



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 21.06.2019

PRONOUNCED ON : 27.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

and

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A.(MD)Nos.181 & 199 of 2017

Crl.A. (MD)No.181/2017:

State Rep. by
The Public Prosecutor,
High Court, Madras 104,
For Inspector of Police,
Srivaikundam Police Station.
Crime No.38/2011

... Appellant /Complainant

Vs.

1.Somu @ Somasundaram

2.Ponnudurai

3.Sekar @ Sankarapandian

4.Sakthivel

... Respondents/Accused Nos.1 to 4

For Appellant

: Mr.S.Chandrasekar
Additional Public Prosecutor

For Respondents

: Mr.AR.Jeyarhuthran

Crl.A. (MD)No.199/2017:

Sivaperumal

... Appellant/Petitioner

Vs.

1.State rep. through
The Inspector of Police,
Srivaikundam Police Station,
Srivaikundam,
Thoothukudi District.
Crime No.38 of 2011.

...1st Respondent/1st Respondent/
Complainant



2.Somu @ Somasundaram

3.Ponnuthurai

4.Sekar @ Sankarapandian

5.Sakthivel

... Respondents 2 to 5/
Respondents 2 to 5/Accused Nos.1 to 4

For Appellant : Mr.V.Angusamy

For Respondents : Mr.S.Chandrasekar
Additional Public Prosecutor
for R.1

Mr.AR.Jeyarhuthran
for R.2 to R.5

COMMON PRAYER: Appeals filed under Sections 378(1)(b) and 372 of the Code of Criminal Procedure, respectively, to call for the entire records connected to the judgment in S.C.No.145 of 2015 on the file of the 1st Additional District Sessions Court, Thoothukudi, dated 10.03.2017 and set aside the order of acquittal.

COMMON JUDGMENT

B. PUGALENDHI, J.,

Crl.A.(MD)No.181 of 2017 is preferred by the State as against the order of acquittal passed by the learned 1st Additional District Sessions Judge, Thoothukudi, in S.C.No.145 of 2015, dated 10.03.2017.

2. Crl.A.(MD)No.199 of 2017 is preferred by Sivaperumal, one of the witnesses [PW4] in S.C.No.145 of 2015, as against the order of acquittal, passed by the learned 1st Additional District Sessions Judge, Thoothukudi, in S.C.No.145 of 2015, dated 10.03.2017.

3. Since both the appeals are arising out of the very same sessions case, they are heard together and are disposed off by way of this common order.

4. The Sessions Case in S.C.No.145 of 2015 pertains to the case in Crime No.38 of 2011, on the file of the Srivaikundam Police Station, Thoothukudi. Originally, there were five accused and even before charges were framed, the fifth accused, namely,

Muthusamy, died. As against the other accused, the trial Court has framed charges as detailed below:

Accused	Charges	Section of Law
A1 to A4	I Charge	148 IPC
A1	II Charge	302 IPC
A2 to A4	III Charge	302 r/w 149 IPC

After full fledged trial, the Trial Court, by order dated 10.03.2017, acquitted the accused from all the charges framed against them. As against the order of acquittal, both the State as well as PW4, who is the brother of the deceased, have preferred the present appeals.

5. The brief facts of the case, as projected by the prosecution, in nutshell are as follows:

5.1. The deceased, namely, Mayandi and the accused are relatives and are residents of Velloor, Srivaikundam Taluk, Thoothukudi District. There existed an enmity between the 1st accused and the deceased, since the deceased put up fencing preventing the 1st accused to access his plantain field. On 17.02.2011, at about 11.30 pm, when PWs 1 to 3 and the deceased were chatting in front of the house of PW1, the deceased received a phone call from the 1st accused questioning his whereabouts. The deceased replied his location and a little later, the accused persons, armed with Aruval, came to the place of occurrence and on the instigation of the accused 2 to 5, the first accused cut the deceased on his head and neck. On witnessing this incident, PWs 1 to 3 raised hue and cry and the accused persons flew away from the scene of occurrence.

5.2. Immediately, PW1 called '108' Ambulance Services and took the deceased to the Government Hospital, Srivaikundam, at about 01.10 am on 18.02.2011. The Doctor, who examined the deceased, informed PW1 that the deceased was already dead. Thereafter, PW1 went to the Srivaikundam Police Station and lodged the complaint [Ex.P1].

5.3. The Sub Inspector of Police [PW15], on receipt of the complaint, has registered a case in Crime No.38 of 2011 at about 01.45 am, against accused 1 to 5, for the offence punishable under Sections 147, 148 and 302 IPC. The printed First Information Report is marked as Ex.P15.

5.4. The Inspector of Police [PW16], on receipt of the intimation, has proceeded to the place of occurrence and has prepared the observation mahazar [Ex.P2] and rough sketch [Ex.P16] at about 03.30 am, on 18.02.2011, in the presence of PWs 7 & 8. He



has also recovered cement mortars with and without blood [MOs. 2 & 3, respectively] from the place of occurrence and also a Cell Phone with bloodstains [MO4]. The Inspector of Police has also conducted inquest on the body of the deceased in the presence of Panchayatars, on 18.02.2011 at about 05.30 am and the inquest report is marked as Ex.P17. Thereafter, he made a request to the Doctor [PW9], Government Hospital, Srivaikundam, for postmortem, through the Constable [PW14].

5.5. The Doctor [PW9] conducted the postmortem on 18.02.2011 at about 11.45 am and noted down the following injuries:

"List of External Injuries:

1. A Deep cut injury at the level of C4.

Vertebra size about 28 x 10 x 4 cm extending from 4 cm below the left angle of mandible to above C7 verbral (torn) minance wound also extended to 6 cm below angle of mandible size 25 x 10 x 4 cm. Underlying all vital Blood vessel cut. Spinal cord cut.

2. A deep cut injury size 23 cm x 4 cm x 2 cm over middle of scalp underlying parital bone fracture and Brain Haemorrhage underlying fracture.

3. A cut injury 5 x 2 x 1 cm over left parital region.

4. A small cut injury 3 x 2 x 1 cm over left parital region.

5. A deep puncture wound size about 2 x 7 x 2 cm over right inner side of thigh.

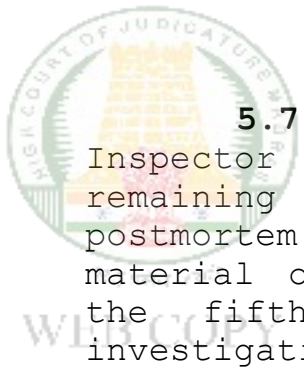
Internal Examination:

Neck Hyoid bone intact larynx and Trachea. (Torn) Normal stomach empty, Heart empty & pale, Lung, Liver, Kidney, Spleen - pale. No injures to Rib.

Skull : On opening the skull - parital bone fracture and underlying fracture haemorrhage present."

The Doctor has also gave a final opinion that the deceased appears to have died 10 to 14 hours prior to the postmortem, by shock and haemorrhage, due to injury nos.1 & 2. The postmortem certificate issued by the Doctor [PW9] is marked as Ex.P6.

5.6. PW16, on 19.02.2011, arrested the accused in front of Isakiamman Temple, in the presence of Village Administrative Officer [PW10] and Village Assistant [PW11]. He examined the first accused separately and the first accused gave a confession statement and the admissible portion of the confession statement is marked as Ex.P18. Pursuant to the confession statement, PW16 recovered the weapons used for the crime [5 Aruvals - MO1] and a white colour shirt with bloodstains [MO9], from a bush.



5.7. The further investigation was taken over by the Inspector of Police [PW17] from 11.03.2011 and he examined the remaining witnesses and the Doctor [PW9] who conducted the postmortem and made a request for chemical analysis on the material objects recovered in this case. Pending investigation, the fifth accused died and PW17, in conclusion of the investigation, filed the final report as against the accused 1 to 4, for the offence under Sections 147, 148, 302 r/w 149 IPC.

5.8. On the side of the prosecution, 17 witnesses were examined and 18 exhibits were marked and 9 materials objects were produced.

6. The available evidences from the prosecution side are as follows:

i) PW1 is the author of the complaint [Ex.P1] and he was a friend of the deceased and in front of his house, the occurrence had taken place. He speaks about the occurrence as well as the examination of the deceased by the Doctor on 18.02.2011 at about 01.10 am and the lodging of the complaint [Ex.P1] before the Sub Inspector of Police [PW15].

ii) PWs 2 & 3 are friends of the deceased, who were also present at the time of occurrence along with PW1. They have also witnessed the occurrence and their evidence runs in similar line as that of PW1.

iii) PW4 is the brother of the deceased and he speaks about the motive part. According to him, he heard the noise and on coming out of the house, he witnessed the deceased with blood and the accused persons leaving with weapons.

iv) PW5 is the wife of PW1 and according to her, when she was inside her house, she heard the noise and on coming out of the house, she witnessed the deceased lying down in bloodstream and the accused persons leaving with weapons.

v) PW6 is the mother of the deceased and her evidence runs in line with that of PW4.

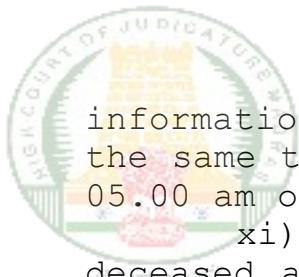
vi) PW7 & PW8 are the witness to the observation mahazar [Ex.P2] as well as the recovery of material objects [MOs. 2 & 3].

vii) PW9 is the Doctor, who conducted postmortem on the body of the deceased.

viii) PW10 is the Village Administrative Officer and PW11 is the Village Assistant. They speak about the arrest of the accused as well as the confession statement given by them.

ix) PW12 is the Head Clerk of Judicial Magistrate Court, Srivaikundam and he speaks about the receipt of requisition letter from the investigating officer for chemical analysis of the material objects as well as the letter forwarded from the Judicial Magistrate Court for chemical analysis.

x) PW13 is the Constable, who received the express first



information report at about 02.45 am on 18.02.2011 and handed over the same to the learned Judicial Magistrate, Srivaikundam at about 05.00 am on 18.02.2011.

xi) PW14 is the Constable who handed over the body of the deceased along with requisition letter to the Medical Officer for postmortem and after postmortem, collected the material objects and handed over the dead body to the relatives of the deceased.

xii) PW15 is the Sub Inspector of Police, who received the complaint [Ex.P1] and lodged the first information report.

xiii) PW16 is the investigation officer who conducted the preliminary investigation and arrested the accused.

xiv) PW17 speaks about the further investigation and the filing of final report.

7. After the prosecution evidence was closed, the incriminating materials were put to the accused under Section 313 Cr.P.C and the accused denied the same. On the side of the accused, no witness was examined, but, four documents [Ex.D1 to Ex.D4] were marked on their behalf.

8. In conclusion of the trial, the learned trial Judge, holding that the prosecution has not established its case beyond reasonable doubt, acquitted the accused.

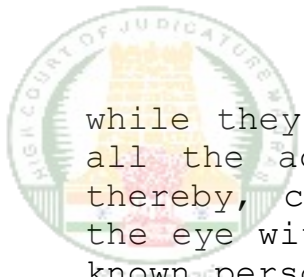
9. Heard Mr.S.Chandrasekar, learned Additional Public Prosecutor appearing for the appellant in Crl.A.(MD)No.181 of 2017 / first respondent in Crl.A.(MD)No.199 of 2017; Mr.V.Angusamy, learned Counsel appearing for the appellant in Crl.A.(MD)No.199 of 2017; and Mr.AR.Jeyarhuthran, learned Counsel appearing for the accused persons.

10. The learned Additional Public Prosecutor appearing for the State / appellant in Crl.A.(MD)No.181 of 2017 and the learned Counsel appearing for the appellant in Crl.A.(MD)No.199 of 2017, in unison, have raised the following points for the consideration of this Court:

10.1. The trial Court has held that motive has not been proved beyond reasonable doubt, since none of the witnesses had deposed that they have knowledge about the motive at the time of occurrence. But, the fact remains it is a case of direct evidence and therefore, motive is insignificant.

10.2. In the observation mahazar [Ex.P2] as well as rough sketch [Ex.P16], prepared by PW16, the existence of street light, near the place of occurrence, was proved.

<https://hcservices.ecourts.gov.in/hcservices> 10.3. The evidence of PWs 1 to 3 is clear and cogent that



while they were having conversation in front of the house of PW1, all the accused came together and caused multiple injuries and thereby, caused death of the deceased. The accused, deceased and the eye witnesses are from the same village. Since the accused are known persons and direct evidence is available, failure to examine the Electricity Board officials as to the functioning of street light is not fatal to the case of the prosecution.

10.4. There is no contradiction between the evidence of eye witnesses with regard to the persons committed the offence and the way in which it was committed.

10.5. A cold blood murder was committed in front of the house of PW1. On a shock, they took the deceased to the Hospital. Therefore, the trial Court ought not to have given a finding that the number of assailants is doubtful, based on the Accident Register [Ex.D4], wherein it has been stated that seven persons were involved in the offence.

11. Per contra, the learned Counsel appearing for the accused has made his submissions supporting the order of acquittal passed by the trial Court. The learned Counsel contended that the medical evidence is inconsistent with the testimonies of the eye witnesses. The accused nos.1 & 3 are polio affected persons, with 45% disability on their right and left leg, respectively and therefore, the evidence of the eye witnesses that the accused persons flew away from the scene of occurrence is highly doubtful.

12. The learned Counsel further pointed out that PW3, in his evidence, has deposed that the police has arrived within half an hour after the occurrence and recorded the statements and thereafter, helped them to send the deceased in Ambulance to the Hospital. This statement is in contradictory to the evidence of PWs 1 & 2. Though PWs 1 to 3 were said to have taken the deceased to the Hospital and their cloths were also stained with blood, no bloodstained cloths were recovered from them.

13. The trial Court has rightly questioned the presence of light at the place of occurrence as well as the variation as to the number of assailants involved in the case. Moreover, the entire case of the prosecution starts from a phone call alleged to have made by the first accused to the deceased at the odd hours on the date of occurrence. But, no call details were collected to establish their case. Therefore, the learned Counsel prays for dismissal of the appeals.

14. This Court has paid it's anxious consideration to the rival submissions and also to the materials placed on record.

15. Before dwelling into the merits of the case, since the



appeals are filed as against an order of acquittal, it is necessary to bear in mind the principles governing the appeal against acquittal, as laid down by the Hon'ble Supreme Court in **V.Sejappa v. State [(2016) 12 SCC 150]**, wherein the Hon'ble Supreme Court has followed its own decision in **Muralidhar v. State of Karnataka [(2014) 5 SCC 730]**. The guidelines issued in the said decision are extracted hereunder:

"23. ...

... (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court;

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal;

(iii) Though, the powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and

(iv) Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court."

16. In yet another decision in the case of **Chandrappa Vs State of Karnataka [(2007) 4 SCC 415]**, the Hon'ble Supreme Court has laid down the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal:

"(1) An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts on limitation restriction or condition on exercise of such power and an appellate Court on the evidence before it may



reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

17. The trial Court disbelieved the evidence of PWs 1 to 3 on the ground that there are contradictions among their evidence as to the arrival of '108' Ambulance and that though the cloths of PWs 1 to 3, while taking the deceased to the Hospital, have got bloodstains, the same were not recovered from them. The trial Court has also held that motive aspect has not been established and that non-examination of the Electricity Board official is fatal and therefore, extended the benefit of doubt to the accused.

18. The occurrence took place at about 11.30 pm on 17.02.2011 in front of the PW1's house. PWs 1 & 2 took the deceased by availing the services of '108' Ambulance. The Doctor, who attended the deceased at Government Hospital, Srivaikundam, has recorded that the deceased was brought by PW2 on 18.02.2011 at about 01.10 am.

19. Neither the Doctor, who attended the deceased, was examined by the prosecution nor the Accident Register issued by him was marked by them. However, the accused has marked the Accident Register issued by the Doctor as defence witness in Ex.D4. A perusal of the Accident Register [Ex.D4] reveals that the deceased was referred with a police memo and it is recorded as



follows:

"Police Memo Details: Alleged H/o assault by seven known male persons by Aruval in front of Durai's house (Durai (A) Muthuraj) in Velloor on 17.02.11 at around 11.30 pm."

WEB COPY

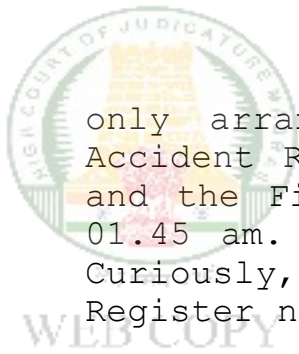
20. It is to be noted that in the original Accident Register, 'three known male persons' has been overwritten as 'seven known male persons'. Be that as it may, the duty of the Casualty Medical Officer is to note down the injuries in the Accident Register and he is not concerned whether the person admitted in the hospital was attacked by known or unknown persons and even assuming that the names of such persons are recorded, still it cannot be used either by the prosecution or by the witnesses. It is also relevant to refer to the decision of Division Bench of this Court in **Annamalai v. State** reported in **(2007) 1 MLJ (Crl) 319**, wherein it is held as follows:

"The Madras Medical Code (Vol.I) Section 10 paragraph-622 gives guidelines or instructions to the doctor as to how the columns in wound certificate are to be filled up. Para-622 (vi) reads:

"Medical officer should ascertain and incorporate in the certificate only the alleged cause as to the manner in which the injuries were inflicted, the weapon used and the time."

The Medical Officer should ascertain the cause of the injury, weapon used, time, etc. thereby showing no power is vested upon the Medical Officer, to ascertain from the injured or the person accompanied the injured, who is the cause for the assault, whether it is known or unknown even. The doctor is concerned, to ascertain and incorporate in the certificate, how the injuries were inflicted and what is the weapon used, including the time, so as to find out, at later point of time, whether the injury would have been caused by the weapon produced on behalf of the prosecution said to have been used by the assailants on the basis of the recovery, if any. In this view, if the doctor had incorporated about the statement made by the person who brought the deceased, that can be ignored, which appears to be the dictum of the Apex Court also in *Basheer v. State* 1993 Crl.L.J. 2173."

21. But the fact remains, according to PW1, immediately after the occurrence, he called '108' Ambulance service and took the deceased to the Hospital and only thereafter, he went to the police station and lodged the complaint. Whereas, the Accident Register [Ex.D4] reveals that the deceased was referred with a police memo. In fact, according to PW3, within half an hour after the occurrence, police came to the place of occurrence and they



only arranged for sending the deceased to the Hospital. The Accident Register [Ex.D4] was recorded on 18.02.2011 at 01.10 am and the First Information Report was registered on 18.02.2011 at 01.45 am. This creates a serious doubt on the prosecution case. Curiously, the prosecution has also neither marked the Accident Register nor examined the Doctor, who attended the deceased.

22. No doubt, motive is insignificant in a case of eye witness. But in this case, the accused as well as the deceased are relatives. It is the case of the prosecution that since the deceased has prevented access to the first accused's land, by putting up a fence, the first accused developed motive against the deceased and committed the offence. But, there is no investigation in this regard. The investigation officer, though said to have visited the land, has not prepared any sketch or mahazar or examined any witness as to whether actually there was any fencing preventing the first accused from accessing his land.

23. It is the case of the prosecution that all the five accused, armed with Aruval, went to the place of occurrence, but, the first accused alone caused the injury and the other accused instigated him to commit the offence. The weapons used by the accused [Aruval] were also recovered through the confession statement of the first accused. A perusal of the Doctor's evidence [PW9], who conducted the postmortem, would show that the injury number 5 is a stab injury, which could be possible only through a sharp weapon like velstick, knife or spear.

24. The accused have also marked the medical certificates of the first and third accused showing that they were disabled by 45% and it is argued that it is very difficult for them to walk and therefore, it may not be possible for them to fled away from the place of occurrence, as projected by the prosecution. Moreover, though PWs 1 to 3 were present in the place of occurrence, they neither attempted to prevent the occurrence nor attempted to nab them. Moreover, the PWs 1 to 3, who took the deceased to the Hospital, stated that their cloths also stained with blood, but, no bloodstained cloths were recovered from them.

25. The occurrence was taken place at 11.30 pm. Though the presence of street light at the place of occurrence has been referred in the observation mahazar and in the rough sketch, the prosecution has not established whether it was in a working condition.

26. Since the present appeals are against an order of acquittal, this Court, in view of the contradictions in the evidence of the prosecution as stated above, is not inclined to interfere with the order passed by the learned 1st Additional



District Sessions Judge, Thoothukudi, in S.C.No.145 of 2015, dated 10.03.2017. Accordingly, both the appeals are dismissed.

Sd/-

Assistant Registrar ()

WEB COPY

// True Copy //

Sub Assistant Registrar (CS)

gk

To

1)The 1st Additional District Sessions Judge,
Thoothukudi.

2.Do Through
The Principal District Judge, Thoothukudi

3.The Judicial Magistrate, Srivaikundam

4.Do Through
The Chief Judicial Magistrate, Thoothukudi

5.The District Collector, Thoothukudi District

6.The Director General of Police, Mylapore, Chennai

7.The Inspector of Police,
Srivaikundam Police Station,
Srivaikundam,
Thoothukudi District.

8.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

9.The Section Officer,-2 copies
Criminal Section
Madurai Bench of Madras High Court,
Madurai.

+1 cc to Mr.V.Angu samy , Advocate SR.No.90430

Judgment made in

Crl.A. (MD) Nos.181 & 199 of 2017

27.09.2019