

**BAIL SLIP**

1.P.Kalaiselvan S/o.Perumal Pandiyan, (Appellant/Accused No.3), 2. Nambi Rajan S/o. Nayinnar Pandiyan, male Aged about 26 years, (Appellant / Accused No.5), 3. Babu, S/o.Thanga Pandian, male aged about 26 years (Appellant / Accused No.2), were directed to be released on bail as per the order of this Hon'ble Court dated 04.12.2013, 20.12.2013 and 24.08.2016 made in MP(MD)Nos.1 and 2 of 2013 and CRL MP(MD).No.7269 of 2016 in CRL A(MD)Nos.262 and 263 of 2013 and CRL A (MD)No.218 of 2014.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.03.2019

CORAM:

The HON'BLE MRS.VIJAYA K.TAHILRAMANI, CHIEF JUSTICE

AND

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CRL A(MD)Nos.262 & 263 of 2013, 33 & 218 of 2014 and 493 of 2017
and

Crl MP(MD)No.11209 of 2017 in Crl A(MD)No.493 of 2017

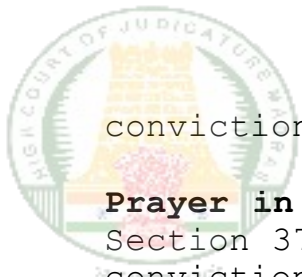
P.Kalaiselvan	... Appellant / Accused No.3 in Crl A(MD)No.262 of 2013
Nambi Rajan	... Appellant / Accused No.5 in Crl A(MD)No.263 of 2013
Issakithurai	... Appellant / Accused No.4 in Crl A(MD)No.33 of 2014
Babu	... Appellant / Accused No.2 in Crl A(MD)No.218 of 2014
Pitchandi	... Appellant / Accused No.1 in Crl A(MD)No.493 of 2017

Vs.

State rep.by Inspector of Police,
Melapalayam Police Station,
Tirunelveli District.

Crime No.544 of 2009 ... Respondent / Complainant in all Cases

Prayer in Crl A(MD)No.262 of 2013 : Criminal Appeal is filed under Section 374 of Criminal Procedure Code, to call for the records in S.C No.81 of 2010 dated 27.07.2013 on the file of the District and Sessions Judge, Mahila Court, Tirunelveli and set aside the



conviction and thereby acquit the appellant/accused No.3.

Prayer in CrI A(MD)No.263 of 2013 : Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, against the sentence and conviction passed in S.C No.81 of 2010 dated 27.07.2013 by the learned Sessions Judge, Mahila Court at Tirunelveli, Tirunelveli District and set aside the conviction thereby acquit the Appellant/Accused No.5.

Prayer in CrI A(MD)No.33 of 2014 : Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, to call for the records in S.C No.81 of 2010 dated 27.07.2013 on the file of the District and Sessions Judge, Mahila Court, Tirunelveli and set aside the conviction and thereby acquit the appellant/accused No.4.

Prayer in CrI A(MD)No.218 of 2014 : Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, to call for the records in S.C No.81 of 2010 dated 27.07.2013 on the file of the District and Sessions Judge, Mahila Court, Tirunelveli and set aside the conviction and thereby acquit the appellant/accused No.2.

Prayer in CrI A(MD)No.493 of 2017 : Criminal Appeal is filed under Section 374 of Criminal Procedure Code, to call for the records in S.C No.81-A of 2010 dated 25.01.2017 on the file of the learned Sessions Judge, Mahila Court at Tirunelveli, Tirunelveli District and set aside the conviction thereby acquit the appellant/accused No.1.

For Appellant
in CrI A(MD)No.262 of 2013 : Mr.Andiraj for Mr.Manikandan

For Appellant
in CrI A(MD)No.263 of 2013 : Mr.R.Alagumani

For Appellant
in CrI A(MD)No.33 of 2014 : Mr.H.Elango

For Appellant
in CrI A(MD)No.218 of 2014 : Mr.V.Kathirvelu, Senior Counsel
for Mrs.A.Banumathy

For Appellant
in CrI A(MD)No.493 of 2017 : Mr.Niranjana S.Kumar

For Respondent : Mr.S.Chandrasekar,
In all cases Additional Public Prosecutor

**COMMON JUDGMENT**

**(Judgment of the Court was delivered by
G.R.SWAMINATHAN, J.)**

The appellants-original accused have preferred these criminal appeals against the judgments passed by the Sessions Judge, Mahila Court, Tirunelveli. The accused were originally six in number. One of them, namely, Shanmugavel died during the pendency of the proceedings. The appellants herein were committed to trial in SC No.81 of 2010 on the file of the First Additional Sessions Court, Tirunelveli. It was then made over to Mahila Court, Tirunelveli. After the examination under Section 313 of Cr.PC was over, the first accused Pichandi absconded. Therefore, the case against the first accused was split as SC No.81 A of 2010.

2.By judgment dated 27.07.2013 in SC No.81 of 2010, the learned Sessions Judge convicted and sentenced the accused. The second accused was convicted under Section 120 B and Section 302 of IPC. He was to sentenced to undergo life imprisonment and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year on each count. The life sentences of course were to run concurrently. The accused 3 to 5 were found guilty of offence under Section 120 B and each of them was sentenced to undergo life imprisonment and also to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year. After the first accused was secured, SC No.81 A of 2010 was taken up. He was also found guilty of the offence under Section 302 of IPC and sentenced to undergo the punishment of life imprisonment and to pay a fine of Rs.10,000/- failing which to undergo simple imprisonment for a period of one year. The accused were acquitted of the other charges. Questioning the conviction and sentence, the first accused filed Criminal Appeal (MD)No.493 of 2017, the second accused Crl A(MD)No.218 of 2014, the third accused Crl A(MD)No.262 of 2013, the fourth accused Crl A(MD)No.33 of 2014 while the fifth accused filed Crl A((MD)No.263 of 2013.

3.The prosecution case briefly stated, is as under :

The accused have previous enmity with the deceased Sivasami and therefore wanted to do away with him. On coming to know that Sivasamy was at the Tea Shop of PW.2 Subbaiah Thevar, A1 and A2 namely Pitchandi and Babu proceeded on a two wheeler to the occurrence spot on 14.07.2009 at about 07.00 A.M. Sivasamy was taking tea and reading a newspaper. He was sitting on the steps of the Tea Stall of P.W2. A1 and A2 yelled and ran towards him and hacked him on his right hand shoulder, neck, chest, right side of the left collar bone and on the left wrist and caused his instantaneous death. This was witnessed by the brothers of the deceased namely PW1 Gunasekaran and Sudalaikannu. P.W1 Gunasekaran and Sudalaikannu went to Melapalayam Police Station and lodged Ex.P1 complaint at about 07.30 A.M.

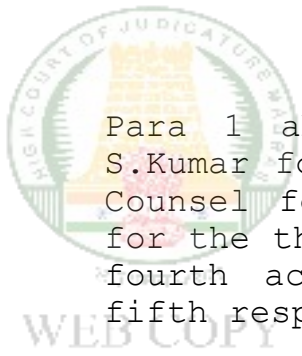


4.The complaint was registered as Crime No.544 of 2009(Ex.P14 F.I.R). P.W 18, the Inspector of Police, Melapalayam Police Station took up investigation and visited the scene of occurrence at about 09.00 A.M. In the presence of P.W5 Murugan and one Jeyaraman, observation mahazar Ex.P15 and Rough Sketch Ex.P16 were prepared. P.W 17 Esakki had signed in the Observation Mahazar, Ex.P15. At about 09.45 A.M on the same day, the investigating officer collected M.O 1 Blood stained sand, M.O.12 Sand without blood stain and M.O.13 newspaper. Inquest was conducted between 10.00 A.M and 12.15 P.M. Postmortem was conducted by P.W 11 at about 12.45 P.M. The Doctor opined that the deceased died on account of the aforesaid injuries and issued postmortem report Ex.P5. P.W 18 examined P.W 3 Sudalai Kannu and came to know that on 11.07.2009 at about 11.00 A.M near the Banana Plantation of Perumal Pandiyan all the accused conspired to murder Sivasamy. Therefore, FIR was altered from Section 302 and the offence under Section 120 B was added and the alteration report was sent to the Judicial Magistrate No.5, Tirunelveli. Investigation Officer examined various witnesses and recorded their statements. By then, the first accused had surrendered before the learned Judicial Magistrate No.2, Tuticorin. P.W 18 obtained orders on 16.07.2019 to take the accused into police custody. A5 Nambirajan and A4 Esakkidurai were arrested on 19.07.2009 at about 07.00 A.M and their confessions were recorded in the presence of P.W 13 Natarajan, Village Administrative Officer and P.W 14 Poolpandian, Village Assistant.

5.Based on the admissible portion of the confession given by A4 Essakkidurai, M.O 14 cycle was seized under Ex.P6 Mahazar. The confession of A5 Natarajan was recorded under Section 164 of Cr.PC by Judicial Magistrate No.IV (C.W1). Ex.C2 was recorded on 22.07.2009. Confession made by the first accused was recorded by P.W 18 on 20.07.2009 in the presence of the Village Administrative Officer P.W 13 Natarajan and P.W 14 Poolpandian Village Assistant. Based on the admissible part of the confession statement, the shirt worn by him at the time of occurrence and the weapons were recovered (M.O4, M.O 5).

6.After recording the statements of the various witnesses, P.W 18 filed final report against the accused under Sections 147, 148, 302, 120B, 109 r/w 149 IPC. The final report was taken on file in PRC No.36 of 2009 on the file of the learned Judicial Magistrate No.V, Tirunelveli. It was committed to the first Additional District and Sessions Judge, Tirunelveli. Against all the accused, Charges 120 B and 147 were framed. Against the accused 1 & 2 charges under Sections 148 & 302 were framed. Against the accused 3 to 5 charges under sections 302 r/w 149 were framed. The appellants pleaded not guilty to the said charges and claimed to be tried. The defence of the appellants was one of total denial and false implication.

7.After going through the evidence adduced in this case, the court below convicted and sentenced the appellants as stated in



Para 1 above. Hence, these appeals. We heard Mr.S.Niranjana S.Kumar for the first accused, Mr.V.Kathirvelu, the learned Senior Counsel for the second accused, Mr.Andiraj, the learned counsel for the third accused and Mr.H.Elango, the learned counsel for the fourth accused and Mr.R.Alagumani, the learned counsel for the fifth respondent.

8.We carefully considered the rival submissions, the facts and circumstances of the case, the judgments and orders passed by the court below and the evidence in the case. After carefully considering the matter for the reasons set out below, we are of the opinion that the appeals filed by A1 and A2 deserve to be dismissed and the appeals filed by A3 to A5 deserve to be allowed.

9.The prosecution case is founded on the ocular evidence of P.W 1 and P.W 2. P.W 1 Gunasekaran is the younger brother of the deceased Sivasami. He deposed that one Kasimurugan who is the cousin of A1 was murdered in the year 2006. In the said case, Sivasamy was arrayed as A5. After trial, Sivasamy was acquitted. This is projected as the primary motive for Pitchandi (A1) to harbour enmity against Sivasami.

10.The learned Senior counsel appearing for the second accused as well as the learned counsel appearing for the first accused would claim that the said murder trial ended in acquittal because the witnesses turned hostile. Though in the cross examination of P.W1 it was suggested that Pitchandi as well as the deceased accused Shanmugavelu turned hostile and that was why Sivasami was acquitted, it was denied by P.W 1 who asserted that Sivasami was acquitted because there was no connection between Sivasami and the murder of Kasimurugan. He categorically stated that they had not entered into any compromise with the prosecution witnesses in Kasimurugan murder case. P.W1 added that the accused were very much having vengeance. The accused had not marked the judgment of acquittal in Kasimurugan case. Therefore, we have no hesitation to reject the contention of the learned Senior Counsel appearing for the second accused that the prosecution failed to establish the motive for the crime.

11.P.W 1 deposed that they had a habit of taking a morning walk and having tea in the shop of P.W2 Subbaiah Thevar. On 14.07.2009, at about 06.15 A.M they were having tea in P.W 2's Tea Shop. Sivasami was reading a newspaper by sitting on a stone. P.W1 and his brother one Sudalaikannu were standing at a distance and having tea. At about 07.00 A.M, A1 and A2 came in a bike and parked the bike in front of Sivasamy. They picked up two long hen tail shaped sickles which were wrapped in a towel. A1 shouted that Sivasamy was the reason for the death of Kasimurugan and that therefore, he too deserved to be killed. He began to hack him on his right shoulder. A2 hacked Sivasamy in the centre of his chest and in the right side of the left collar bone and on the left wrist. After inflicting injuries on Sivasamy, A1 and A2 escaped.



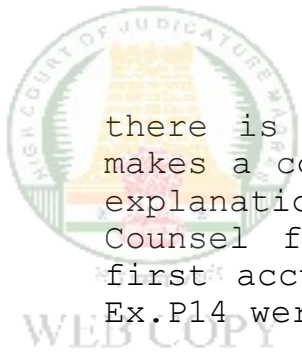
12. Before P.W1 and his brother Sudalaikannu and the tea shop owner Subbaiah Thevar could come near Sivasami everything was over. Sivasami had suffered an instantaneous death. The learned Senior Counsel as well as the learned counsel appearing for the first accused contended that the version of P.W 1 that the entire incident namely, parking of bike, getting down, taking of the sickles and hacking, got over in half a minute is not believable.

13. We are of the view that much capital cannot be made out of this answer given by P.W1. The measure of time stated by P.W1 cannot be taken literally. He meant that the entire occurrence took place very fast. The learned Senior Counsel appearing for the second accused and the learned counsel for the first accused also doubted the very presence of P.W1 in the occurrence spot. According to them, if P.W 1 and another brother Sudalai Kannu had actually been present, they would have certainly rushed to save their brother. They did not suffer any injury. In fact, the suggestion made by the learned counsel is that the occurrence had taken place elsewhere and that the body of the deceased was placed outside the tea shop of P.W2. This theory according to them is fortified by the fact that no photographs of the occurrence spot were taken.

14. We are not persuaded by this submission. When P.W1 and his brother saw A1 and A2, suddenly appearing on the scene and brandishing deadly weapons with aggressive intent, they were bound to have gone into a stupor. According to P.W1, the accused parked their bike at a distance of two feet from Sivasamy. There was thus no time to even react. The event had occurred at a great speed. Therefore, before P.W 1 and his brother realized what was happening, everything had already happened.

15. Therefore, we are of the view that no significance can be attached to the fact that P.W 1 did not attempt to save the deceased or that he did not suffer any injury. In his evidence, P.W.1 had categorically and clearly deposed that it was A1 and A2 who caused the injuries that were found on the body of Sivasami. The occurrence had taken place at 07.00 A.M and the F.I.R was registered at 07.30 A.M. In Ex.P1 lodged by P.W1, the occurrence had been described in graphic detail. The motive for the occurrence was also set out in Ex.P1 complaint.

16. The learned Senior Counsel for the second accused would contend that the FIR was not registered as claimed by the prosecution immediately after the occurrence. This is because the FIR did not reach the judicial magistrate in time. P.W 7 Balakrishnan was the Head Constable who was entrusted with the task of handing over Ex.P14 to the Judicial Magistrate No.V, Tirunelveli. Even according to the prosecution, he was given the FIR at 08.30 A.M itself. The FIR came to be handed over to the learned Magistrate only at about 04.45 P.M in the evening. Thus



there is a delay of 08.00 hrs. The explanation given by P.W 7 makes a comic reading. In fact, the court below observed that the explanation given by P.W 7 was not believable. The learned Senior Counsel for the second accused and the learned counsel for the first accused therefore wanted this Court to hold that Ex.P1 and Ex.P14 were prepared later and ante-timed.

17.Again, we not persuaded by this submission. It is not as if the FIR reached the court after the arrest of the accused. The FIR had reached the court on the same day of the occurrence. The FIR was registered on the complaint given by P.W1 who is an eye witness. He is the younger brother of the deceased. As observed by the Hon'ble Supreme Court in the decision reported in (2009) 1 MLJ 48 (SC), a witness who is a close relative would not conceivably leave out the actual culprit and make allegations against an innocent person. As already noted the FIR is quite exhaustive. Apart from setting out the motive, it describes the manner in which the occurrence had taken place. The implication is direct and specific. It implicates only A1 and A2. Therefore, we do not doubt the lodging of the complaint immediately after the occurrence and its registration on the same day itself.

18.The learned Senior Counsel also claimed that the crime should have been committed some time during the night hours and that the body had been conveniently placed outside the Tea Shop of P.W2 so that the prosecution case can be built as if there were eye witnesses who had seen the occurrence. The learned Senior Counsel also drew our attention to the deposition of P.W11 who conducted the postmortem. The postmortem was done at around 12.45 P.M on 14.07.2019. He had deposed that rigor mortis was present all over the body. The learned Senior Counsel contended that it would take about 12 hours for rigor mortis to set in. During the cross examination, Doctor had also stated that the death might have occurred 12 hours prior to postmortem.

19.Again, we are not persuaded by this submission. It is true that rigor mortis was present all over the body at around 12.45 P.M on 14.07.2009 when the Doctor performed autopsy. According to the prosecution, the crime took place at around 07.00 A.M. Thus, there has been a gap of almost six hours. There is no iron rule that rigor mortis would set in only after 12 hours and not earlier. It depends on several factors, such as the wether condition, the physical condition of the body, etc.,

20.What strengthens the case in favour of the prosecution is that 50 ML of brown colour liquid was found in the stomach of the deceased. The definite case of the prosecution is that the deceased had tea in the shop of P.W 2 and was reading the newspaper when the occurrence took place. P.W 11 doctor in response to the question in the cross examination only opined that the death might have occurred 12 hours prior to postmortem. In other words, his reply was more on the possibility and he did not definitely assert



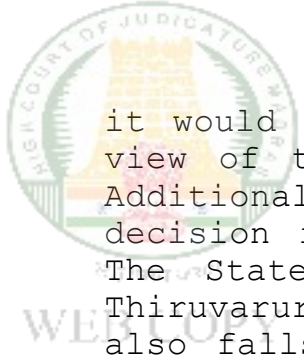
that the death could not have taken place within 12 hours from the time of autopsy. Hence, the defense cannot derive any advantage from this reply given by the postmortem doctor.

21. The other eye witness is PW.2 the owner of the tea shop namely, Subbaiah Thevar. He corroborates the evidence of P.W 1 in all aspects. The learned Senior Counsel and the other learned counsel wanted us to doubt the testimony of P.W 2 because he claimed to have gone to his house and his statement was recorded by the police only on the next day. They characterize the conduct of P.W 2 as unnatural. We find it difficult to subscribe to this contention. P.W 2 was a man aged 68 years when the occurrence took place. When a gruesome murder had taken place in front of his eyes and the deceased was also his regular customer, he was bound to be traumatized. He therefore closed the shop and retired to his house. He was not in a position to make a statement to the police when he was approached on the same day. Only on the next day, he went to police station and gave a statement.

22. Even though P.W 2 is not a blood relation of the deceased, he appears to have had a close relationship with the deceased. This will not however weaken his testimony. On the other hand, we hold that P.W 2 would want the actual culprits to be punished and he would not have falsely implicated A1 and A2. Even though P.W 1 and P.W 2 were subjected to extensive cross examination, they could not be shaken. They have brought out the roles played by A 1 and A 2 convincingly. The motive has been established. Except formally suggesting that they are giving false evidence, the defense has not succeeded in dislodging their evidence. Ex.P5 postmortem report and the deposition of P.W11 also confirm the manner of occurrence spoken to by these eye witnesses.

23. The learned Senior Counsel further contended that the entire case of the prosecution has been fabricated and that it does not represent the correct sequence of events. Ex.D1 is the extract of the general diary of Melapalayam Police Station. It has been entered therein that on 14.07.2009 at 06.30 A.M, D.W2 Thiru.Sankarapandian, S.I of Police, Melapalayam Police Station came to the police station and that thereafter he went to Melanatham Railway Gate and sent the body of the deceased Sivasamy to Palayamkottai G.H for postmortem along with HC 1121. This entry is in the hand writing of D.W1 Andi who was the Head Constable during the relevant time. From this, the learned Senior Counsel wanted us to infer that the prosecution version that P.W 1 came at 07.30 A.M to the Police station to lodge Ex.P1 complaint cannot be true.

24. We are of the view that the prosecution case cannot be thrown out merely on the ground of discrepancies in the general diary. An entry in the general diary is not a substantive evidence. When the learned counsel appearing for the accused sought to refer to Ex.D1, the learned Additional Public Prosecutor submitted that



it would not be open to the accused to place reliance thereon in view of the bar set out in Section 172 of Cr.PC. The learned Additional Public Prosecutor brought to our attention to the decision reported in 2018 (2) LW Criminal 853 (Haji Mohammed vs. The State rep. by the Inspector of Police, Koradacheri P.S., Thiruvavarur District) in which it has been held that a general diary also falls within the scope of Section 172 of Cr.PC and the bar that has been provided under Section 172 will equally apply to a general diary also. The accused shall not be entitled to call for a general diary, unless it falls within the scope of Section 172(3) of Cr.PC.

25.While we hold that the discrepancy brought out by the learned Senior Counsel appearing for the accused will not affect the prosecution case, we must also lay down here that the aforesaid decision rendered by the learned Single Judge in CrI OP(MD)No.26744 of 2018 dated 27.11.2018 (2018 (2) LW Criminal 853) does not represent the correct legal position. Section 172 of Cr.PC reads as follows :

"172.Diary of proceedings in investigation. (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(1-A) The statements of witnesses recorded during the course of investigation under section 161 shall be inserted in the case diary.

(1-B)The diary referred to in sub-section (1) shall be a volume and duly paginated.)

(2)Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3)Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court ; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply."

26.The Hon'ble Supreme Court in the decision reported in **(1995) 4 SCC 430 (Shamshul Kanwar vs. State of U.P)** observed that some vagueness or confusion is there in respect of the meaning of the word "diary" used in Section 172 and other Sections of Cr.PC and suggested that a legislative change is necessary. It did not hold that the general diary or station diary will fall within the



scope of Section 172 of Cr.PC. There is no doubt that as per the police standing orders in force in Tamilnadu, there are two kinds of diaries. One is the station diary or the general diary maintained in the police station itself and the other is the diary maintained by the investigating officer setting forth the day to day proceedings in respect of the case. There is no doubt whatsoever that such a case diary or police diary maintained by the investigating officer is what is referred to Section 172 of Cr.PC. The learned Judge in Haji Mohammed case has held that not only the case diary but also the general diary maintained in the police station would fall within the ambit of Section 172 of Cr.PC. The learned Judge extensively refers to the decision reported in **(2014) 2 SCC 1 (Lalita Kumari .Vs. Govt. of Uttar pradesh)** and comes to the conclusion that the ratio that can be culled out from the said judgment is that the right of an accused in relation to a Police file and "the General Diary" is a very limited one and is controlled by Section 172 of Cr.P.C.

27. We are constrained to observe that the Hon'ble Supreme Court has nowhere held it to be so. It is true that the expression "police diary/general diary" have been used somewhat interchangeably. What appears to have escaped the attention of the learned Judge is the categorical observation made in Paragraph No.95 of the aforesaid judgement rendered by the constitution bench. The said para reads as under :

"95. The police is required to maintain several records including Case Diary as provided under Section 172 of the Code, General Diary as provided under Section 44 of the Police Act etc., which helps in documenting every information collected, spot visited and all the actions of the police officers so that their activities can be documented. Moreover, every information received relating to commission of a non-cognizable offence also has to be registered under Section 155 of the Code.

Therefore, there can be no manner of doubt that what is referred to in Section 172 of Cr.Pc is only the case diary. This is because the general diary is maintained under Section 44 of the Police Act. They are two distinct documents. In **State vs. H.Srinivas (2018) 7 SCC 572**, it has been reiterated that the concept of maintaining general diary has its origin under Section 44 of the Police Act, 1861 as applicable to States. Section 44 of the Police Act reads as under :

"44. Police- officers to keep diary.-- It shall be the duty of every officer in charge of a police-station to keep a general diary in such form shall, from time to time, be prescribed by the State Government and to record therein all complaints and charges preferred, the names of all persons arrested, the names of the complainants, the offences charged



against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined. The Magistrate of the district shall be at liberty to call for and inspect such diary."

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28. Police Standing Order Nos. 706 and 707 of Tamil Nadu Police Standing Orders deal with the contents of the general diary. In **Sone Lal vs. State of U.P (1978) 4 SCC 302**, the general diary is referred to as a public document. In **(1978) 4 SCC 428, (Sadhu Singh vs. State of U.P)**, it has been mentioned that entries are made in the general diary about the events that took place in the police station in chronological order and it is ordinarily difficult to fabricate false entries in the general diary. In **Bir Singh vs. State of U.P (1977) 4 SCC 420**, the courts, from the trial court to the Supreme Court, took note of the overwriting in the original general diary. In hundreds of reported decisions, one can find references to the entries made in the general diary and reliance being placed thereon.

29. Section 172 of Cr.PC came up for interpretation before the Hon'ble Supreme Court in a recent decision reported in **(2017) 7 SCC 668 (Balakram vs. State of Uttarakhand)**. The Hon'ble Supreme Court after referring to Section 172 of Cr.PC and Section 145 of the Indian Evidence Act, 1872 held as follows :

9. The afore-mentioned provisions are to be read conjointly and homogenously. It is evident from Sub-section (2) of Section 172 Code of Criminal Procedure, that the Trial Court has unfettered power to call for and examine the entries in the police diaries maintained by the Investigating Officer. This is a very important safeguard. The legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. If there is any inconsistency or contradiction arising in the evidence, the Court can use the entries made in the diaries for the purposes of contradicting the police officer as provided in Sub-section (3) of Section 172 of Code of Criminal Procedure. It cannot be denied that Court trying the case is the best guardian of interest of justice. Under Sub-section (2) the criminal court may send for diaries and may use them not as evidence, but to aid it in an inquiry or trial. The information which the Court may get from the entries in such diaries usually will be utilized as foundation for questions to be put to the police witness and the court may, if necessary in its discretion use the entries to contradict the police officer, who made them. But the entries in the police diary are neither substantive nor corroborative evidence, and that they cannot be used against any other witness than against the police officer that too



with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses such entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to provisions of Sections 145 and 161 of the Indian Evidence Act. Thus, a witness may be cross-examined as to his previous statements made by him as contemplated Under Section 145 of the Evidence Act if such previous statements are brought on record, in accordance with law, before the Court and if the contingencies as contemplated Under Section 172(3) of Code of Criminal Procedure are fulfilled. Section 145 of the Indian Evidence Act does not either extend or control the provisions of Section 172 of Code of Criminal Procedure. We may hasten to add here itself that there is no scope in Section 172 of the Code of Criminal Procedure to enable the Court, the prosecution or the Accused to use the police diary for the purpose of contradicting any witness other than the police officer, who made it.

14. In case of *Malkiat Singh and Ors. v. State of Punjab* MANU/SC/0622/1991 : 1991(4) SCC 341, this Court while considering the scope of Section 172(3) Code of Criminal Procedure with reference to Section 145 of the Indian Evidence Act observed thus:

"11. It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the investigating officer to ascertain the statement of circumstances ascertained through the investigation. Under Sub-section (2) the court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the Accused, nor his agent, by operation of Sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence merely because the court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court uses it for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act, it shall be used for the purpose of contradicting the witness, i.e. Investigation Officer or to explain it in re-examination by the prosecution, with permission of the court. It is, therefore, clear that unless the



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investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous statement Under Section 161 that too after drawing his attention thereto as is enjoined Under Section 145 of the Evidence Act, the entries cannot be used by the Accused as evidence."

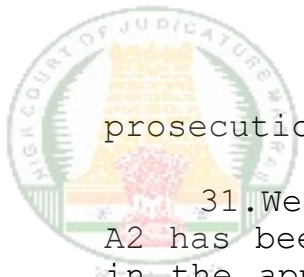
15. The police diary is only a record of day to day investigation made by the investigating officer. Neither the Accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred by the Statute Under Section 172 (2) of Code of Criminal Procedure on the court to examine the entries of the police diary would not allow the Accused to claim similar unfettered right to inspect the case diary.

17. From the afore-mentioned, it is clear that the denial of right to the Accused to inspect the case diary cannot be characterized as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the Accused on his demand.

19. Since in the matter on hand, neither the police officer has refreshed his memory with reference to entries in the police diary nor has the trial court used the entries in the diary for the purposes of contradicting the police officer (PW-15), it is not open for the Accused to produce certain pages of police diary obtained by him under the provisions of Right to Information Act for the purpose of contradicting the police officer."

In view of the analysis of the aforementioned cases and the relevant statutory provisions, we hold that the decision reported in **2018 (2) LW (Criminal) 853 (Haji Mohammed vs. The State rep. by the Inspector of Police, Koradacheri P.S., Thiruvavarur District)** has been wrongly decided and we overrule the same.

30. There is one more circumstance that will have to be taken note of. C.W3 Scientific Officer, Regional Forensic Science Laboratory, Madurai has deposed that the blood of Sivasami belongs to B Group. The bloodstain particulars of the material objects such as the apparel worn by the accused and the weapons on examination were found to contain human blood belonging to B Group. C.W.3 was not cross examined on the side of the accused on this aspect. Though this circumstance by itself may not establish the culpability of A1 and A2, taken together with the testimony of eye witnesses, it goes a long way in establishing the case of the



prosecution against them beyond reasonable doubt.

31. We are of the view that the prosecution case against A1 and A2 has been established beyond reasonable doubt. We find no merit in the appeals filed by A1 and A2 and we confirm the judgments of the courts below passed against them.

32. The remaining accused A3 to A5 were charged with the offences under Sections 120 B, 147 and 302 r/w 149 of IPC. The learned Sessions Judge found A3 to A5 not guilty of the offences under Sections 147 and 302 r/w. 149 IPC and accordingly acquitted them of those charges. It was however held that the prosecution proved the charges under Section 120 B against them beyond reasonable doubt. The prosecution has relied on the evidence of P.W3 Sudalaikannu and P.W 9 Chinnadurai to sustain the charge under Section 120 B of IPC. Other than their evidence, there is nothing against A3 to A5.

33. P.W 3 claims that he was informed that there was an agricultural land available for sale at Vadakkupathu of Melanatham. In order to see the land, he had gone there along with his friend Chinnadurai (P.W9). When they were walking near the Banana Plantation of Perumalpandian, they heard the accused talking. He narrated the conversation said to have taken place among the accused. They were conspiring to murder Sivasami. P.W 9 Chinnadurai also deposed on the same lines. The learned Sessions Judge believed the version of P.W 3 and P.W 9 to find the accused A3 to A5 guilty of the charge of conspiracy.

34. As rightly contended by the learned counsel appearing for A3 to A5, the testimony of these two witnesses cannot inspire the confidence of this Court. If these two witnesses had actually overheard the conversation said to have taken place among the accused, they would have certainly alerted the deceased or his associates. Admittedly, these two witnesses did not do so. They also did not inform the local police. More than anything else, the witnesses claimed to have overheard the said conversation at a distance of 10 feet. The accused were said to have been standing at a height of about five feet from the spot where these two witnesses were present. If that be so, the presence of these two witnesses would not have gone unnoticed. We find it difficult to believe that the accused would have assembled in an open place in the forenoon and loudly proclaimed their intention to commit the murder of Sivasami. During the cross examination, probing questions were put to P.W 3 as to the person from whom he was proposing to buy the paddy field. P.W 3 replied that he intended to purchase the paddy field of Nambi Konar. He however admitted during the cross examination that he did not know the house of Nambi Konar and had never seen him. It was also admitted that they returned even without seeing the paddy field in question.



35. On a careful reading of the testimony of these two witnesses we have no hesitation to come to the conclusion that they had deposed falsely. Once their testimony is eschewed out of consideration, the prosecution case has no leg to stand as against these three accused. We therefore set aside the judgment dated 27.07.2013 made in SC No.81 of 2010 on the file of the Sessions Judge, Mahila Court, Tirunelveli insofar as the accused Nos.3 to 5 are concerned.

36. Before parting with this case, we cannot help noting an unusual feature. On the side of the accused, Andi the S.I of Police, Sankarapandian and Thiru.Nagarajan, Inspector of Police were examined as defence witnesses (D.W1 to D.W3). They were also subjected to cross examination by the prosecution. Aandi was the Special Sub Inspector of Police while Sankarapandian was the Sub Inspector of Police and Nagarajan was the Inspector of Police. Sankarapandian was examined as P.W 16 while Nagarajan was examined as P.W 18. It is not known as to how they could have been examined on the side of the defence. The learned Sessions Judge, Mahila Court, Tirunelveli committed grave procedural irregularity in permitting the accused to examine the prosecution witnesses on their side. The course of action adopted by the Sessions Judge is unknown to law. We disapprove the practice of examining prosecution witnesses on the side of the defence. It cannot be permitted.

37. In the result,

- CrI.A.(MD).Nos.218 of 2014 and 493 of 2017 filed by the appellants/accused Nos.1 and 2 are dismissed and the conviction and sentence imposed on the appellants/accused Nos.1 and 2 by the learned District and Sessions Judge, Mahila Court, Tirunelveli, in S.C.Nos.81 of 2010, dated 27.07.2013 and the learned Sessions Judge, Mahalir Neethimandram, Tirunelveli in S.C.No.81-A of 2010, dated 25.01.2017 are confirmed.
- Suspension of sentence granted by this Court in respect of the appellant/Accused No.2, on 24.08.2016, in CrI.MP.(MD).No.7269 of 2016 in CrI.A.(MD).No.218 of 2014 shall stand cancelled.
- The Trial Court is directed to take appropriate steps to secure the appellant/Accused No.2 and commit him in prison to serve the period of sentence.
- CrI.A.(MD).Nos. 262, 263 of 2013 and 33 of 2014 filed by the appellants/accused Nos.3, 5 and 4 are allowed and the conviction and sentence imposed on them by the learned District and Sessions Judge, Mahila Court, Tirunelveli, in S.C.No.81 of 2010, dated 27.07.2013, is set aside and the appellants/accused Nos.3, 5 and 4 are acquitted of the charges framed against them.
- Fine amount, if any paid, shall be refunded to the appellants/accused Nos.3, 5 and 4.



- Since the appellant/accused No.4 [Crl.A.(MD).No.33 of 2014] is in jail, he is directed to be set at liberty forthwith, unless his detention is required in connection with any other case. Consequently, connected Crl.MP(MD)No.11209 of 2017 is closed.

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Assistant Registrar (CO)

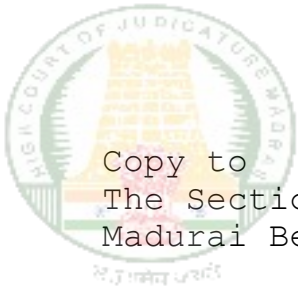
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Sub Assistant Registrar(CS)

Skm

To

- 1.The District and Sessions Judge, Mahila Court, Tirunelveli.
- 2.The Principal District Judge,
Tirunelveli.
- 3.The Judicial Magistrate No.V,
Tirunelveli.
4. The Chief Judicial Magistrate,
Tirunelveli.
- 5.The Inspector of Police,
Melapalayam Police Station,
Tirunelveli District.
- 6.The Superintendent,
Central Prison, Palayamkottai.
- 7.The Commissioner of Police,
Tirunelveli.
- 8.The District Collector,
Tirunelveli.
- 9.The Director General of Police,
Mylapore, Chennai.
- 10.The Additional Public Prosecutor,
Madurai Bench of the Madras High Court,
Madurai.



Copy to
The Section Officer, Criminal Section(Records),
Madurai Bench of Madras High Court, Madurai. (2 copies)

+2CC TO MR.NIRANJAN.S.KUMAR, Advocate Sr. No.52813 & 52358
+1CC TO MR.H.ELANGO, Advocate Sr. No.52399
+1CC TO MR.R.MANIKANDAN, Advocate Sr. No.52687
+1CC TO Mrs.A.BANUMATHY, Advocate Sr. No.52332

CRL A(MD)Nos.262 & 263 of 2013,
33 & 218 of 2014 and 493 of 2017
07.03.2019

NS (CO)
TR (03.05.2019) 18P 18C