

BAIL SLIP

The Petitioner/Accused Viz.G.Sathish @ Sathishkumar S/o.Gandhi was directed to be released on bail as per the Order of this Court Dated 10/06/2019 in Crl.M.P.No.15882/2018 in Crl.Appeal No.766/2018 on the file of this Court.

BAIL SLIP

The Petitioner Viz., Manikandan S/o.Anbalagan was released on bail as per the Order of this Court Dated 24/10/2019 in Crl.M.P.No.14867/2019 in Crl.A.No.537/2019 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.12.2020

Delivered on : 23.12.2020

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH

AND

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

Criminal Appeal Nos. 688 & 766 of 2018 and 537 of 2019

Kozhi Prakash ..Appellant
in Crl.A.No. 688/18/A1

Manikandan ..Appellant
in Crl.A.No. 537/19/A2

G.Sathish @ Sathishkumar ... Appellant
in Cr.A.No.766/18/A3

Vs

The Inspector of Police,
Kannankurichi Police Station,
Salem District.

... Respondent
in all Crl. Appeals

Common Prayer: Appeals filed under Section 374(2) of Criminal Procedure Code against the judgment passed in S.C.No. 85 of 2015 on the file of I Additional Sessions Court, Salem dated 06.02.2016.

For Appellant : Mr.Philip Ravindran Jesudoss
in Crl.A.No. 688/2018
Mr.V.Parthiban
for Mr.M.Mohamed Saifulla
in Crl.A.Nos. 766/18 & 537/19

For Respondent : Mr.K.Prabhakar,
Addl. Public Prosecutor

COMMON JUDGMENT

M.M.SUNDRESH, J.

The appellants were arrayed as A1 to A3 in S.C.No. 85 of 2015 on the file of the I Additional Sessions Court, Salem. They were charged with the following charges:-

A	1 st charge	Criminally Conspired to commit the murder of deceased under Section 120 (B) IPC against A1 to A3
B	2 nd Charge	Murder - Under Section 302 IPC - against A1
C	3 rd Charge	Common Intention to commit murder - Under Section 302 r/w 34 IPC - against A2 and A3
D	4 th Charge	Criminally intimidated the witnesses - under Section 506(ii) IPC - against A1.
E	5 th Charge	Criminally intimidated the witnesses with common intention - Under Section 506 (ii) r/w 34 IPC - against A2 and A3

2. Accordingly, the trial Court convicted A1 under Sections 120-B, 302 and 506(ii) IPC while A2 and A3 were convicted under Sections 120-B, 302 r/w 34 IPC and 506(ii) r/w 34 IPC with the major punishment of life sentence among others.

3. Criminal Appeal No. 668 of 2018 is filed by A1, Criminal Appeal No. 537 of 2019 is filed by A3 and Criminal Appeal No. 766 of 2018 is by A2.

Prosecution Version:

4. A1 was having prior enmity with the deceased as the deceased was making a demand for payment of water can charge

from his wife. A2 and A3 are the friends of A1. They went to the house of the deceased on 01.11.2014 and threatened him. While A1 threatened the deceased by questioning him on the demand for payment from his wife, A2 and A3 pacified him and took him away stating that the deceased would be taken care of later. This was stated to have been done in the presence of P.W.1 - wife the deceased and P.W.2 - father. Thereafter, while the deceased was walking along with P.W.1, he was seen by A1, who instructed A2 and A3 to catch the deceased and cut him causing death with a single stab injury. A2 and A3 were stated to have caught hold of the deceased. P.W.7 and another witness took the deceased in a two-wheeler to a Government hospital. The deceased was pronounced dead. P.W.1 thereafter came to the police station and gave a complaint which was registered by P.W.12 - Sub-Inspector of Police under Ex.P17 at about 10.30 p.m.

5. P.W.14 recorded the statements, prepared the observation mahazar, inquest report and filed the final report on 04.02.2015. The case was committed to the Principal District Judge, Salem and thereafter made out to the I Additional Sessions Court, Salem for trial. After framing the charges, the same was read over and explained to the accused, who pleaded not guilty.

6. The prosecution had examined fourteen witnesses in total while marking Exs.P1 to P27 apart from M.Os 1 to 12. On behalf of the accused, neither oral nor documentary evidence was let in. The accused were placed with the incriminating materials while complying with the mandate of Section 313 Cr.P.C. They, accordingly, denied such materials put against them. The trial Court, upon considering all the offences before it, was pleased to render conviction, as aforesaid. Laying a challenge to set aside the judgment rendered, all the accused have filed these three appeals.

Witness, Documents and Material Objects:

7. P.W.1, is the wife of the deceased and also the eye witness. She not only stated about the motive qua the prior occurrence but also the actual occurrence. In her cross-examination, she has stated that she and her husband were walking on the road. The accused were present in the liquor shop, which was situated on the way. A1 shouted that the person who insulted his wife by making a demand is going and asked the others to capture him to finish him off. Accordingly, A2 and A3 ran and caught hold of the deceased while A1 used M.O.5 which is a USA Super knife and stabbed the deceased on his chest. At that point of time, P.W.1 shouted and P.W.2, who is her father-in-law came from the nearby hotel in which he was taking food.

P.W.3 and P.W.7 also came running along with two other persons by name, Ganapathy and Vinoth, who had not been examined. Thereafter, all the accused ran away. P.W.1 saw the occurrence from the electric light used in the nearby shops and the street lights. She gave a complaint under Ex.P1. She also identified the materials objects used by the deceased. On a query P.W.1 had stated that for the earlier occurrence, no complaint was given as it was felt that the accused were under the influence of alcohol. To be noted, the statement of P.W.1 given under Section 161 Cr.P.C on 07.11.2014 reached the Court within 4 days. From the evidence of P.W.1, the presence of A1 could be very well seen. A1 was the one, who stabbed the deceased with M.O.5 causing a single injury.

8. P.W.2 is the father-in-law of P.W.1 and thus, the father of the deceased. He was working as a Sheristhadar at the Chief Judicial Magistrate, Salem. He also speaks about the earlier occurrence and the subsequent one. It is his further evidence that the accused fled the place after threatening. He has deposed that he ran to the place of occurrence after hearing the voice of P.W.1. However, in his cross-examination, he has stated that in the police enquiry, he has stated that he was in the mutton shop at the time of occurrence. There were number of persons present at the place of occurrence. On the earlier occasion, A1 was pacified by A2 and A3. He told the relatives of A2 and A3 not to indulge in activities along with A1, after the first occurrence. He saw the occurrence from the street light. A threat got exerted by A1 after the occurrence. This witness further speaks about the subsequent development as deposed by P.W.1. Even the statement of the witness under Section 161 Cr.P.C reached at the same time as that of the one made by P.W.1.

9. P.W.3 is the friend of the deceased. According to him, he was informed about the earlier occurrence happened on 01.11.2014 by the deceased. He overheard the accused talking to each other while he at the bar for the purpose of drinking on 04.11.2014. This was informed by him to the deceased. He once again saw the occurrence when the deceased and P.W.1 were walking before him. He did not go to the hospital as his vehicle tyre was punctured. Though he was in the habit of drinking, he did not know about that of the deceased who is stated to be his friend. Thus he went thereafter. This statement of P.W.3 reached the Court after 89 days.

10. P.W.4 is the Village Administrative Officer, who signed the observation and the seizure mahazar under Ex.P.2 while recovering M.Os. 6 and 7 (blood stained soil and sample soil).

11. P.W.5 is the Village Administrative Officer, who

attested Ex.P4 confession statement of A1 and Ex.P5, which is the seizure mahazar for M.O.5 - knife and M.O.8 - shirt of A1.

12. P.W.6 is the another Village Administrative Officer who attested Ex.P6 - confession statement of A2 followed by recovery mahazar under Ex.P7 for M.Os 9 and 10. He also attested Ex.P8 - confession statement of A3 leading to seizure mahazar under Ex.P9 and recovery of M.Os. 11 and 12, which are T-shirts and Trousers of A3.

13. P.W.7 is the eye witness, who took the deceased to the hospital and in particular P.W.12, the duty Doctor. The Doctor, who signed the Accident Register under Ex.P16 is P.W.12. Ex.P16 states that the person who admitted, namely, P.W.7, did not know the details of the deceased. The Doctor, who has been treated as hostile while examining P.W.12 has deposed in tune with Ex.P16. The statement of P.W.7 cannot reach after 88 days and that too when the statement of P.W.12 reached after 74 days. These documents were stated to have been filed along with the final report, like that of the statement of P.W.13.

14. Similarly, the statement of P.W.5 was also sent to the Court after 89 days, though the statement made by P.W.4 reached as that of P.Ws. 1 and 2 with respect to the recording statements under Section 161 Cr.P.C.

15. P.W.8 is the witness, who speaks about the prior occurrence stated to have occurred on 01.11.2014. Even the statement of this witness under Section 161 Cr.P.C was received after 88 days by the Court.

16. P.W.13 is the Sub-Inspector of Police(as he then was), who registered the complaint given under Ex.P1 in the form of First Information Report under Ex.P17. His statement though recorded at the earliest point of time along with of P.W.8, once again reached the Court belatedly as produced along with the final report.

17. Some of the documents marked on behalf of the prosecution starting from the complaint, observation mahazar and seizure mahazar among other documents reached the Court within the reasonable time. We further note that even the admissible portion of the confession statement of A1 under Ex.P4, P6 and P8, reached the Court on the 10th November, 2014 after recording on the 7th November, 2014.

18. The Doctor, who conducted the post-mortem and gave the post-mortem report under Ex.P12 has opined that there were abrasions on the nose, left toe and knee while there was a deep

cut injury on the right chest of the body. He has further deposed that it is possible that the other injuries could have occurred by possibly falling down after being stabbed.

19. The trial Court rendered the conviction as aforesaid making substantial reliance on the evidence of the prosecution witness, in particular, P.Ws 1 to 3 and 7. The trial Court also accepted the recovery made pursuant to the confession statement given by the accused.

Submissions:

20. Learned counsel appearing for the appellants made the following submissions.

There is an inordinate delay in the statement recorded under Section 161 Cr.P.C reaching the Court. This delay has not been explained. P.W.14 has already been questioned on that aspect. He merely denied that there was no delay. The eye-witnesses could not have been present at the place of occurrence. The evidence of P.Ws 1 to 3, 7 and 8 cannot be believed. P.W.3 could not have been a privy to all the occurrences. There is no material to substantiate the offences charged with the evidence as against the appellants. A2 and A3 do not have any role in the entire episode. Even, P.W.12 has stated that P.W.7 did not say anything about the nature of death. The eye witness could not have seen the occurrence stated to have happened during the night from a distance. The evidence of P.Ws 1 and 2 reached the Court in 3 days. There is no explanation for the other injuries suffered. If there was a motive, the accused could have committed the offence on 01.11.2014. Neither the offence under Section 120-B IPC nor Section 34 IPC is made out against the accused persons. A1 has suffered a fracture, which has not been explained properly by the prosecution. The Doctor, who examined A1 has not been cited as a witness. The trial Court has not considered these aspects in the correct perspective. In support of his contentions, the learned counsel appearing for the appellants made reliance on the following decisions (i) Amar Singh and another v State(NCT of Delhi) reported in (2020) 4 MLJ (Cr1) 344 SC, (ii) Manickaraj and another v. State Represented by the Inspector of Police, Alwarthirunagari Police Station, Thoothukudi District reported in (2019) 4 MLJ (Cr1) 528, (iii) Periyasamy versus State by the Inspector of Police, Mel Chengam Police Station, Tiruvannamalai reported in CDJ 2019 MHC 675 and (iv) Mani @ Manirathinam and others v State Rep. By the Inspector of Police (Crime), Chennai reported in CDJ 2016 MHC 2674.

21. Learned Additional Public Prosecutor appearing for the State submitted that the delay in the statement and some of the documents reaching the Court by itself cannot be a factor to exonerate the accused persons. Section 173 Cr.P.C which speaks

of filing all the documents along with the final report is not mandatory but only directory. The prosecution has proved not only the motive but also the occurrence. Merely because, P.Ws 1 and 2 are the wife and father of the deceased, they cannot be treated as interested witnesses. There are other witnesses in the form of P.Ws 3,7 and 8. In support of his contentions, particularly on the question qua the time factor involving the receipt of statements made during investigation and documents collected, the learned Additional Public Prosecutor relied on the following decisions (i) Abu Thakir and others vs. State, Rep. By the Inspector of Police, Tamilnadu reported in MANU/SC/0265/2010, (ii) D.Sudhakar and ors vs. State of Tamil Nadu, reported in MANU/TN/0676/2014, (iii) State vs. Muthu and others reported in MANU/TN/1174/1996 and (iv) Central Bureau of Investigation v. R.S.Pai and another (in Crl.A.No.1045 of 2000 dated 03.04.2002).

Discussion:

22. A1 is the main accused while A2 and A3 are his friends. The motive as projected by the prosecution emanated from the demand made by the deceased for the dues toward the supply of water can from the wife of A1. Enraged over the same, A1 along with A2 and A3 went to the house of the deceased and picked up quarrel. The other accused pacified him and thereafter all of them left the place. When the deceased and P.W.1 were walking on the road, from the liquor shop, A1 stabbed the deceased while the others held him and committed the offence. The occurrence took place at about 8.30 p.m. and the death was caused by a single stab injury at the hand of A1 through M.O.5.

23. P.W.1 spoke about the prior motive and the occurrence. Insofar as the prior motive is concerned, there is nothing to discredit the evidence rendered by P.W1 on the quarrel initiated by A1 with the deceased. However, it is the case of the prosecution, as could be seen from the evidence adduced that A2 and A3 took A1 away from the said place on 01.11.2014 stating that the deceased would be taken care of later. They were also stated to be under the influence of alcohol on 01.11.2014. If A2 and A3 were under the influence of alcohol and went to the place of the deceased to pick up a fight, there is no reason as to why they picked up a quarrel at a later point of time in a crowded place when P.W.1 and the deceased were seen by chance. P.W.1 has clearly stated about the overt act of A1. However, in her cross examination, it is she who has stated that A1 has shouted to A2 and A3 when the deceased was crossing and he was the one who insulted his wife and therefore he should be stabbed and killed. Though it was stated that A2 and A3 were also coming from the liquor shop, it is nobody's case that they were under the influence of alcohol as against the first occasion which formed the motive. It is a case of a single stab and A1 was

removing the knife hidden by him in his hip. P.W.11, who is the author of post-mortem certificate under Ex.P12 though received after 89 days, has clearly stated about the bruises. It is not as if the accused were aware of the presence of the deceased and waiting to commit the offence. On the contrary, the very case of the prosecution itself is that A1 saw the deceased on the road and thereafter shouted. Therefore, it is probable that P.W.1 could only have seen the occurrence from behind. That is the reason why, the deceased suffered bruises by way of three other injuries on the nose, knee and the toe. There is also some distance between the liquor shop and the place of occurrence and therefore it is doubtful if P.W.1 could have heard any such utterance. Thus, we are inclined to accept the evidence of P.W.1, with respect to the overt act of A1, the same cannot be extended to A2 and A3. Admittedly, they were not carrying any weapons. Even after the occurrence, it is A1, who was brandishing M.O.5. It was also the night time and P.W.1 was seeing it from the street light and the lights in the nearby shops.

24. Insofar as P.W.2 is concerned, he saw the occurrence after hearing the shouting of P.W.1 while coming out of the mutton shop nearby. During the cross-examination, he has stated that he has not stated about him being the eye witness during enquiry. This was confirmed from the evidence of P.W.14 - Investigating Officer. Even he had stated that A1 after the occurrence brandished the knife M.O.5 while escaping from the place of occurrence. Therefore, for the reasons discussed with respect to the evidence adduced by P.W.1 and applying the same to that of P.W.2, we once again reiterate that the evidence adduced can, at best, be attributable against A1, particularly with respect to the subsequent conduct.

25. The evidence of P.W.3, in our considered view, is highly doubtful. He is someone who has taken a part with respect to the conspiracy and the occurrence. He was also the friend of the deceased. His statement has reached the Court along with the final report. It is rather improbable that he would have overheard it on 04.11.2014 while he was at the liquor shop. He also saw the deceased and P.W.1 walking before him on the date of occurrence. This witness did not even accompany the deceased. Therefore, his evidence does not inspire confidence of the Court particularly when there is no explanation from the Investigating Officer having not filed the statement obtained under Section 161 Cr.P.C. though recorded on the same day as that of P.Ws 1 and 2.

26. P.W.5 is the witness, who recorded the confession statement followed by recovery. The statements made by P.W.5 and P.W.6 once again reached the Court along with the final report after nearly three months. Therefore, we are not inclined to

give much weightage to these evidence.

27. P.W.7 is the witness who took the deceased to the hospital and to the Doctor, namely, P.W.12. To this extent, the evidence can be accepted being in tune with that of P.W.12 and Ex.P16. However, the evidence of P.W.12 cannot be eschewed being a Government Doctor, who deposed in tune with Ex.P16. In such view of the matter, we are not inclined to accept the evidence of this witness as well.

28. P.W.8 is the neighbour of the deceased. Like that of the other statements recorded for the other witnesses such as P.W.3 and P.W.7, even his statement recorded reached the Court after nearly 88 days. This witness gives evidence slightly different from that of P.Ws 1 and 2. He has deposed that the accused went to kill the deceased even on 01.11.2014 and he overheard and saw the occurrence from his house, being a neighbour. Accordingly, we reject this evidence as well, particularly as against A2 and A3.

29. P.W.14 is the Investigating Officer. While he has stated that P.W.2 has not told him about seeing the occurrence, which is deposed by him that there was no delay in sending the statements and exhibits to the Court, which is factually incorrect.

30. Much arguments have been made on the delay which occasioned in sending the exhibits and documents. There is no dispute on the delay coupled with inadequate explanations given. As stated, P.W.14 has merely denied the delay. Section 172 of the Cr.P.C deals with the diary of proceedings in investigation. Such a diary of proceedings is required to be maintained for an appropriate and fair investigation. Duty is enjoined upon the Investigating Officer to record the proceedings of the investigation in the diary. While doing so, the time at which the information reached, place visited by him, statements recorded along with the time of the conclusion arrived are to be recorded. The Court is at liberty to peruse the diary maintained to satisfy itself on the fairness of the investigation.

31. Section 172 Cr.P.C has to be read along with Section 173 Cr.P.C. Under this provision, the Investigating Officer is expected to complete the investigation without any unnecessary delay. Upon such a completion, the officer shall forward the report to the jurisdictional Magistrate.

32. The report under Section 173 Cr.P.C. is expected to contain the requisite particulars and materials. While doing so, the Investigating Officer is expected to send the statements

recorded under Section 161 Cr.P.C. of those persons whom the prosecution proposes to examine as its witnesses. This provision is procedural in nature. However, there cannot be any compromise in furnishing of documents to the Court as sending them would certainly give the impression of a fair investigation being done, though it is procedural and judge made. The Investigating Officer after completion of the investigation, prosecutes the offender for the offences charged. Therefore, the agency plays a twin role and that is the reason why the role of the Court becomes important. A fair investigation is a sine qua non to be complied with by the agency. That is the reason why the victim has been given a limited role while prosecuting the accused.

33. There cannot be any mandate of law that an investigation would necessarily be vitiated when the statements recorded under Section 161 Cr.P.C, which is likely to be relied upon by the prosecution during trial, when it does not reach the Court on time. It is a factor to be seen on a given case while testing the fairness on the part of the investigating officer. Therefore, one cannot say that merely because a statement has not been sent immediately and received, the entire case of the prosecution will have to fall, which, at best, be termed as procedural lapse. However, the Investigating Officer is bound to explain the delay. Merely because Section 173 Cr.P.C provides for filing of 161 Cr.P.C. Statements recorded and to be relied upon, it can never be stated that there is no need for sending them to the Court. A specific role is expected to be performed by the Court even during the investigation. However, limited the role be, the same cannot be dispensed with or diluted unless adequate reasons are assigned. Therefore, the issue qua the delay in statements reaching the Court belatedly is one of factor to be decided on the facts of each case.

34. When the question is put to the officer on this aspect, he is expected to come with a satisfactory answer. Added further, Section 173 Cr.P.C. requires the filing of the statement obtained under Section 161 Cr.P.C. along with the final report only with respect to the witness which the prosecution would like to rely upon.

35. In Central Bureau of Investigation v R.S.Pai and another in Crl.A.No. 1045 of 2000, dated 03.04.2002, the Apex Court, after considering the scope and ambit of Section 173 Cr.P.C was pleased to hold as follows:

"-...From the aforesaid sub-sections, it is apparent that normally, the Investigating Officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be

held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court. In our view, considering the preliminary stage of prosecution and the context in which Police Officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which prosecution proposes to rely, the word 'shall' used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173(4) of the Code of Criminal Procedure, 1898 was considered by this Court in *Narayan Rao v. The State of Andhra Pradesh* [(1958) SCR 283 at 293] and it was held that the word 'shall' occurring in sub-section 4 of Section 173 and sub-section 3 of Section 207A is not mandatory but only directory. Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there can not be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained."

36. In *Abu Thakir and others v. State, Rep. By the Inspector of Police, Tamil Nadu*, reported in AIR 2010 SC 2119, the Apex Court, once again, reiterated the above said position through the following paragraphs:

"9. Now we proceed to consider the submission of the learned senior counsel that the statements of PWs 2 to 4

(eyewitnesses), though purported to have been recorded on 29th March, 2002, had reached the Court only on 11.4.2002 which according to him makes the whole prosecution story doubtful. In fact, PW30-the Investigating Officer explained that in the case of murder of Sultan Meeran on 26th March, 2002, and the murder of Murugesan (deceased) on 28th March, 2002 in succession, the entire city of Coimbatore and surrounding areas were in a highly disturbed state and widespread bandobasth was arranged in surrounding areas. Adverting to this aspect of the matter, the High Court in clear and categorical terms, upon reappreciation of the evidence, held that in such a situation, no one could find fault with the Investigating Officer in not sending the statements of PWs 2, 3 and 4 to the Court before 11th April, 2002. Mere delay in sending the statements of PWs 2 to 4 per se would not make their evidence unacceptable unless something glaring is brought to our notice to doubt their very presence at the scene of offence. As rightly pointed out by the High Court, the evidence of PWs 2 to 4 is so clinching, wherein they have stated in clear and categorical terms that three persons joining together stabbed one individual. That portion of the evidence remains unshaken. It is true that the assailants were not previously known to PWs 2 to 4. But they have later identified the appellants as the persons who stabbed the deceased.

10. Learned senior counsel relied upon the judgment of this Court in Thulia Kali Vs. The State of Tamil Nadul and Marudanal Augusti Vs. State of Kerala² in support of his submission that the delay in sending the statements recorded under Section 161, Cr.P.C. to the Court is fatal to the prosecution's case. Thulia Kali deals with importance of timely despatch of the first information report which is an extremely vital and valuable piece of evidence for the purpose of corroborating oral evidence adduced at the trial. In Marudanal Augusti, this Court on the facts held that there was a delay of as many as 28 hours in submitting

FIR to the Special (1972) 3 SCC 393 (1980) 4 SCC 425 Magistrate which remained unexplained by the Investigating Officer in spite of being questioned. The Court came to the conclusion that there was no proper explanation as to why there was delay in sending the FIR to the Court. We fail to appreciate as to how those judgments would help the defence in this case since there is no delay in sending the FIR in the present case. There is a delay in sending the statements of PWs 2 to 4 recorded under Section 161, Cr.P.C. There is a clear explanation available on record that the Investigating Officer was also in charge of maintaining law and order in the area that got vitiated after two murders in succession leading to a lot of commotion and communal strife. There is no reason to reject the explanation as to why the statements recorded under Section 161 Cr.P.C. could not be promptly despatched to the Court. It was obviously for the reasons beyond control of the Investigating Officer. Nothing is further suggested to accept the theory propounded by the learned senior counsel. It is nobody's case that such statements were not recorded by the Investigating Officer at all. The suggestion made in this regard to PWs 2 to 4 was denied by them."

37. Thus, from the above said position, a distinction is sought to be made between the delay in sending the FIR and the statements recorded under Section 161 Cr.P.C. After all, any infirmity in this regard has to be seen contextually with the other evidence said to be relied upon by the prosecution.

38. The Division Bench of this Court in State vs. Muthu and others reported in Manu/TN/1174/1996 dealt with the said issue and the relevant paragraphs are extracted below:-

(f) Furthermore, the decision of Karunakaran Jabamani Nadar In re (MANU/TN/0118/1974 : 1974 L.W. (Cr1.) 190) as referred to in the judgment of the trial Court, is not the authority to say that the delay in sending the statements recorded under Section 161 of Code of Criminal Procedure would be fatal to the prosecution case. In that case, the Division Bench in the appeal, while confirming the conviction, incidentally

directed for the issuance of the circular for the guidance of the Magistrate and the Police, with reference to the importance in the matter of despatch of the documents like, complaint, printed First Information report, inquest report, statement of witnesses, Medical Memos sent to the Doctor, death intimation, observation mahazar of recovery etc., and the necessity of the magistrate to put his initial in those documents by noting down the date and time of the receipt. The reason for this direction is to avoid the fabrication of such documents in grave crimes.

(9) In this case, there was no delay in sending the First Information Report and inquest report. However the Court received the statements recorded under Section 161 of Code of Criminal Procedure and the material objects only on the third day after the occurrence took place. As regards the statements recorded under Section 161 of CrI.P.C, it is to be noted that as per the new Code of Criminal Procedure, which came into force on 1.4.1974, the Investigating Officer could file the statements recorded under Section 161 of Code of Criminal Procedure even at the time of filing the final report or charge sheet in the Court. In this context, the citation referred to by the trial Court to throw out the case of the prosecution on the ground of delay of three days in sending the statements recorded under Section 161 of Code of Criminal Procedure has no relevance.

(h) Furthermore, the Apex Court has observed in *Nath Singh v. State of U.P* (1980 S.C.C (Cr.) 968) that five days delay in sending the material objects and connected records to the Court will not in any way prejudice the accused and that it would not affect the case of prosecution in any manner. The observation of the Supreme Court is as follows:

Undoubtedly, there was a delay of about five days in sending the sealed parcels containing the gun of Niranjana Singh and the empty 'crime' cartridges to the Judicial Malkhana, but this could be only a routine delay and nothing sinister could be read

into it, unless it was shown that the police had any hostile animus or motive to implicate this accused falsely.

In the absence of any material to show that the delay of three days was caused in order to fabricate the documents by the Police Officers, who got hostile attitude against the accused, it cannot be said that three days delay in receipt of the material objects by the Court would affect the prosecution case. As far as the statements recorded under Section 161 of Code of Criminal Procedure, it can be filed even at the time of filing the charge sheet. So as regards the filing of statements recorded under Section 161 of Crl.P.C, there is no delay at all."

39. This decision could also be construed to mean that it is for the Court to decide the case by taking into consideration of relevant factors on which the delay in sending the statement recorded and the exhibits marked.

40. Much reliance has been made on the another judgment of this Court in Periyasamy vs. State by the Inspector of Police, Mel Chengam Police Station, Tiruvannamalai reported in CDJ 2019 MHC 675, in which the following paragraph would be apposite:-

"22. Further, in this case admittedly there had been great delay in registering the FIR, the FIR reaching the Court and that there is also long delay in the statements recorded from the witnesses under Section 161 Cr.P.C reaching the concerned Magistrate's Court thereby casting grave suspicion on the case of the prosecution. It is clear that the documents have been created to suit the case of the prosecution."

In the said case, this Court, dealt with the issue of delay as a factor along with the other circumstances while giving a factual finding.

41. Thus, on the said issue, we find that in the case on hand, the delay has not been explained properly. This along with the discussion made on the evidentiary value of the witnesses examined and the documents produced would go to show that the conviction rendered against A2 and A3 cannot be sustained.

42. Learned Additional Public Prosecutor also explained that there are two days of intervening holidays in between. The

difficulty for us, is that though the other statements were also recorded on the same day, for the reasons known to P.W.14, they were sent only along with the final report and so also the position in sending some of the exhibits marked as against the others. It is this piecemeal act on the part of the Investigating Officer raised a very serious question for which there is no explanation forthcoming when the question was put to him.

43. Though the learned counsel appearing for the appellants submitted that there is delay in reaching the Court, we do not think so. There is no substantiate delay in giving complaint nor the same reaching the Court. Similarly, the statement of P.Ws 1 and 2 reached the Court within a few days along with the other records. Therefore, apart from the assessment of the evidence of these witnesses, the delay cannot be attributed on the part of the Investigating Officer in sending the statements recorded under Section 161 Cr.P.C.

44. We have already discussed the evidence at length. We are inclined to accept the evidence to the effect that A1 has indeed committed the offence. There is no motive on the part of P.W.1 to implicate A1 as she is not an interested witness. The evidence of P.Ws.1 and 2 could also be accepted with respect to A1's motive. We have already discussed that the same evidence cannot be extended to A2 and A3 as it is they who took A1 from the place of the first occurrence. Had the accused were drunk during the first occurrence as against the second occurrence, for which there is no such evidence of intake of alcohol, though they were stated to be coming from the liquor shop. Thus, we do not find any material to implicate the accused for the charges framed under Sections 120-B and 34 IPC. The evidence regarding conspiracy and common intention does not inspire the confidence of this Court.

45. As we approve the evidence adduced by P.W.1 with specific reference to A1 and his overt act and motive, while setting aside the conviction and sentence rendered against A2 and A3, we accordingly, set aside the conviction rendered against A1 with respect to Section 120-B and 506(ii) IPC.

46. Accordingly, the appeals in Criminal Appeal No. 537 of 2019 and Criminal Appeal No. 766 of 2018 stand allowed in toto, setting aside the judgment of the trial Court as against A2 and A3 while Criminal Appeal No. 688 of 2018 stands allowed in part by setting aside the conviction rendered under Section 120-B and 506(ii) IPC as against A1 is concerned. Thus, in all the other aspects, the judgment of the trial Court stands confirmed.

47.The appellants in Crl.A.Nos.537 of 2019 and 766 of 2018 viz., A3 and A2 are acquitted of the charges framed against them. The fine amount, if any paid, shall be refunded to them.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

ssm

To

1.The I Additional Sessions Court, Salem.

2.The Inspector of Police,
Kannankurichi Police Station,
Salem District.

3.The Judicial Magistrate-4
Salem.

4.The Chief Judicial Magistrate,
Salem(for information)

5.The Superintendent
Central Prison, Coimbatore.

6.The Superintendent,
Central Prison, Salem.

7.The District Collector,
Salem District.

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

9.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.Philip Ravindran Jesudoss, Advocate SR.43122

+1cc to Mr.M.Mohamed Saifulla, Advocate SR.43126

Criminal Appeal Nos. 688 & 766 of 2018
and 537 of 2019

SRA(CO)
CB(15/03/2021)