiving the F.I.R, reached the scene of occurrence at about 11.30 a.m, prepared Observation Mahazar [Ex.P3], Rough Sketch [Ex.P13], enquired the witnesses, conducted inquest on the body of the deceased, sent the body for postmortem. On 25.09.2001 the 3rd accused surrendered before PW13 and he confessed [Ex.P7] about the crime and about the involvement of the other accused involvement. Based on the confession [Ex.P7] recovered the material objects. In the meanwhile the other accused surrendered before the learned Judicial Magistrate No.II, Erode and the learned Judicial Magistrate, Rasipuram. Thereafter on receipt of the Postmortem [Ex.P6] report and other reports, PW17 filed the charge sheet before the Judicial Magistrate No.I, Sankari and assigned P.R.C.No.14 of 2002. The case, on committal was tried against the accused in S.C.No.225 of 2005 on the file of the learned Additional Sessions Judge and Special Judge for EC Act Cases, Salem.

5.Before trial Court, prosecution examined 17 witnesses and marked 18 exhibits and 3 materials objects. None were examined and nor any exhibits were marked on the side of the defence.

5.1.PW1 the wife of the deceased stated about the accused were the friends of the deceased. On 23.09.2001 at about 04.30 p.m the accused had forcibly taken the deceased to drink liquor where he was assaulted by all the accused. At about 06.30 p.m the accused left back the deceased in his house. When PW1 questioned the accused about the deceased being in drowsiness, the accused informed that due to consumption of liquor he is in such a state. During night hours, the deceased suffered severe abdomen pain and he was admitted to Government Hospital, Sankagiri, wherein the deceased informed PW1 that the accused have taken him to an isolated place and assaulted him. PW16 on

getting information, reached the hospital, received the complaint [Ex.P1] from PW1 at about 07.30 a.m. At about 09.30 a.m the deceased has died due to injuries sustained. Thus it was the accused who had caused the murder of the deceased.

5.2.PW2 the sister of the deceased stated that the accused and the deceased were friends and there was some dispute between them with regard to cooking and eating of beef and on vacating the shop of the accused. Though the deceased has forgotten about the incident, the accused planned to murder the deceased due to previous enmity. The assault of the accused on the deceased was informed by one Milk man to PW2 and she had seen the deceased being brought by the accused and laying him in the cot.

5.3.PW3 the Aunt of the deceased, who is the witness for Observation Mahazar [Ex.P2] has seen the deceased suffering from abdomen pain on the fateful day. PW4 the Sister-in-law of the deceased saw the accused kidnapping the deceased in Ambassador Car forcibly.

5.4.PW5 the younger brother of the deceased has seen the accused and deceased together near a public well near Athappagounder farm and also seen the accused assaulting his brother/deceased. On enquiry he was informed by the accused that they are simply playing with him. Later he came to know about the death of the deceased.

5.5.PW6 and PW7 have not supported the case of the prosecution and turned hostile. PW8 is the witness for Observation Mahazar [Ex.P3]. PW9 the Casualty Doctor examined the deceased, issued Ex.P4 Accident Register. PW10 the Doctor issued death intimation [Ex.P5] to police. PW11 the Postmortem Doctor conducted Autopsy on the body of the deceased and issued Postmortem report under Ex.P6.

5.6.PW12 the Head Constable handed over the body of the deceased to his relatives after conducting the Postmortem. PW13 the Village Administrative Officer before whom the 3rd accused surrendered and gave extra judicial confession [Ex.P7]. PW13 has not supported the case of the prosecution and treated as hostile.

5.7.PW14 the another Village Administrative Officer in whose presence some of the accused had given confessions [Ex.P9], based on which MO3-Ambassador Car has been seized under Ex.P10. PW15 is the Photographer, who took the photographs on the body of the deceased.

5.8.PW16 the Special Sub Inspector of Police on receipt of information from Government Hospital, Sankagiri went to the

hospital, received the complaint [Ex.P1], registered the case in Crime No.1329 of 2001 [Ex.P11]. On receipt of the death intimation [Ex.P5] from PW10 altered the Section 302 of IPC through Ex.P12.

5.9.PW17 the Investigating Officer took up the investigation, reached the scene of occurrence at about 11.30 a.m, prepared Observation Mahazar [Exs.P3], Rough Sketch [Ex.P13], conducted inquest through Ex.P14 between 12.30 p.m and 03.00 p.m. On 25.11.2001 PW13 produced the 3rd accused before PW17 and confession statement [Ex.P16] was recorded. Pursuant to which PW17 again visited the scene of occurrence, prepared Observation Mahazar [Ex.P8] and Rough Sketch [Ex.P15] and continued his investigation. On 26.09.2001 the 1st and 4th accused surrendered before the learned Judicial Magistrate No.II, Erode and on 04.10.2001 the 2nd accused surrendered before the learned Judicial Magistrate, Rasipuram. Thereafter the accused were taken into police custody for one day, confessions were recorded, material objects were recovered, Postmortem report and other reports were obtained and on completion of investigation filed the charge sheet.

6.Though the charge sheet was filed against five persons in which the 1st accused Sekar was died and the rank of the accused was re-arranged and the case proceeded against the other accused 1 to 4. On questioning under Section 313 Cr.P.C the appellants denied the charges. On appreciation of evidence, oral and documentary, the trial Court under Judgment dated 17.11.2011, convicted the appellants. Hence, the present appeal has been filed by the 1st and 4th accused and the 2nd and 3rd accused have not preferred appeal, they have undergone their sentences.

7.The learned counsel for the appellants would submit that it is admitted that the accused did not use any weapon in this case and nobody has seen the accused assaulting the deceased. From the evidences let-in by the prosecution, it could be seen that the accused and the deceased are friends and according to PW1, at about 04.30 p.m, the accused took the deceased in MO3-Ambassador Car and at about 06.30 p.m, the accused came and left him back to his house and hence there is no question of kidnapping. PW5 is the only evidence, who has seen the deceased being assaulted by the accused and he categorically stated that he saw the accused and the deceased were talking and are in a playful mood. When PW5 questioned the same, the accused informed that they were playing. On satisfying himself, he left the scene. If there is any assault or attack of the accused, PW5 who is the none other than the brother of the deceased would have intervened or informed the same to others. There is no witness to show that the accused had attacked the deceased and due to which the deceased had died.

8. In this case the 3rd accused appeared before PW13 and confessed about the murder of the deceased. PW13 produced him before PW17 and in the presence of PW13, PW17 recorded the confession of the 3rd accused [Ex.P7]. But PW13 has not supported the case of the prosecution and no credence has to be given to Ex.P7.

9. PW2 and PW4 are the sister and sister-in-law of the deceased have stated that the accused and deceased were talking friendly, hence there was no commotion or forcible kidnapping of the deceased. PW5 the younger brother of the deceased has categorically stated that he saw the accused and deceased together in a playful mood and he has also questioned about the same and he did not find any fight between them. The evidence of PW2, PW4 and PW5 would show that there was no kidnap or assault by the accused. In the presence of PW13, the 3rd accused gave a confession [Ex.P7] and PW13 has not stated so. PW9 issued Accident Register [Ex.P4] in which no external injuries were found. PW11 issued Postmortem report [Ex.P5] and opined that the injuries were found in the mesentric vessels. Thus from the available evidence, it is to be seen that there is no kidnapping of the deceased and there was no evidence to show that the deceased was assaulted by the accused. Hence, the prosecution has failed to prove the case and prayed for acquittal of the appellants.

10. Per Contra, the learned Additional Public Prosecutor appearing on behalf of the respondent would submit that PW1 has categorically stated that the accused have forcibly taken the deceased in MO3/Ambassador Car to a remote place which have been corroborated by PW2 and PW4. Further PW5 has seen the accused and the deceased together in an isolated place, wherein the accused were assaulting him. The evidence of Doctors PW9 & PW11 and the Accident Register [Ex.P4] and Postmortem [Ex.P6] would prove that the accused had kicked and punched on the abdomen of the deceased, due to which the deceased had sustained injuries in the mesentric vessels. Further from the Postmortem report [Ex.P6] it is seen that two litres of blood was seen in the abdominal cavity and due to which the deceased had died. Further the other witnesses have also supported the case of the prosecution. Hence, the lower Court on proper analysis of the evidence adduced by the prosecution has rightly convicted the appellants.

11. The learned counsel appearing for the petitioner/defacto complainant/PW1 in CrI.R.C.No.1039 of 2012 would submit that the evidence of PW1, PW2 and PW4 are cogent with regard to kidnap of the deceased by the accused. Thereafter PW5 has seen

the deceased was assaulted by the accused and they had come and left the deceased and laid him in a cot in his house. At the night hours on 23.11.2001, the deceased had developed acute unbearable abdomen pain and was admitted to Government Hospital, Sankagiri, wherein the deceased informed PW1 that the accused have taken him to an isolated place and assaulted him. PW16 on getting information, reached the hospital, received the complaint [Ex.P1] from PW1 at about 07.30 a.m. At about 09.30 a.m the deceased died due to abdomen injury sustained, which is in conformity with the evidence of PW9, PW11, the Accident Register [Ex.P4] and the Postmortem report [Ex.P6]. Thus it is the accused who had caused the death of the deceased. The other witnesses have also supported the case of the prosecution.

12.The lower Court having found the accused kidnapping the deceased and inflicting injuries and the death of the deceased has occurred due to the injuries inflicted by the accused, ought to have convicted the accused under Section 302 of IPC and not under Section 304 (ii) of IPC, wherein the knowledge of the accused in inflicting such injury in normal course would cause the death have been proved.

13.The learned counsel for the petitioner in CrI.R.C.No.1039 of 2012 has relied upon the following cases to substantiate her arguments:-

1.State rep. By Inspector of Police, Kalakadu Police Station, Tirunelveli District Versus Arumuga Konar reported in 2013(2)MLJ (Criminal) 910 : 2013 (8) R.C.R.(Criminal)1829.

2.State of Andhra Pradesh Versus Rayavarapu Punneya and another reported in (1976) 4 SCC.

3.State of Gujarat Versus Gamecha Vaghri Kalu Amtha reported in 1999 (1) GCD 324 : 1999 (2) Crimes 410.

14.This Court considered the rival submissions made by the learned Counsel on either side and perused the materials on record.

15.PW1 has stated that the accused forcibly took the deceased to remote place and after 2 ½ hours they came and left him in his residence. PW5 saw the accused hitting the deceased and he misconstrued that they were in a playful mood. The fact that the accused taking the deceased to a remote place and after 2 ½ hours dropping him back to his residence has been proved. In such circumstances the case of kidnapping would not arise and hence there is no question of kidnapping or rioting without any resistance.

16. PW2 and PW4 have stated that the accused and the deceased were coming back together. As could be seen from the medical evidence of PW9, PW11, the accident register [Ex.P4] and the Postmortem report [Ex.P6], the accused had died due to the injury in the mesentric vessels. It is an admitted fact that none of the accused were armed with any weapon and there was no apparent external injury. Further it is seen that the 4th accused is only a driver of the MO1/Ambassador car and he did not play any role of taking the deceased and inflicting any injury. As per the evidence of PW9 and PW11 it is seen that there have been no external injury and they did not ascertain about the corresponding internal injury. The internal injury is that "a tear about two inches seen in the base of the transverse mesocolon involving the mesentric vessels" has been mentioned.

17. Taking cue from the decision of the Hon'ble Supreme Court of India laid down in the case of "Virsa Singh Versus State of Punjab reported in AIR 1958 SC 465" which has been followed as a guideline that whether the intention was to inflict the injury found to have been inflicted, that would be sufficient to cause death in the ordinary course of nature and the accused had no intention to cause that particular injury is sufficient to cause death in the ordinary course of nature. Admittedly there was no weapon used in this case. It transpires from the evidence of witnesses that nobody saw the accused punching and kicking the deceased. When the substratum of the evidence of the prosecution witnesses examined is scrutinized, it shows that the evidence on the part of accused was only to give a good thrashing to the deceased, and he did not have any intention of causing an injury which would result in the ordinary course of nature in the death of the deceased. Therefore, the presumption remains unshaken that the first accused, when he inflicted the injuries on the person of the deceased, did not have the knowledge that the injuries were sufficient in the ordinary course of nature to cause death or that the said injuries in all probability would cause the death of the deceased. Such being the position for the other accused too. Therefore, the appellants cannot be made liable for the offence of murder.

18. No doubt that the injury on the deceased has been caused by punching and kicking. PW11 did not give any opinion regarding the nature of this injury and he gave only the features of the injury and it reveals the reason for the death "the deceased would appear to have died of Hemorrhage shock due to injury to the mesentric vessels of the transverse mesocolon". From the internal description given above we can very well come to the conclusion that this injury is of grievous hurt in nature which falls under clause 8 of Section 320 IPC that any hurt endangers human life. In such circumstances the overtact of the 1st accused in causing this injury on the abdomen

of the deceased cannot be stated to be one, in furtherance of a common intention of murdering the deceased by intentionally causing the death and if at all it may be stated that they had voluntarily caused grievous hurt and the penal sections of such would be attracted.

19. In view of the above discussions, the conviction and sentence as regards the 4th accused for the offence under Sections 147, 364 and 304 (ii) of IPC are set-aside. As regards the 1st accused, the conviction and sentence under Section 147 and 364 are set-aside. Instead of Section 304 (ii) of IPC, the 1st accused is liable to be punished under Section 325 of IPC. Coming to the question of sentence under Section 325 of IPC of the 1st accused, he has already in incarceration for a period six months both during the trial and pendency of the appeal and hence the sentence of imprisonment has already undergone.

20. In the result the 1st accused alone is found guilty under Section 325 of IPC and the sentence of imprisonment has already undergone. Subject to the above modification, Crl.A.No.784 of 2011 is Allowed, Crl.A.No.843 of 2011 is Partly-Allowed and Crl.R.C.No.1039 of 2012 stands dismissed.

21. The learned counsel for the petitioner in Crl.R.C.No.1039 of 2012 has vehemently opposed the modification of the sentence of the accused under Section 302 of IPC to 304 (ii) of IPC by the lower Court and she has made a strenuous effort in taking through the evidence and also citing the Judgments and we appreciate the effort taken by her.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional Sessions Judge and
Special Judge for EC Act cases,
Salem.

2.The Inspector of Police,
Sankagiri Police Station,
Salem.

3.The Public Prosecutor,
High Court, Madras.

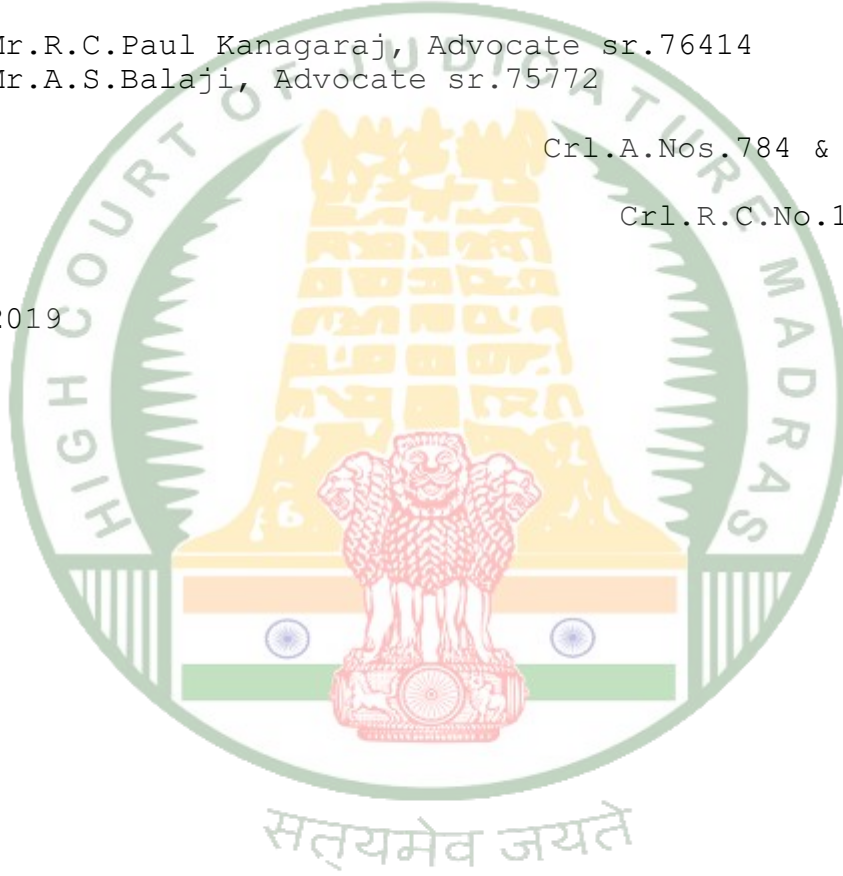
4. The Section Officer,
Criminal Section,
High Court, Madras

+1cc to Mr.R.C.Paul Kanagaraj, Advocate sr.76414

+1cc to Mr.A.S.Balaji, Advocate sr.75772

Crl.A.Nos.784 & 843 of 2011
and
Crl.R.C.No.1039 of 2012

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