

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 23.12.2020
PRONOUNCED ON : 30.12.2020

CORAM:

THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

C A.Nos.328 of 2017 and 418 of 2018

Santhoshkumar	..Appellant/A1 in CA No.328 of 2017
Sathishkumar	..Appellant /A1in CA No.418 of 2018

Vs.

The State rep. by
The Inspector of Police,
Perundurai Police Station,
Erode District.

Crime No.389 of 2013 ..Respondent/Complainant in both CAs

Common Prayer: The Criminal Appeals filed under Section 374 (2) of the Code of Civil Procedure, praying to set aside the conviction and sentence imposed in Judgment dated 14.06.2017 made in SC.No.126 of 2015 on the file of the learned Assistant Sessions Judge, Perundurai by allowing this Criminal Appeal.

For Appellants
in both CAs : Mr.N.Manokaran
For Respondent : Mr.K.Madhan,
in both CAs Government Advocate

COMMON JUDGMENT

These criminal appeals have been filed against the Judgment of the learned Assistant Sessions Judge, Perunduarai in S.C.No.126 of 2015. The appellant in Criminal appeal No.418 of 2018 Sathishkumar is the first accused in this case and the appellant in Criminal appeal No.328 of 2017 Santhoshkumar is the second accused in this case.

2.The respondent filed a final report against the accused under Sections 120 B, 460 and 394 r/w 397 IPC alleging that the accused conspired to commit robbery in the house of the victim Devikarani and in pursuance of the conspiracy, on 02.06.2013 at about 7.00 pm, they entered into the house of Devikarani and taking advantage of the fact that she was alone at the house, both the accused caused grievous injuries, A1 with a knife and A2 with an Aruval, to her at the back side of her head, left

shoulder, left wrist, fingers. The first accused robbed the gold bangles and the second accused robbed the gold chain wore by her. The acts of the accused are liable to be punished under Sections 120B, 460 and 394 r/w 397 IPC.

3.After the accused entered appearance, they were furnished with the free copies of the documents relied on by the prosecution under Section 207 of the Code of Criminal Procedure. Since there were sufficient materials to frame charges against the accused under sections 120 B, 460 and 394 r/w 397 IPC, the charges were framed under these sections and the accused were questioned about the charges. Denying the charges, they demanded trial.

4.During the trial, PW1 to PW14 had been examined and Exs.P1 to P22 had been marked and MO 1 to 13 had been produced on the side of the prosecution. On the side of the accused, Ex.D1 and D2 had been marked. In addition, Ex.C1 was marked as court exhibit.

5.Before proceeding further, it is better to understand the case of the prosecution as seen from the evidence of prosecution witnesses in this case. PW1 is the wife of PW2. PW3 is the brother of PW2. The first accused Sathiskumar is the son of Junior paternal uncle of PW1. PW1 knew both the accused. The first accused Sathishkumar was doing real estate business. He used to come to the house of PW1 and he used to ask money,sometimes, from PW1 for his business purposes. PW1 would inform her husband about his request and gave money to him. On 02.06.2013, at about 7.00 pm, Sathishkumar and another person came to her house. She asked Sathishkumar as to who is that other person?. Sathishkumar told that he is his friend Santhoshkumar. She gave drinking water to both the accused. Sathishkumar asked PW1 about his uncle (husband of PW1). She told him that her husband had gone to shop and would return at 8.30 pm. Sathishkumar asked her to switch on the television. She offered them tea. When she proceeded to take milk from the fridge, both the accused took her to nearby room and attacked at the back side of her head with aruval and with knife, hurt her tongue with knife and prevented her from speaking. Then she was dragged to hall. When she tried to ward off aruval and knife attack, she suffered injuries in his left ear, right shoulder, left wrist and ring finger. She lost lot of blood and she was not able to speak. Then both the accused escaped from the spot. She thought that she would die. But she wanted to intimate her husband about what had happened to her. Hence, she wrote on a nearby wall as "NTT Sathish friend kolai 7 p.m". Her husband came at 8.15 pm. On seeing the condition, her husband got worried and asked her what had happened. Then she informed about the visit of the accused Sathishkumar, her Junior paternal

uncle's son, and his friend Santhoshkumar and also about the attack against her and robbery committed by them. Then she got fainted. She identified the Gold chain and bangles wore by her at the time of incident as MO 1 and MO 2 and knife and aruval used for attacking her as MO 3 and MO 4. She regained her conscious at KMCH hospital, Erode on 24.06.2013. The spectacles wore by her at the time of incident is MO 6.

6.P.W.2 stated that after completing his work, he came home at about 8.15 pm on 02.06.2013 and he found that his wife was in a pool of blood with injuries. He asked her that what had happened. She informed him that NTT Sathish and his friend Santhoshkumar caused her injuries. He found a knife and aruval near his wife. They are marked as MO 3 and MO 4. He informed his paternal junior uncle's son Thirumoorthy about the incident. He came in an auto. He took his wife to KMCH, Perundurai. Doctor told him that his wife lost too much of blood and advised him to take her to Erode. Then he took his wife to KMCH, Erode. The Police came to hospital at about 11 pm and recorded his Ex.P1 statement. PW3 corroborated the evidence of PW2 with regard to telephonic information received from PW2 about the incident, immediately visiting him and taking PW1 to KMCH, Perundurai first and from there to KMCH, Erode. P.W.4 spoke about visiting the scene of crime and seeing the writings made on the wall with blood.

7.P.W.9 is a Doctor working in Perundurai KMCH Hospital. He told that on 02.06.2013 at about 8.30 pm, Devikarani was brought to hospital for treatment. He found that she had cut injuries on her neck, ears and on her back side of head and blood was oozing from the wound. He gave first aid treatment and sent her to KMCH, Erode. P.W.12 Doctor was working in KMCH, Erode stated that on 02.06.2013 at about 10.00 pm Devikarani was brought by her husband for treatment. He informed him that at about 8.15 pm, on the same day, two known persons had attacked Devikarani with sharp edged weapons and caused injuries. On examination, he found that Devikarani was looking weak and she was not able to speak. She obeyed the commands and opened her eyes and shaken her hands and legs. He found the following injuries on her body and entered in Ex.P14 wound certificate:

- i. Deep Laceration 5x2x2 cm over right occipital region
- ii. Laceration 7x2x2 cm over right Temporal parietal region
- iii. Laceration 1x0.5x0.5 cm behind right Pinna
- iv. Laceration 15x2x2 cm from left occipital region from left Pinna upto left cheek
- v. Deep laceration 8x3x2 cm over outer aspect of neck
- vi. Laceration swelling and one left shoulder (multiple)
- vii. Deformity of both wrist joint (+)
- viii. Laceration 5x2x3 cm on right hand dorsum
- ix. Laceration 4x1x2 cm on left hand dorsum

x. Dysphonia & Dysphagia due gross edema pharynx

8. On Radiological examination, it was found that there are fractures in right ring finger and left little finger. Nerves had been cut in both the hands and it was surgically treated. Tracheostomy was performed. She was taking treatment from 02.06.2013 to 14.06.2013 and from 21.06.2013 to 24.06.2013. Except injury No.6, all the other injuries are grievous injuries. Injury No.6 is simple injury. He also stated that the injuries could have been caused at the time and the manner in which the injuries alleged to have been caused.

9. P.W.10 who was the Sub Inspector of Police, Perundurai Police Station stated that on 02.06.2013 at about 10 pm, he received an intimation from KMCH Hospital, Erode and visited the hospital. Devikarani was taking treatment in Intensive Care Unit. Therefore, he enquired her husband PW2 Rajarathinam and recorded his statement at 11.00 pm. He came back to Police Station and registered Ex.P11 first information report in Crime No.389 of 2013 under Sections 394 r/w 397 IPC at 00.30 hours. He sent the first information report to the Judicial Magistrate and copies to the higher officials.

10. On 03.06.2013, P.W.14 was working as an Inspector of Police, Perundurai Police Station. On receiving the first Information report in this case, he visited the scene of occurrence at 01.45 am on 03.06.2013 and inspected the house in the presence of witness Rajarathinam, Gurusamy. He made arrangements to photograph the scene of crime by a photographer. P.W.7, the photographer, took photographs of the scene of crime at about 1.45 am. on 03.06.2013 as per instructions of the Inspector of Police, Perundurai Police Station. He took photos from 9 angles and handed over the photos and CDs to the inspector. 10 Photos are Ex.P8 and 2 CDs are M.O.9. P.W.14 prepared Observation Mahazar and Rough Sketch in the presence of the same witness.

11. P.W.5 Deivasigamani stated that he was informed by his sister Chitra, who is living next to the house of Devikarani, about the incident. He visited his sister Chitra's house and the scene of crime. He found blood in the hall and the writing on the wall with blood as "NTT Sathish friend kolai 7 pm". At about 1.45 am, the Police prepared Observation Mahazar and Rough Sketch and he attested the Observation Mahazar as a witness. The Observation Mahazar is Ex.P3. The Police recovered the blood stained knife, aruval, spectacles, the hair of PW1, blood stain cloths, mosaic floor with blood stain and without blood stain. Ex.P4 is seizure Mahazar. He signed in both the Mahazars along

with Munusamy. The Rough Sketch is Ex.P16. The pieces of hair is MO.12.

12. In continuation of his investigation, P.W14 visited KMCH Hospital, Erode to enquire P.W.1. As she was taking treatment in Intensive Care Unit, he could not enquire her. He recorded the statement of Rajarathinam, Thirumoorthy, Nagesh, Santhana murthy, Palanisamy, Malleswari, Umarani, Amutha, Saraswathy and Krithika, Deivasigamani and Gurusamy. He got secret information about the whereabouts of the accused. At about 1.00 pm, he was conducting vehicle search along with police party below the over bridge of NH 47 Vijayamangalam to Uthukule. The accused came in two wheeler bearing Registration No. TN39 V 5902 from South to North. When he stopped the two wheeler, the accused tried to take 'U' turn. However, the police rounded the accused and nabbed them. On enquiry, it was found that they are the 1st accused Sathishkumar and the 2nd accused Santhoshkumar. During enquiry, the accused informed him about causing injury to Devikarani and robbing her Jewelleries. He recorded their confessional statement in the presence of witness PW6 Arumugam and Sekar. The First accused Sathish kumar handed over one pair of gold bangles from his right side pant pocket. The 2nd accused Santhoshkumar handed over the Motorcycle bearing Registration No. TN39 V 5902 and also handed over the gold chain from the tool box to the Inspector. The accused Sathishkumar undertook to show the place where he had hidden the dress wore by him at the time of incident. The Seizure Mahazar is Ex.P17 and Motor Cycle is M.O.13. Then the accused took them to Thirupur Mannarai Road where the 1st accused had shown the place where he hide the black and blue colour full hand shirt and produced it. He recovered it under Ex.P18 seizure mahazar. The 2nd accused has also identified the place near Kasi Vishwanathar Koil where he had hidden the blood stained dress wore by him at the time of commission of offence and took blue colour half hand T Shirt and blue colour Jeans pant and handed over it. P.W.6 corroborated the evidence of PW14 with regard to the arrest of the accused, recording of their confessional statement given by the accused, the recovery of bangles from the accused Sathishkumar and recovery of chain and motorcycle from Santhoshkumar. M.O.6 is the Shirt, M.O.7 is the Jeans Pant and M.O.8 is the half hand T shirt. The seizure mahazar Ex.P19. The admitted portion of confessional statement of the accused Sathishkumar is Ex.P20 and the admitted portion of confessional statement of the accused Santhoshkumar is Ex.P21. PW.14 sent properties to the court under Ex.P22.

13. P.W.8 was working as a Head Clerk in the District Munsif and Judicial Magistrate Court, Perundurai. He received the properties in Crime No.389 of 2013 of Perundurai Police station in P.R.No.234 of 2013. As per Ex.P7, requisition of the

Inspector of Police to send the properties to chemical analysis and as per the orders of the Judicial Magistrate, he sent the properties to chemical analysis through Ex.P10 on 11.07.2013.

14.P.W.14 came to know on 24.07.2013 that PW1 regained conscious and therefore he gave requisition to Judicial Magistrate No 2, Erode for recording the dying declaration of Devikarani. P.W.11 was working as Judicial Magistrate No.2, Erode. On 24.07.2013, she received a request from the KMCH, Erode for recording the dying declaration of Devikarani. She proceeded to hospital and started to record the statement at about 6.45 pm. She questioned Devikarani about the incident. Devikarani was conscious and in a fit state of mind when she was giving dying declaration. She recorded her dying declaration and the same is Ex.P12.

15. P.W.13 was working as a Scientific officer in Coimbatore Regional Forensic laboratory. He received seven properties concerned in Crime No.389 of 2013 for forensic analysis. He found blood stains in Serial No.1 Aruval, 2. knife 3. Mosaic floor 6. T-Shirt 7. Jeans Pant and found no blood stains in S.No.4 plain Mosaic floor and 5. Full hand shirt. The blood samples were sent for serological examination. The properties are M.O.4 aruval, M.O.3 knife, M.O.10 blood stained mosaic floor, M.O.11 plain mosaic floor M.O.6 full hand shirt, M.O.7 jeans pant, M.O.8 T- shirt. The report is Ex.P15. .In continuation of his investigation, P.W14 examined the photographer, the Sub Inspector of Police and the Head Clerk. After completing the investigation he filed the final report under Sections 120 B, 460 and 394 r/w 397 of IPC.

16.The accused were questioned with regard to the incriminating evidence found against them in the evidence of prosecution witnesses. The accused denied those evidence as false. No oral evidence was produced on the side of the accused except marking of Ex.D1 arrest memo and EX.D2. photographs.

17.On considering the oral and documentary evidence produced before the trial court, the learned trial Judge found that the charges framed against the accused under sections 120 B, 460 and 394 r/w 397 IPC have been proved and found the accused guilty under these sections and sentenced them to under go five years rigorous imprisonment under Section 120 B of IPC and to pay a fine of Rs.2,000/-, in default to pay the fine to undergo rigorous imprisonment for three months; 10 years rigorous imprisonment under Section 460 of IPC and to pay the fine of Rs.5,000/- in default to pay the fine to under go rigorous imprisonment for 6 months; 10 years rigorous imprisonment under Section 394 r/w 397 of IPC and to pay a fine of Rs.5,000/-, in default to pay the fine to undergo 6 months rigorous imprisonment. Substantive Sentences are ordered to run

concurrently. Against the said Judgment, both the accused have preferred these Criminal appeals.

18. Mr.N.Manokaran, learned counsel for the 2nd accused and the appellant in C.A.No.328 of 2017, led the argument, which was ably supported and complimented by the learned counsel for the 1st accused for setting aside the Judgment of the Trial Court and for acquitting the accused. The grounds on which the learned counsel appearing for both the accused/appellants pray for setting aside the Judgment of the trial Court are as follows:

- i. There was a delay in giving the complaint and sending the FIR to the Court. The occurrence alleged to have been taken place at 7.00 pm on 02.06.2013. P.W.2 came to the spot at 8.15 pm and took PW1 to KMCH, Perundurai at 8.30 pm and then PW1 was shifted to KMCH, Erode and admitted there at 10.00 pm. P.W.1 was examined at 11.00 pm. FIR was registered at 00.30 hours on 03.06.2013. Express FIR was received by the learned Judicial Magistrate at 11.50 am on 03.06.2013. The Police Station is located just $\frac{1}{2}$ km away from the scene of crime. Judicial Magistrate Court and the Police Station are located in the same compound. This fact is admitted by P.W.1 to PW5 and PW.14. However, there is no reason as to why the complaint was not given immediately after the occurrence and why there was an inordinate delay in sending the complaint and FIR to the Court.
- ii. The complaint given by P.W.2 at the Police Station has been suppressed. It is seen from the evidence of P.W.10 that he received intimation from KMCH, Erode at 10.00 pm on 02.06.2013, thereafter went to hospital and recorded the statement of P.W.2 at 11.00 pm. He registered FIR at 00.30 hours. However, P.W.2 states that he had gone to Police Station and gave a written FIR. The complaint given by him in the Police Station is different from the statement given by him at the hospital. He also stated that he was given a receipt for registration of FIR. Copy of Ex.P1 complaint was not supplied to the accused at the time of furnishing copies. Copy of the complaint was given only at the time of marking. It shows that Ex.P1 was prepared after fixing the accused and arresting them on 03.06.2013. It is also clear from Ex.C1 affidavit petition filed under Section 451 of Code of Criminal Procedure that P.W.2 gave a complaint at the Police Station. Therefore, the first complaint given to the police by PW.2 is suppressed. It affects the very foundation of the case of the prosecution.
- iii. The Accident Register and medical records from KMCH, Perundurai are not produced. It is seen from the evidence

of P.W.2 and P.W.3 that they had taken P.W.1 to KMCH, Perundurai and after giving first aid treatment, she was shifted to KMCH, Erode. It is necessary to make entries in accident register with regard to the injuries and treatment particulars in medic legal case. However, no such entry has been made in the accident register in KMCH, Perundurai with regard to the alleged treatment given to PW.1. Therefore it creates a strong doubt as the the first aid treatment alleged to have been given to P.W.1 at KMCH, Perundurai. Only to cover up the delay, the story of first aid at KMCH, Perundari is projected.

- iv. It is the evidence of P.W.9 that P.W.1 would have lost her conscious within 15 to 30 minutes of the occurrence. Therefore, the claim of P.W 2 that P.W.1 informed him about the occurrence could not be believed. It is the case of the prosecution that P.W1 regained conscious only on 24.06.2013. Therefore the version of the prosecution that P.W 1 had written something on the wall with blood could not have been true and it is unbelievable.
- v. P.W 2 and P.W.3 accompanied P.W 1 to hospital with blood stained cloths. However no blood stained cloths were not recovered from them and subjected to forensic examination. It also creates a doubt in the case of the prosecution.
- vi. It is seen from Ex.P12 that the dying declaration of P.W.1 did not mention the name of the 2nd accused. She just said the name of Sathishkumar with someone. It establishes that the 2nd accused has no connection with the crime. In fact, when police conducted vehicle check on 03.06.2013, he picked up quarrel with the police. Therefore he was arrested at 12.30 pm on 03.06.2013 and falsely implicated in this case. No Test Identification Parade had been conducted for identifying A2. The 2nd accused is not familiar to P.W.1 and in fact he is a stranger to her. She deposed that she had seen the 2nd accused on 02.06.201.3 and came to know his name only through the 1st accused. She has not mentioned any physical description of the 2nd accused to her husband. No photograph of the 2nd accused had been shown to P.W.1 or P.W.2. Even at the time of giving evidence, P.W.1 has not identified the 2nd accused. Therefore, the involvement of A2 in this crime has not been established by the prosecution.
- vii. Insertion and interpolation in Ex.P4, Ex.P11, Ex.P22. Express report and other material documents were sent to Court only at 11.50 pm on 03.06.2013. The accused were arrested at 12.30 am on 03.06.2013. It is evident that the alteration and interpolation made in Ex.P4, Ex.P22 and

Ex.22 with regard to M.O1 and M.O.13. Similar insertions were made in Form 91 for M.O.4 and M.O.5. These insertions and interpolations clearly show that the material objects have not been seized at the place and time alleged by the police and they have been created for the purpose of this case.

viii. No compliance of Section 65B (4) of the Indian evidence Act. Ex.P2, Ex.P.8 and M.O.9 were not accompanied with a certificate given under Section 65B (4) of the Indian Evidence Act. Therefore as decided recently by the Hon'ble Supreme Court reported in (2020) 7 SCC these documents and material object cannot be relied on by the Prosecution. Moreover, the CD has to be marked only as document and not as material object as decided in 2020-1 L.W (Cr1) 693. However, the CD has been marked as material object in this case. Therefore, Ex.P2,Ex.P8 and MO. 9 cannot be relied on in the absence of certificate under Section 65B (4) of the Indian Evidence Act. When Ex.P2 , E.x.P8 , M.O.9 is out of consideration by this Court, there is no acceptable corroborating evidence to support the case of the prosecution.

19. Apart from these grounds, the learned counsel appearing for the appellants brought to notice of this court, the following omissions and laches in the case of the prosecution:

- a) No reference in Ex.P13 as to whom the intimation was given or by whom it was received.
- b) Photos taken through digital camera, but the memory chip was not seized.
- c) Ex.P2, Ex.P8 and MO9 were not seized under Form 91
- d) No steps taken to get the report from the finger print and foot print expert.
- e) Aruval without handle was seen in Ex.P2 photo, but MO4 is with handle
- f) PW 11 admits the corrections made in the Arrest Card (Ex.D1)
- g) MO 1 and MO 2 (jewels) were produced before the Court only on 05.07.2013.
- h) P.W.1 admits interpolations made in Ex.P4, but, without initial.
- i) P.W.1 admits similar corrections both in Ex.P4 and Ex.P22
- j) Bloodstained dress materials of PW2 and PW3 were not recovered.
- k) No records to prove the ownership of A2 for MO 13 (Motorcycle)
- l) PW.11 admits that PW1 was in the hospital for 22 days.
- m) MO1 and MO2 were not packed and sealed after recovery
- n) Name of A2 was found in the 161 statement given by PW1

20. Pointing out these lapses, omissions and the material contradictions, the learned counsel appearing for the accused /

appellants submitted that the prosecution case has not been proved beyond reasonable doubt. The fact that however gruesome and enormous a crime may be, the guilt or otherwise of the accused has to be decided only on the basis of acceptable and reliable evidence. In the absence of full proof and legally acceptable evidence, no one can be punished. From the Judgement reported in (1973) 2 SCC 808, the learned counsel for the appellants pointed out the following observation of the Hon'ble Supreme Court:

"It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the Judicial system, much worse, however, it is wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society."

"Certainly it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions"

Hence, the learned counsel for the accused/appellants pray for setting aside the judgment of the trial court and acquitting the accused by allowing the criminal appeals.

21. Per contra, the learned Public Prosecutor submitted that P.W.1 has clearly spoken about the occurrence. Her evidence is supported by P.W.2 to P.W.5. The points now raised have also been raised before the trial Court and the learned trial Judge had considered all those points extensively and rejected them as not material. Anyone who is near and dear of a victim will give first priority to give treatment to the victim in order to save the life of the victim. Only then they will think of giving police complaint. May be that the police station situates within ½ km or one km from the scene of crime in this case, the priority for P.W.2 was to give to immediate medical treatment to his wife PW1, who was seriously injured with multiple injuries. Hence, she was taken to hospital first and her medical treatment was taken care of. That is the reason why there was a delay in giving the police complaint. Similarly, the delay in sending the complaint, express FIR to the Court is because of administrative reason in the police station. There may be some delay in sending the complaint and FIR to the police station, but the delay is not of such magnitude to be considered as enormous delay. P.W.1 was given only the First Aid Treatment at KMCH, Perundurai and she was immediately shifted to KMCH, Erode for treatment. That was the reason as to why the treatment given there was not entered in the accident register. Even otherwise, the failure on the part of the doctor working in the private hospital, who may not be well versed with the legal

procedures in medico legal cases is not a ground to reject the case of the prosecution.

22.He further submitted that the perusal of the evidence of P.W.2, and connected documents namely the complaint and FIR clearly shows that P.W.2 gave only one statement and that was recorded by P.W.10. May be because of lack of understanding the question, P.W.1 appears to have given confusing answers. There is no second complaint or previous complaint as alleged by the accused. The non recovery of blood stained cloths from P.W.1 to P.W.3 is the omission on the part of the investigation officer. However, in the facts and circumstances of the case where the evidence of P.W.1 is available with regard to the occurrence and participation of the accused in the crime, the non recovery of blood stained cloths of P.W.1, P.W.2 and P.W.3 and subjecting them for forensic analysis will no way affect the case of the prosecution. With regard to insertion and interpolation in Mahazar and Form 91, though there are some insertions and interpolations, nothing had been altered differently or with new information. Descriptions of material objects had only been elaborated, which will no way affect the case of the prosecution.

23.With regard to Section 65B(4) of the Indian Evidence Act, it is submitted that the Judgment was delivered on the basis of point of law prevailing then. Even without photos and CDs, sufficient and ample evidence are available to prove the role of the accused in the crime and the prosecution succeed in proving the guilt of the accused. The trial Court had properly appreciated the evidence and correctly found the accused guilty of the charges framed against them and imposed them with suitable punishments. Therefore, the learned Public prosecutor prays to confirm the Judgement of the trial Court and for the dismissal of the criminal appeals.

24.Point for consideration is whether the Judgment of the trial court suffers from any in correctness, illegality or improprieties in convicting the accused and sentencing them for the charges framed against them under Sections 120-B, 460, 394 r/w 397 of IPC?

25. I have considered the rival submissions.

26.In view of the latest Judgement of the Hon'ble Supreme Court in the case of Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others reported in (2020) 7 SCC 1, 65B (4) Certificate is mandatory for considering the electronic evidence.When the issue relating to the requirement of Certificate under Section 65 B (4) of the Indian Evidence Act, was referred to three member bench to settle the conflicting views expressed by the Hon'ble Supreme Court in Anvar P.V. Vs P.K. Basheer reported in (2014) 10 SCC 473 and Shafhi Mohammad

Vs State of Himachal Pradesh reported in (2018) 2 SCC 801, the Hon'ble Supreme Court answered that the certificate under Section 65 B (4) of the Indian evidence Act is mandatorily required and the oral evidence in the place 65 B94) certificate cannot be possibly suffice, as the certificate under section 65 B (4) of the Indian Evidence Act is a mandatory requirement of law?

27.Now, It is necessary to find out whether Ex.P2, Ex.P8 photos, M.O.9 CDs and Ex.D2 can be relied by the prosecution and the defence. Ex.P2 and Ex.P8 photos and M.O.9 CDs are electronic records as per Section 3 of the Indian Evidence Act. Admittedly, the prosecution has not produced the certificate under Section 65 B (4) of the Indian Evidence Act at the time of producing these documents before the trial court. Therefore, as per the law settled law now with regard to the admissibility of the electronic evidence, this Court is of the considered view that Ex.P2 and Ex.P8 photos and M.O.9 CDs produced by the prosecution and D2 photos produced by defence cannot be looked into in support of either the case of the prosecution or the case of the accused. The case has to be decided on the basis of other evidence available in this case.

28. Some of the proved facts from the evidence produced in this case are,

- i. P.W.1 and the 1st accused Sathishkumar are related to each other. The accused Sathiskumar is the son of the Junior paternal uncle of P.W.1.
- ii.The fact that P.W 1 suffered extensive injuries as seen from Ex.P14 wound certificate and the evidence of P.W12 Doctor. Of the 10 injuries, except the injury no.6, other injuries are grievous injuries. P.W.1 was given treatment by surgical and other procedures at KMCH, Erode. These facts are not disputed and proved facts. The point to be considered is who was responsible for causing injuries found on P.W.1.

29. According to the case of the prosecution, the accused were responsible for causing injuries to P.W1 in their attempt to rob PW.1 of her jewelleryes. The accused stoutly denied the allegations and claim that they are noway connected with the crime alleged against them. We have an eyewitness who is also victim in this case in the form of P.W.1. With regard to weightage of evidence attached to the injured witness, the Hon'ble Supreme Court in Abdul Sayeed Vs State of Madya Pradesh in Criminal Appeal No.1243 of 2007, dated 14.09.2010 held that

"the question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the

occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a build-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness."

30. It is seen from this Judgement that the testimony of the injured witness is considered to be very reliable because that comes with a guarantee of her presence at the scene of crime and the unlikelihood of sparing the actual assailant(s) in order to falsely implicate someone. Though feeble attempt was made by the accused that there was some money transactions between the 1st accused and P.W.1 and P.W.1 did not return a sum of Rs.1 lakh alleged to have been borrowed from the 1st accused, there is nothing produced to support this allegation. In fact, nothing concrete was elicited from P.W.1, with regard to any previous enmity or motive against the accused, for P.W.1 to falsely implicate the accused. If somebody else had caused the grievous injuries suffered by P.W.1, she would have certainly given a complaint against those persons. There is no reason why she had to screen the real offenders and falsely implicate the accused.

31. It is seen from the evidence of P.W.1, that on 02.06.2013 at about 7.00 pm, both the accused had come to her house. She offered them seat in the sofa. She enquired the 1st accused as to who was the other person. The 1st accused informed her that the other person was his friend Santhoshkumar. During the cross examination by the 2nd accused, she stated she had seen the 2nd accused Santhoshkumar on a previous occasion. The 1st accused had brought him and he was standing outside the house. She admitted that she did not inform the Judicial Magistrate about the name of the 2nd accused. But she said that the friend of the 1st accused had come along with him. It is not known why P.W.1 had omitted to inform the name of the 2nd accused when her dying declaration was recorded. But the fact remains that even before giving the statement before the learned Judicial Magistrate she informed her husband P.W. 2 about the presence of the 2nd accused by his name along with the 1st accused. P.W.2 had also given Ex.P1 complaint specifically mentioning the names of both the accused Sathishkumar and Santhoshkumar. Therefore, this court is of the considered view that the omission to mention the name of the 2nd accused Santhoshkumar in her dying declaration before the Learned Judicial Magistrate is of no adverse consequence to the case

of prosecution.

32. Another circumstance which establishes the presence of both the accused in the scene of crime, apart from the evidence of P.W.1 is the writing on the wall. After the occurrence, P.W.1 wrote on a wall with her own blood about the perpetrators of the crime as "NTT Sathish friend Kolai 7 pm". Immediately after her husband P.W.2 came home at 8.15 pm, she informed him about the crimes committed by the accused Sathishkumar and Santhoshkumar. In spite of multiple serious injuries caused to her, she kept her will power, grit, determination and survival instinct to the highest degree in trying to keep her alive with an objective to inform her husband about the perpetrators of the crime and she made the aforesaid writing on the wall. This writing was spoken to by P.W.2 her husband, P.W.3, the brother of P.W.2. P.W.4, the resident of the area, and P.W.5, the brother of Chitra who was residing next to the house of P.W.1. Later P.W.1 identified the accused Sathishkumar and Santhoshkumar as the persons who attacked her with knife and aruval and robbed her of jewellery.

33. One more circumstance which established the presence of the the second accused at the scene of crime, whose presence is seriously disputed by the accused on the ground that he is a stranger to P.W.1, is the blood stained dress wore by him at the time of occurrence, namely MO 7 Jeans Pant and MO 8 T-shirt. These material objects were recovered in pursuance to the information provided by the second accused at the time of his arrest. The information provided by him led to the discovery of fact that the dress wore by him at the time of commission of the offence had been hidden by him. Recovery of these material objects at the instance of the accused is very much relevant under Section 27 of the Indian Evidence Act. These M.O.7 and MO 8 material objects along with some other material objects had been sent for chemical analysis. Ex.P15 serological report shows that the blood found on MO7 and MO8 Jeans Pant and T-Shirt was human blood. Similarly, the blood stains found in MO3 knife MO4 aruval seized from the scene of crime also contain the traces of human blood. So is the case with the blood stained mosaic tile piece sent for forensic analysis. The blood stains found on the mosaic tile piece was also identified as human blood. How come the human blood stain come into contact with MO7 Jeans Pant and MO 8 T-Shirt belong to the second accused and recovered at his instance. It further strengthens the case of the prosecution about the presence of the second accused along with the first accused at the scene of crime during the commission of crime and also his active involvement in attacking P.W.1 with aruval. On the whole, the omission to mention the 2nd accused name when P.W.1's dying declaration was recorded, in the considered view of this court, would no way affect the case of

the prosecution. The evidence of PW1 is very cogent and convincing with regard to offences committed by the accused Sathishkumar and Santhoshkumar against her. There is no reason to disbelieve or discredit her evidence.

34. With regard to submission made by the learned counsel appearing for the accused/ appellants on the aspects of delay, laches, omissions, insertions, interpolations, contradictions, they will be taken for consideration of one by one.

35. With regard to delay in giving complaint and sending it to the learned Judicial Magistrate, it may be true that the police station is located just $\frac{1}{2}$ km from the scene of occurrence. But the priority, as argued by the learned Public Prosecutor, for the near and dear ones, especially the husband of the victim is not to go to police station and give a police complaint first. The first and foremost priority is to give immediate medical treatment to the victim. That was done in this case. P.W.2 along with P.W.3 took PW1 to KMCH, Perundurai and there he was asked to go to KMCH, Erode. Therefore, he took P.W.1 to KMCH, Erode. When P.W.1 was taking treatment at KMCH, Erode, P.W.10 came there to record his statement at 11.00 pm. The complaint was given within 2 hours 45 minutes from the time P.W.1 came to know about the occurrence. Considering the enormity of the situation, the immediate medical treatment required to be given to P.W.1, the time taken for giving complaint cannot be considered as a delay at all.

36. It is admitted by the police officers that the police Station and the magistrate court situate in the same compound. However, the express FIR reached the court only at 11.50 am on 03.06.2013. The occurrence had happened at 7 pm which came to the notice of P.W.2 at 8.15 pm. The complaint was recorded at 11.00 pm. FIR was registered at 00.30 hours on 03.06.2013. Exactly there was a delay of 11 hours 20 minutes in sending the FIR to the court. Yes, there is some amount of delay in sending the FIR to the court, which situate in the same compound. The perusal of complaint and the FIR shows that there is nothing addition or omission or correction to suggest exaggeration or embellishment in the version of the prosecution case. It is expected and required that FIR should be sent to court at the earliest point of time. However, delay cannot be avoided sometimes for various reasons as submitted by the Public Prosecutor. The delay might have been caused by some administrative reasons as submitted by the Public Prosecutor. Though there is a delay in sending the FIR to the Court, it cannot be considered as enormous delay as suggested by the learned counsel appearing for the accused. There is nothing brought out on record by the accused as to the prejudice caused to the accused on account of this delay.

37. It is submitted by the learned counsel appearing for the accused that the police arrested the accused beforehand and prepared all the supporting documents to suit the case of the prosecution and only then sent the FIR and complaint to the Court. In fact, it is submitted that there was one more complaint given by P.W.2 in the Police Station and that has been suppressed. My attention was drawn to the the evidence of P.W.2, wherein he stated that he came to police station and gave a written FIR; the complaint written in a police station is different from the statement given at hospital; police gave receipt for the FIR. This particular portion of P.W.2's evidence is sought to be taken advantage by the accused for supporting argument that there was another complaint given by P.W.2 in the police Station and that was suppressed. However, the perusal of Ex.P1 complaint and Ex.P11 FIR shows that the FIR was registered on the statement given by P.W.2 to P.W.10 at KMCH, Erode. There is nothing to suggest that P.W.2 had gone to police station and given another compliant. A person can either give a written complaint or a oral statement. He cannot give a written FIR. FIR is registered only by the police. PW.2 had inadvertantly said that he had given a written FIR in the police station. It is the duty of the police to register FIR. Sometimes even the educated and informed persons do not understand the difference between a statement, compliant and the FIR. Therefore, the mistaken answer given by P.W.2 without understanding the question with regard to the FIR given in the police station, cannot be taken advantage by the accused.

38.Ex.C1 is sought to be relied on for supporting the argument of the accused that P.W.2 had given complaint at Perundurai Police Station. It is stated in the affidavit that P.W.2 had given a complaint in Perundurai Police Station. It meant that there is only one complaint and on the basis of the complaint, the case was registered in Crime No.389 of 2013. That does not mean that he had given one more complaint to the Perundurai Police station. Therefore, the reliance of Ex.C1 affidavit would no way help the case of the accused.

39. Too much was said about the omission on the part of P.W.9 to enter the particulars of injuries and the treatment given to P.W.1, when she was brought to KMCH, Perudarai. It is true that P.W.9 had not made any entries in the accident register of KMCH, Perundarai when he gave first aid treatment to P.W.1 He was very specific about the fact that he had given only the first aid treatment to arrest the blood by applying bandage. It is desirable that he had entered the details of treatment given to P.W.1 in the accident register of KMCH , Perundurai. However, because of his failure to make entries in the accident register of KMCH, Perundurai, nothing can be made

out against the case of the prosecution for the reason that within a short time, that is at about 10.00 pm, P.W.1 was admitted in KMCH, Erode and P.W.2 informed P.W.12 Doctor that two known persons attacked P.W.1 with sharp edged weapons and she suffered injuries. It is seen from the evidence of P.W.9 that P.W.1 was not conscious at the time of examination. Therefore, whatever that has to be said about the occurrence could have been said only by P.W.2 and he told about the occurrence to P.W.12 Doctor at KMCH, Erode within a short time of leaving KMCH, Perundurai. Therefore, this Court is of the considered view that the failure on the part of PW9 to make entries in the accident register at KMCH, Perudurai with regard to the treatment given to P.W.1 would no way affect the case of the prosecution.

40. It is submitted by the Learned Counsel of the Appellants that it is seen from the evidence of P.W.9 that P.W.1 would have lost conscious within 15 to 30 minutes of the occurrence and therefore she would not have been in a position to inform P.W.2 about the occurrence. It is clear from the evidence of P.W.1 that she wanted to inform her husband about the crime committed against her and therefore she had written on the wall about the name of the 1st accused "NTT Sathish friend kolai 7 pm". It shows her grit, determination, will power, more than that, her survival instinct to make her husband known about the perpetrators of the crime. It is clear from her evidence that she was trying to keep her alive to inform her husband about the incident. P.W.1 was taken to KMCH, Perundurai in an auto. Due to travel in an auto to the hospital and due to loss of further blood, she would have lost conscious at the time when P.W.9 saw her. That does mean that P.W.1 was not conscious at the time when P.W.2 saw her at 8.15 pm. Therefore, the evidence of P.W.9 that P.W.1 would have lost conscious within 15 to 30 minutes of the occurrence is without any scientific reasons and based on assumption and therefore, his evidence in this regard cannot be accepted.

41. With regard to non recovery of blood stained dress of P.W.1, P.W.2 and PW.3, it is desirable that the blood stained cloths would have been recovered by the police during investigation. However, the non recovery of these objects would no way affect the case of the prosecution for the reason that the injured (P.W.1) is alive and was able to identify the perpetrators of the crime against her. Therefore, non recovery of cloths of P.W.1, P.W.2 and PW.3 would have no adverse consequences to the case of the prosecution.

42. As to non mentioning the name of the 2nd accused in the dying declaration and failure to conduct the Test Identification Parade, it has already been decided that first accused is the relative of P.W.1 and the second accused was introduced to her

by the 1st accused. It can be gathered from her evidence that she had already seen the second accused on a previous occasion when the first accused was brought him to her house. Therefore failure to conduct the Test Identification Parade and non-mentioning the name of the 2nd accused in the dying declaration would not affect the case of the prosecution.

43. With regard to insertions found in Ex.D1, it was written that there was no recovery from the accused Sathishkumar. Subsequently, the recovery of MO1 and M O13 had been inserted. Though there is a correction done on the face of the records, it is seen from the "dates and events" in a typed format produced on the side of the 2nd accused that he was intercepted by the police during vehicle check up on 03.06.2013 and he picked up quarrel with the police and therefore he was arrested at 12.30 am on 03.06.2013 and implicated in this case. It establishes the fact that on 03.06.2013 A2 was intercepted and arrested during the vehicle check up. May be, due to oversight the recovery of material objects has been wrongly omitted in Ex.D1. Therefore, the insertions and interpolations in Ex.D1 would no way affect the case of the prosecution. Similarly, the insertions and interpolation made in Exs.P4, P6, P22 relate only to a detailed description of the properties already seized. That will not in any way affect the genuineness of the prosecution case.

44. Another submission was made with regard to failure to establish the ownership of M.O 13 motorcycle. The fact that MO13 motorcycle was ridden by A2 at the time of interception during the vehicle check up on 03.06.2013 is admitted by the second accused in the written submission filed in the form of "Dates and Events". Therefore, the failure to produce ownership records of MO13 motorcycle would be no relevant to the facts and circumstances of the case. PW1, PW2, witnesses to observation mahazar, confessional statements and seizure mahazar, and the investigating officer and the other witnesses had been extensively cross examined by the accused. Nothing incriminating was elicited against the prosecution case and in favour of the accused during the course of the cross examination. When a witness is deposing about an incident after a long time and for a long duration in the witness box, there bound to occur certain contradictions. What we have to consider is whether the contradictions are material contradictions and affect the foundation of the prosecution of the case. Whatever the contradictions pointed out by the learned counsel appearing for the accused in the evidence and case of the prosecution and the lapses, omissions, insertions, interpolations do happen in the natural course of investigation and when giving evidence. In the considered view of this court, these contradictions and lapses, omissions, insertions, interpolation are

inconsequential in nature and would no way affect the case of the prosecution.

45. On the complete evaluation and appreciation of the oral and documentary evidence produced in this case, this Court is of the considered view that the prosecution proved the charges against the accused under Sections 120 B, 460, 394 r/w 395 IPC beyond any reasonable doubt. The learned trial judge has properly appreciated the evidence and rightly convicted the accused for the charges framed against them and imposed suitable punishment. This Court has no reason to interfere with the Judgment of the trial court and hence it is confirmed.

46. In this view of the matter, the both the criminal appeals are dismissed. It is seen from the judgment of the trial court that there is nothing said about the set-off available to the accused under section 428 of the Code of Criminal procedure. Period of imprisonment undergone by the accused during the trial is ordered to be set-off under Section 428 of Criminal Procedure Code. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

1.The Assistant Sessions Judge, Perundurai.

2.The Superintendent, Central Prison, Coimbatore.

3.The Inspector of Police,
Perundurai Police Station,
Erode District.

4.The Public Prosecutor,
Madras High Court, Chennai.

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

+1cc to M/s.N.Manokaran, Advocate, S.R.No.28

C A.Nos.328 of 2017 & 418 of 2018
and Crl MP No.13860 of 2019

KJ(CO)
KKV/11/03/2021