

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.11.2020

DELIVERED ON : 19.11.2020

CORAM

THE HONOURABLE MR. JUSTICE M. NIRMAL KUMAR

Crl.M.P.No.6571 of 2020

in Crl.R.C.No.1056 of 2019

Kesavan

... Petitioner

Vs.

State rep.by
The Inspector of Police
Magudanchavadi Police Station,
Salem District.
(Crime No.412 of 2015)

... Respondent

Criminal Miscellaneous Petition filed under Section 389(1) Cr.P.C. seeking to suspend the sentence and enlarge the petitioner on bail in connection with the judgment dated 30.10.2018 passed in S.C.No.314 of 2016 on the file of the Assistant Sessions Court, Sankari and confirmed by the judgment dated 11.04.2019 passed in Crl.A.No.182 of 2018 on the file of the III Additional Sessions Court, Salem, pending disposal of the revision.

For petitioner : Mr.C.Rajasekaran

For Respondent : Mr.C.Iyyappa Raj
Additional Public Prosecutor

ORDER

The petitioner/A3 faced prosecution in S.C.No.314 of 2016 before the Assistant Sessions Court, Sankari along with two others, by judgment dated 30.10.2018 he was convicted under Section 394 read with Section 397 IPC and sentenced to undergo seven years rigorous imprisonment. Aggrieved against the same the petitioner preferred appeal in Crl.A.No.182 of 2018 before the III Additional District and Sessions Court, Salem and by judgement dated 11.04.2019 the same was dismissed, confirming the conviction of the trial Court. Challenging the conviction and sentence, the petitioner preferred Crl.R.C.No.1056 of 2019 before this Court and the instant Crl.M.P. seeking suspension of sentence and bail.

2. The gist of the case is that the respondent police on receipt of the complaint from PW1 Sivaraj registered a case in Crime No.412 of 2015 for offences under Section 394 r/w Section 397 IPC. On 03.07.2015 at about 9:30 p.m. PW1 - Sivaraj who was working as a medical collection agent for Shri Venketeswara Medical agency, after collecting money from various medical shops, was proceeding in his motorbike in the High Way No.47 towards Sankari with a cash of Rs.18,000/-. At that time three persons namely A1 to A3 following PW1 -Sivaraj in TVS Apache motor bike had stopped him. The petitioner/A3 was riding the bike, A1 Viji @ Vijayan was sitting in the middle of A2 Siva and petitioner/A3, stopped the defacto complainant. A1 using iron rod hit the defacto complainant on his helmet, A2 attempted to snatch away the bag containing the cash which was resisted. A1 again assaulted the defacto complainant on his head and on his right hand due to which he sustained bleeding injuries and contusions. Thereafter all the three escaped in the bike. The defacto complainant sustaining bleeding injuries was standing in the high road and asking for lift from the passer by P.W.2 Kumar noticed the same and enquired PW1. PW1 informed about the attack and robbery committed on him. Thereafter PW2 called his friend (PW3) for help and he had also informed the Ambulance, PW7 brother of PW1 and also the employer of PW1. PW1's employer informed PW4 & PW5, the co-employees of PW1. PW1 was taken to Sankari Government Hospital there PW11-Dr.Rani Vidhya gave first aid treatment. Thereafter he was referred to Government Hospital, Erode since the injuries were grievous in nature. PW12-Sub Inspector of Police who received information from the hospital on 04.07.2015 had gone to the Government Hospital, Erode, recorded the statement of PW1 and later PW10 Sub Inspector of Police registered an FIR in this case which is marked as Ex.P8. PW13-Investigating Officer visited the scene of occurrence on 04.07.2015 at about 8:00 a.m. prepared Observation Mahazar and Rough Sketch in the presence of PW2 and enquired PW1 and other witnesses.

3. During road check on 16.09.2015 A2 on seeing the police attempted to flee away, on suspicion he was caught, A2 admitted about the commission of offence along with A1 & A3. Thereafter A2 was arrested in this case and sent for remand. Later on 27.01.2016, A1 & A3 were caught during road check near Attayampatti and both admitted their involvement in the offence and gave confession in the presence of PW9-Village Administrative Officer. Ex.P.6 and Ex.P7 are the confession given by them. Based on their confession M.O.1 iron rod and M.O.3 Rexsin bag, M.O.4 Apachi bike, M.O.5 Rs.3,000/- were recovered in this case. On completion of investigation, charge sheet came to be filed. During trial PW1 to PW14 were examined, Ex.P1 to Ex.P10 were marked and M.O.1 to M.O.5 were marked on the side of the prosecution. On the side of the defence DW1 and DW2 were examined. Ex.D1 to Ex.D.8 were marked. The trial Court on the evidence and materials produced convicted A1 & A3 in this case for seven years and acquitted A2. The petitioner/A3 aggrieved against the conviction had preferred an appeal before the III Additional District and Sessions Court, Salem and the same came to be dismissed against which the present revision.

4. The contention of the petitioner herein /A3 is that in this case PW1 is the victim and the only eye witness to the occurrence. PW2-Kumar, the passer by. PW3 is the friend of PW2 both admitted that they have reached the scene of occurrence after the occurrence. PW4 and PW5 are the co-workers of PW1 who had also reached later. PW6 has not supported the case of the prosecution. PW7 is the brother of PW1 who is not a witness to the occurrence. PW8 is the witness for arrest and confession of A2. PW9 is the witness for arrest and confession of A1 & A3. PW10 is the Sub Inspector of Police who registered the FIR. PW11 is the Casualty Medical Doctor attached to Government Hospital, Sankari who gave first aid treatment to PW1 on 03.07.2015 at 10:20 p.m. and thereafter referred PW1 to Government Hospital, Erode. PW12 is the Special Sub Inspector of police who visited the hospital recorded the statement of PW1 and handed over the same to the PW10. PW13 is the investigating officer who had conducted investigation from 04.07.2015 till 24.02.2016. PW13 is the Investigating Officer who conducted major part of investigation visited the scene of occurrence examined the witnesses, prepared observation mahazar and rough sketch arrested the accused, made recoveries and got opinion from the Doctor, thereafter he was transferred. PW14 is the Investigating Officer who succeeded PW13 took up investigation on 25.02.2016 and filed the charge sheet in this case on 18.03.2016.

5. He further submitted that in this case admittedly PW1 is the only eye witness to the occurrence and the witnesses PW2 to PW7 are not witnesses to the occurrence. The trial Court had disbelieved the of PW1 evidence as regards A2 and acquitted A2 from this case. Admittedly prosecution had not preferred any appeal against the acquittal of A2. The specific case of PW1 is that all the three accused came in a bike way laid PW1. A1 attacked him with an iron road, A2 snatched away the cash bag and as far as this petitioner/A3 is concerned he was the rider of the bike who intercepted PW1 and later all the accused fled in the motorbike. The occurrence is said to have been taken place in a high way at about 9:30 p.m. and there is no evidence that any light was available at the scene of occurrence. The trial Court finding that the head light of the bike of both PW1 and as well as the petitioner was switched on and with the help of the bike head light PW1 had seen the accused and later identified them is not proper. This finding is without any evidence. PW1 has not stated that he saw the accused with the help of motorbike light. PW13 Investigating Officer had also not stated anything with regard to the availability of light. The trial Court on its own notice had given such a finding which is not sustainable.

6. Further he submitted that PW1 in his evidence admits that he had identified all the accused A1 to A3 together in the police station. It is seen that in this case A2 was arrested on 16.09.2015 and from the date of arrest he was under remand. Arrest of A1 & A3 was on 27.01.2016 and they were remanded on 28.01.2016. At no point of time A1 to A3 were together in the police station. Further PW13 admits that he had not taken any steps for conducting test identification parade. Admittedly in this case the accused and PW1 are strangers and no test identification parade has been conducted.

PW1 in his statement stated that he saw A1 to A3 in the police station which is not true on the facts of the case. The entire case unfolded on the arrest of A2 on 16.09.2015. A2 is said to have given a confession and no recovery was made based on his confession. The confession of A2 is not admissible and cannot be acted upon. Further PW8 is the witness for arrest and confession of A2 who admits that confession was prepared in the police station and he had signed the same in the Police Station. PW9 Village Administrative Officer is the witness for arrest and confession of A1 & A3, who states that PW13 had called him and informed that four persons were in his custody who were apprehended on suspicion of which A1 & A3 in this case said to have admitted the offence. What had happened to the other two persons namely Raja and Senthil is not known. Rs.3,000/- was available with the petitioner/A3 and the bike in which the petitioner was riding is shown to be recovered as case property. These recovery namely M.O.4 and M.O.5 would no way lead to inference of the petitioner's/A3 involvement in this case. The lower Court disbelieving the evidence of PW1 had acquitted A2 in this case. There have been contradictions between the evidence of PW1 and PW13. PW1 states that A2 was sitting in the middle and A1 in the rear. PW13 states that it was A1 who was sitting in the middle and A2 in the rear. No clarification had been given for this. The trial Court in its judgment while acquitting A2 had given a reason that PW13 had not taken steps to bring in PW1 to identify A2, the same analogy applies to the petitioner/A3 also. Further the trial Court has given a finding that A2 in his confession has not admitted about his involvement with the other accused in this case. PW11 had given Accident Registrar copy which is marked as Ex.P.9. In this case, no Wound Certificate had been obtained since PW1 had left Government Hospital, Erode without informing the Doctors. The trial Court on its own observation had given a finding that they are grievous in nature. Without medical evidence the trial Court has given a finding that the injuries are grievous in nature. PW11 Doctor had not stated about the grievousness of any injury. In this case two defence witnesses were examined. DW1 is the Opthomologist attached to Aravind Eye hospital and through him Ex.D1 and Ex.D2 were marked. From Ex.D1 it is seen that A2 had under gone eye surgery and taking treatment during the relevant period. DW2 Silambarasan through him Ex.D3 to Ex.D8 have been marked. The case of the petitioner is that the bike in this case which was seized by the respondent on 27.01.2016 is said to be the bike which was used on 03.07.2015. The said bike was purchased only on 11.11.2015. The explanation given by the lower Court is that when the bike which was seized had no number plate, Engine number and chassis number were tampered with. In the confession as well as in the mahazar there is no reference to any such tampering. He further submitted that the petitioner has been in confinement from the year 2015 and he got a family to be taken care.

The lower Appellate Court had not independently considered the evidence and assessed the materials but had mechanically dismissed the appeal. The petitioner earlier moved a suspension of sentence petition in M.P.No.14425 of 2019 and the same was dismissed by this Court on 27.07.2020 for the reason that the learned Government Advocate had submitted that there are three previous cases of similar in nature against the petitioner/A3 which is not true.

Hence, petitioner seeks suspension of sentence.

7. The learned Government Advocate appearing for the respondent filed a counter and submitted that the defacto complainant PW1 lodged a complaint before the respondent police stating that on 03.07.2015 while he was travelling from Magudanchavadi to Sankari near Thalaiyur eri in his two wheeler bearing Registration No.TN-34-W-1860 at that time the petitioner along with other two other accused namely Viji @ Vijayan and Siva with intention to commit robbery on the defacto complainant followed him from the medial shop intercepted him in the scene of occurrence. A1 attacked PW1 on his helmet with an iron road, M.O.2 is the helmet and the same was broken. A2 removed the helmet and again A1 attacked PW1 with an iron road on his head. PW1 became unconscious and the petitioner/A3 along with other accused committed robbery of Rs.18,000/-. On the complaint of PW1 a case was registered in Crime No.412 of 2016 for offence under Section 394 r/w 397 IPC. A2 in this case was arrested on 16.09.2015, on his arrest the involvement of the petitioner/A3 and A1 came to light. on 27.01.2016 A1 & A3 were arrested they have given a confession, based on their confession recovery was made. PW1 in this case has identified A1 & A3 in the Court.

8. The prosecution in this case has examined PW1 to PW14. Ex.P1 to Ex.P10 were marked. M.O.1 to M.O.5 were marked. On the side of the defence DW1 & DW2 were examined and Exhibits Ex.DW1 to Ex.DW8 were marked. The trial Court on considering the evidence and materials had convicted the petitioner/A3 and the other accused A1. A2 was acquitted by the trial Court, since A2 was not present before the trial Court when PW1 was examined and hence he could not be identified. He fairly admits that against the acquittal of A2 no appeal preferred. The appeal preferred by the petitioner/A3 and the other accused before the Sessions Court came to be dismissed. The trial Court as well as the lower Appellate Court found the petitioner/A3 guilty for the offences and the offence is of serious in nature, granting suspension of sentence and bail to the petitioner/A3 would cause menance to the society. The petitioner is a regular offender involved in offence of similar nature. This petitioner/A3 involved in the following cases and opposed the bail application.

S. No	Police Station, Crime Number and Section of Law	Stage of the case
1	Magudanchavadi P.S. Crime No.31 of 2019 U/s.392 r/w 397 IPC	Charge sheet filed and the same is yet to be taken on file by the J.M.Court No.II, Sankari
2	Attayampatti P.S.Crime No.332 of 2015 U/s.395 IPC	Charge sheet filed and the same is yet to be taken on file by the J.M.Court No.II, Salem.

S. No	Police Station, Crime Number and Section of Law	Stage of the case
3	Poolampatti P.S. Crime No.20 of 2016 U/s.392 r/w.397 IPC	Charge sheet filed and the same is yet to be taken on file by the J.M.Court No.II, Sankari.

9. He further submitted that earlier the petitioner/A3 had filed CrI.M.P.No.14425 of 2019 seeking suspension of sentence and bail and the same was dismissed by this Court vide order dated 27.07.2020. There is no change of circumstances hence he opposed for granting of bail to the petitioner.

10. This Court considered the submissions and on perusal of the materials finds that in this case there are three persons involved. PW1 is the only eye witness to the occurrence. PW2 to PW7 are private persons who are not witnesses to the occurrence. PW9 to PW14 are official witnesses. On the arrest and confession of A2 the involvement of A2 as well as the petitioner/A3 and A1 came to light. A2 was immediately sent for remand. As far as this petitioner/A3 and A1 are concerned they were arrested on 27.01.2016 during the routine road check. On the confession of petitioner/A3 M.O.4 bike in which they were riding and M.O.5 cash of Rs.3,000/- which was in his pocket were shown as recovery. Recovery of these two articles will no way lead to inference of involvement of the petitioner/A3 in this case.

11. Further PW1 in his complaint has not stated about the description of the accused persons. Added to it PW11 the casualty medical Doctor in the Accident Registrar-PW9 had recorded that three unknown persons have assaulted PW1 and there is no description about the accused persons. It is to be seen that the scene of occurrence was on a High Way road and there is no light available, the lower Court reasoning that PW1 had seen the accused with the aid of the motorbike light, is not supported with any evidence. PW1 & PW13 have not spoken with regard to the availability of light. PW11 Doctor who gave Ex.P.9-Accident Registrar stated that Wound Certificate could not be issued since PW1 had left the hospital without informing the Doctors. Hence the nature of the injury is not proved. The trial Court on its own observation given a finding that the injuries are grievous in nature which is without any medical evidence.

12. Added to it the case against the petitioner is that the petitioner was riding bike on 03.07.2015 in which A1 & A2 were pillion riders. A1 assaulted PW1, A2 took away the bag containing cash M.O.3. The trial Court disbelieving the evidence of PW1 had acquitted A2. The act of A2 with the other accused cannot be separated and seen in isolation. Further PW1 stated that he had seen A1 to A3 together in the police station which cannot be true. The petitioner in this case is in confinement from the year 2015. From the materials produced it is seen that the case in Crime No.31 of 2016 at Magudanchavadi Police Station culminated as S.C.No.179 of

2018 and by judgment dated 19.09.2018 got acquitted. As regards Crime No.20 of 2016 it is culminated as S.C.No.358 of 2016, the trial Court convicted the petitioner/A3, against which the petitioner preferred an appeal in C.A.No.142 of 2018 which is pending before the II Additional District Judge, Salem. The petitioner sentence has been suspended and granted bail by the Sessions Court in Crl.M.P.No.486 of 2019. As regards Crime No.332 of 2015 investigation completed and charge sheet filed and the same is yet to be taken on file by the committal Court. Considering the sentence imposed on the petitioner/A3 for seven years and that he is already in confinement from the year 2015, this Court is inclined to suspend the sentence and grant bail to the petitioner.

13. Accordingly, the substantive sentence of imprisonment alone is suspended and the petitioner is directed to be enlarged on bail on condition that the petitioner shall execute a bond for a sum of Rs.10,000/- (Rupees ten thousand only) with two sureties each for a like sum to the satisfaction of the learned Assistant Sessions Judge, Sankari and on further condition that the petitioner shall appear before the Inspector of Police, Attayampatti Police Station, Salem daily at 10:30 a.m. except on the dates when he has to appear before the concerned Court for hearing and trial, until further orders. The petition is ordered.

-sd/-

19/11/2020

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE ASSISTANT SESSIONS COURT,
SANKARI

2 THE III ADDITIONAL SESSIONS COURT,
SALEM.

3 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

4 THE INSPECTOR OF POLICE
MAGUDANCHAVADI POLICE STATION,
SALEM DISTRICT.

5 THE INSPECTOR OF POLICE
ATTAYAMPATTI POLICE STATION,
SALEM.

C.C. to M/S. C.RAJASEKARAN Advocate on payment of necessary
charges

Order

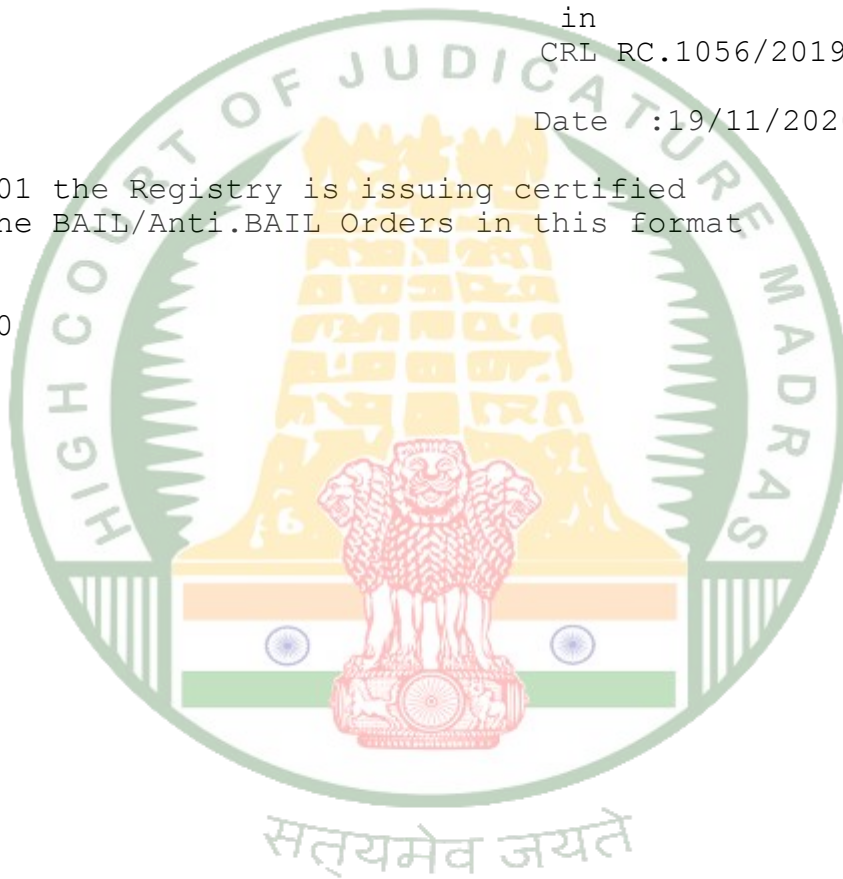
in
CRL MP.6571/2020

in
CRL RC.1056/2019

Date :19/11/2020

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