



BAIL SLIP

1. Sathik Ali @ sathik, S/o.Pakkir Mohideen, Male, aged about 30/2013 (Accused No.1), 2 mansoor Alikhan, S/o. Ahamed Meera Sahib @ Palappa, male aged about not known (Accused No.3) are released on bail vide Court Order dated 11/10/2013 and 03/12/2013 made in MP (MD).Nos.1 and 1 of 2012 in CRL A(MD)No.306 and 320 of 2013 respectively.

BEFORE THE MADURAI BENCH OF THE MADRAS HIGH COURT

RESERVED ON : 08.01.2020
PRONOUNCED ON : 22.01.2020

CORAM

THE HONOURABLE MR. JUSTICE M.NIRMAL KUMAR
CRL. A. (MD) Nos. 306 & 320 of 2013
and
Crl.M.P. (MD) .Nos.11350 & 11351 of 2019

Sathik Ali@Sathik .. Appellant / Accused No.1 in CRL A.306/2013
A.Mansoor Alikhan .. Appellant / Accused No.3 in CRL A.320/2013

- Vs -

The Inspector of Police,
Arumuganeri Police Station,
Tirunelveli.

(Crime No.193 of 2009) .. Respondent / Complainant in both cases
(Investigation by CBCID, Tuticorin)

Common Prayer : Appeal filed u/s 374 (ii) of the Code of Criminal Procedure, to call for the records and set aside the sentence and conviction imposed by the II Additional Sessions court, Tuticorin in S.C.No.33 of 2013 dated 10.09.2013.

(in Both Cases)

For Appellant	: Mr. V.Kathirvelu, Senior Counsel for Mr.S.M.A.Jinnah
For Respondent	: Mr.M.Chandrasekaran Additional Public Prosecutor
For De-facto Complainant	: Mr.N.Dilip Kumar

COMMON JUDGMENT

Criminal Appeal No.306 of 2013 filed by Accused No.1, Criminal Appeal No.295 of 2013 filed by Accused No.2 and Criminal Appeal No.320 of 2013 filed by Accused No.3 against their conviction in S.C.No.33 of 2013, by the learned II Additional Sessions Judge, Tuticorin, judgment dated 10.09.2013, convicting



the accused for the offences under Sections 341 and 307 I.P.C., against which, the present Criminal Appeals are filed.

2. As regards Cr1.A.(MD).No.295 of 2013, due to the death of accused No.2, the Criminal Appeal was dismissed as abated on 06.09.2019.

3. After trial, Accused Nos.1 to 3 convicted and sentenced as under:-

Penal Provision	Punishment
Section 341 I.P.C.	To undergo one month Simple Imprisonment
Section 307 I.P.C.	To undergo seven years Rigorous Imprisonment and to pay a fine of Rs.3,000/- each in default to undergo six months rigorous Imprisonment

The substantive sentences were ordered to run concurrently and the remand period undergone by the accused is ordered to be set off under Section 428 Cr.P.C.

4. The case of the prosecution briefly to be stated as under:-

4.(1). The case of the prosecution is that the accused and P.W.1 belong to the Kayalpattinam Village. P.W.1 is running a Goldsmith Shop at Kayalpattinam, who is also secretary of the Kathiriya Kodimara Siru Nainar Mosque. During the year 2005, the Chinna Muthuvappa Dharga compound wall was demolished, for which, M.A.G.Moulana lodged a complaint with the Arumuganeri Police Station against 15 accused persons. In the said case, P.W.1 is the second eye witness. The accused were an impression that P.W.1 played instrumental role in lodging the above said complaint and hence, they were enimically disposed against P.W.1. The members of the 'Manitha Neethi Pasarai' (hereinafter referred to as 'M.N.P' for brevity) were also enimically disposed against P.W.1. The Manitha Neethi Pasarai is headed by one Farook. The accused belong to Farook group. P.W.1 belongs to Sunni Muslim and there was hatred between P.W.1's group and M.N.P. Further, there was also hatred between Muslim Iyakkia Peravai (Hereinafter referred to as the 'M.I.P' for brevity) and P.W.1's group in connection with missing of one Bharkath Jameen. She said to have been kidnapped by two persons viz., Muthupalkees and Palani and in this regard, a case was registered in the Arumuganeri Police Station. P.W.1 is said to have helped Muthupalkees / accused in that case to obtain bail. The group which was against P.W.1 had held demonstration and protest seeking ex-communication of P.W.1 from the Village. The accused were against the Sunni Muslims. In this background, on 03.05.2009, at about 09.30 p.m., when P.W.1 and P.W.2 were walking back home,



near Jalalia Grocery Shop at Nainar Street, Kayalpattinam, three persons wrongfully restrained, abused, threatened and questioned him, about the complaint against Farook and at that time, the accused attacked P.W.1 with Aruval on his right and left hand, wrist, both leg and knee and thereby, P.W.1 sustained grievous injuries and thereafter, fell un-conscious. When P.W.1 cried in pain, at that time, P.W.2, Alimshamuthu and wife of P.W.1 viz., Jannath came there. P.W.2, P.W.1's wife Jannath and another one viz., Muthu took P.W.1 to the K.M.T. Hospital at Kayalpattinam, where, P.W.8-the Doctor, gave first aid to P.W.1. Thereafter, he was sent in ambulance to the Sushrushah Hospital at Nagercoil, for further treatment.

4.(2). Thereafter, on receipt of information, P.W.12-the Sub Inspector of Police, attached to the Arumuganeri Police Station, had gone to the Hospital, taken down the statement from P.W.1, registered a case on 04.05.2009 at about 05.00 a.m. in Crime No.193 of 2009, for the offences under Sections 294(b), 341, 307 and 506 (ii) I.P.C. Thereafter, he sent Ex.P.6-printed F.I.R to the higher officials. P.W.14-the then Inspector of Police, attached to the Arumuganeri Police Station, took up investigation, examined witnesses, visited the scene of occurrence, prepared observation mahazar-Ex.P.3 and thereafter, on his transfer, P.W.15-Inspector of Police, Arumuganeri Police Station has taken up further investigation. In the meanwhile, P.W.1 filed Cr1.O.P.(MD.No.1414 of 2010, before this Court, seeking transfer of investigation to the file of C.B.C.I.D and this Court, by order dated 09.04.2011, transferred Crime No.193 of 2009, from the file of the Arumuganeri Police Station to C.B.C.I.D, Thoothukudi. Thereafter, P.W.16-Inspector of Police, C.B.C.I.D., Thoothukudi, had taken up the investigation, examined the witnesses and thereafter, on his transfer, P.W.17-Inspector of Police, C.B.C.I.D. concluded investigation, filed charge sheet against the appellants for the offences under Sections 341, 307, 506 (ii) r/w 34 I.P.C.

5. In order to prove the case, on the side of the prosecution as many as 17 witnesses were examined as PW.1 to P.W.17 and 8 documents were marked as Ex.P.1 to Ex.P.8 and one material object was marked as M.O.1. On the side of the accused, two witnesses were examined as D.W.1 and D.W.2 and no document marked.

6. When the appellants were questioned u/s 313 Cr.P.C. about the incriminating circumstances appearing against them, they denied the same.

7. The trial Court, on the basis of the oral and documentary evidence, acquitted the appellants for the offences under Sections 294 (b) and 506 (ii) I.P.C., convicted and sentenced the accused to undergo one month Simple Imprisonment for an offence under Section 341 I.P.C. and seven years Rigorous Imprisonment and



to pay a fine of Rs.3,000/- each in default to undergo six months rigorous Imprisonment for an offence under Section 307 I.P.C., against which, the present appeals have been filed.

Submissions:

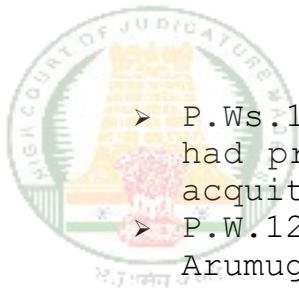
8. The learned senior counsel appearing for the appellants made the following submissions:

- In this case, the occurrence is said to have been taken place at about 09.30 p.m., on 03.05.2009. Thereafter, P.W.1 is said to have been taken to K.M.T.Hospital at Kayalpattinam, at about 10.00 p.m. and after first aid on 04.05.2009, at about 00.40 hours, he was admitted in Sushrushah Hospital, Nagercoil for further treatment. The complaint-Ex.P.1 was recorded by P.W.12, is said to be at 00.30 hours on 04.05.2009, which is highly improbable.
- Further, P.W.9 in his evidence has categorically stated that he treated P.W.1 in the operation theatre in the Sushrushah Hospital for five hours. During that time, nobody had access to him and hence, the registration of the complaint-Ex.P.1 itself is clouded with suspicion and highly doubtful.
- Further, in the complaint, P.W.1 had mentioned that three persons belonging to M.N.P. had attacked him and in his evidence, he had stated that he can identify them. The appellants are residing in the same Village. But, P.W.1 had not named the accused persons by name and as known persons and without any description. It is only mentioned that the persons could be identifiable.
- Further, the appellants are not the members of M.N.P. and there is no material to show that the appellants are the members of M.N.P.
- Further, in the complaint-Ex.P.1, it has been mentioned that the persons viz., Mohamed Ali, Muthu Mohamed and P.W.1's wife Jannath had seen the occurrence. On the date of occurrence, the said Mohamed Ali was not in India and this was admitted by P.W.17-the Inspector of Police, C.B.C.I.D. P.W.17 in his chief-examination, further confirms by V.A.O certificate for the same.
- Further, it is highly improbable that P.W.12 could have reached the Hospital at Thoothukudi and recorded the statement at about 00.30 hours on 04.05.2009 and registered a case at 05.00 a.m. The complaint and F.I.R. had reached the Court with delay. Hence, there is delay in registering the complaint.
- Further in the petition filed before the High Court by P.W.1, there is no mention about the appellants being the assailants. The Inspector of Police, C.B.C.I.D. on what basis and on what materials arrested the Accused No.1. There is mystery on the arrest of Accused No.1. On his confession, the two other accused viz., Accused Nos.2 and 3 have been brought in. The alleged confession has not been marked in this case. The witness to the confession namely P.W.5-Village Administrative



Officer has not stated anything other than the arrest of Accused No.1 in his evidence.

- In the 164 statement which was recorded as on 22.09.2011, the names of accused Nos.1 and 2 were only mentioned. Further, it is admitted by P.W.1 that after the arrest of Accused No.1, he had identified the other two accused in the Police Station after a lapse of two years i.e., in the year 2011. In the meantime, P.W.1 had nowhere mentioned anything about the appellants. On the other hand, P.W.1 admits that he was enimical with two persons viz., the group of Manitha Neethi Pasarai and Thowsith Jamath for various reasons. Further, it is submitted by P.W.1 in his evidence that when P.W.1 and P.W.2 were talking and walking together, the occurrence is said to have been taken place. But, P.W.2 in his evidence states that he went along with one Alimshahsmuthu, at that time, they saw P.W.1 being assaulted by the accused, which creates serious doubt about the presence of P.W.2 and being eye witness.
- Further, it is seen that the cut injuries inflicted on P.W.1 suggest profuse bleeding of blood to have taken place. Neither P.W.1 produced any blood stained clothes nor P.W.2, who is said to have taken him to the Hospital, which creates serious doubt against P.W.1 and P.W.2, no reason had been given for the same. There was no mention of any blood stains in the scene of occurrence as could be seen from Ex.P.3-observation mahazar.
- P.W.1 and P.W.2 had also not given any reason for not naming the appellants / accused at the initial point of time. The reason given by P.W.1 and P.W.2 is that they were in fear, due to which, they had not named the appellants.
- P.W.3 is the witness to the observation mahazar.
- Further, it is seen that the occurrence is said to have been taken place in front of Jalaliya stores. But as per Ex.P.8-rough sketch, no such store is found.
- Further, it is seen that the arrest of Accused No.1 is a stage mannered one, P.W.5 / Village Administrative Officer is the witness for the arrest of the accused No.1.
- The occurrence is said to have taken place at the night hours and P.W.1 and P.W.2 had not mentioned anything with regard to the availability of light. P.W.6-Assistant Executive Engineer, who marked Ex.P.4, has categorically stated that on 03.05.2009 and 04.05.2009 there was no power cut. Further, P.W.6 admits that he had not signed Ex.P.4. The person who gave Ex.P.4 had not been examined.
- P.W.8-Doctor, attached to the K.M.T Hospital, Kayalpattinam had not produced Accident Register copy or any material to show that P.W.1 was given first aid in the Hospital, despite, it was a medico legal case.
- P.W.9-Doctor, attached to the Shuruksha Hospital, Nagercoil, who marked Ex.P.5/wound certificate, categorically states that he had not furnished and produced x-rays / M.O.1 series.



- P.Ws.10 and 11 had been examined to show that the appellants had previous cases and both admitted that those cases ended in acquittal.
- P.W.12, P.W.14 and P.W.15 are the Police officials from the Arumuganeri Police Station. P.W.12 had registered the complaint, who prepared First Information Report. As submitted earlier, it is highly doubtful the time and manner at which the complaint came into existence.
- Further P.W.12 admits that the complaint was not written by him and it was written by one Boomiraja-Head Constable and thereafter, P.W.1 affixed left thumb impression. The said Boomiraja had not been examined. Further, there is no mention in Ex.P.1 that the complaint was written as per statement of P.W.1 read over, explained, admitted to be true. Thus, Ex.P.1-complaint and Ex.P.6-F.I.R., coming into existence are true version. According to the appellants, these doubts are doctored version prepared to suit the case of the prosecution.
- P.W.15-Inspector of Police attached to the Arumuganeri Police Station states that he had given request for call details of the suspects and of the victim, the same has not been produced.
- P.W.16 and P.W.17-Investigating Officer of C.B.C.I.D admit that they have taken earlier examination statement of witnesses before the Arumuganeri Police Station as true. Except examining few other witnesses, they have not carried out any investigation and they have not given any justifiable reason how first accused was identified and arrested as on 28.11.2011, after two years of the occurrence based on what materials. P.W.1 admits that on the arrest of the accused by the Police, he identified by him in the Police Station. Further, there were no features of the assailants and no test identification parade in this case had been conducted. Other than the reason of fear P.W.1 and P.W.2 had not given any particulars or description of the appellants. In order to substantiate his submissions, the learned counsel relied upon the judgment of this Court in the case of **Nagaraj and others Vs. State** reported in **[2016 (2) T.N.L.R. 121 (MAD)]**. The relevant portion of the judgment is extracted hereunder:-

"20. P.W.19, learned Judicial Magistrate No.III, Vellore, conducted Test Identification Parade with P.W.1. P.W.1 identified A-2 alone. It is pertinent to note that in her complaint Ex.P.1, P.W.1 has not given any description of accused including A-2. In such circumstances, she had no opportunity to had the countenance of A-2. In her evidence, she had also admitted that at the Police lock-up. A-2 was identified to P.W.1. So her identifying A-2 before P.W.9 Magistrate at the Test Identification Parade could not be accepted."



- The appellants have been falsely implicated in this case.
- The statements and materials had reached the Court along with the charge sheet.
- P.W.1 categorically asserts that already two named groups were enimical against him, the appellants does not belong to both the groups and in view of the same, the learned counsel appearing for the appellants prayed for acquittal.
- P.W.9-Doctor, who treated P.W.1 in the Sushrushah Hospital had produced Ex.P.5 / Wound certificate and M.O.1/ X-ray series. He had categorically stated that he had not produced X-rays and there is nothing to show that x-rays were taken in the Hospital and there is no radiology report. The alleged weapon were not found and recovered. In order to substantiate his submissions, the learned counsel relied upon the order of this Court in the case of **Sampath and others Vs. State represented by Sub Inspector of Police, Dusi Police Station** reported in **2000-2-L.W. (Cr1.) 861**. The relevant portion of the judgment is extracted hereunder:-

"3. However as far as the first accused is concerned the question that still survives for consideration is as to whether his conviction for the offence under Section 325 of the Indian Penal Code is legal. In this respect the learned counsel for the petitioner would argue that the doctor's opinion that one of the injuries to PW.1 is grievous in nature is based on his reading of the X-ray of the injured P W.1. P.W.5 would admit that X -ray was taken. Unless the X-ray is before the Court, it cannot be legally sustained that the nature of the injury stated to have been sustained by P.W.1 was grievous in nature I have perused the judgments of the Courts below in this context and I find that X -ray was taken for P.W.1 with regard to the injury found on his left hand. That X -ray is not marked. The opinion of P.W.5 in Ex.P.2 and his oral evidence that P.W.1 had sustained grievous injury must get the support from the X-ray. Unless the X-ray is exhibited before the court, the Court would not be in a position to come to a conclusion that P.W.1 sustained grievous injury or not. The burden is on the prosecution to establish this fact by exhibiting the X-ray, which they have not done for the reasons best known to them. In the absence of X-ray relating to P.W.1, it cannot be legally accepted that P.W. 1 had sustained grievous injury. It may be noticed here that even the weapon stated to have been used by the first accused while P.W.1 was attacked was not even recovered. This Court



of weapon the accused could have used while causing injury to P.W.1."

9. The learned Additional Public Prosecutor appearing for the respondent made the following submissions:-

- The learned Additional Public Prosecutor appearing for the respondent submitted that the case was originally registered by the Inspector of Police, Arumuganeri Police Station in Crime No.193 of 2009 for the offences under Sections 294 (b), 341, 307 and 506 (ii) I.P.C. Thereafter, on 09.06.2011, P.W.16 took up the case for investigation as per the order of this Court in Cr1.O.P.(MD).No.1414 of 2010 and as per the direction of the Additional Director, CBCID, Chennai in R.C.No.C.1633/008438/2011, dated 08.06.2011.
- P.W.1 in this case is an injured witness. On 03.05.2009 at about 09.25 p.m., when P.W.1 was walking along with P.W.2, suddenly, P.W.1 was brutally attacked by three persons with aruval and he sustained severe injuries. Thereafter, P.W.2, P.W.1's wife Jannath and one another Muthu took P.W.1 to the K.M.T. Hospital. P.W.8-Doctor, gave first aid to P.W.1. Thereafter, P.W.1 was taken in ambulance to the Sushrushah Hospital, Nagercoil for further treatment. P.W.9-Doctor in the Sushrusha Hospital, who gave treatment in the I.C.U Operation Theatre nearly for five hours to P.W.1. In the medical memo, it is seen that his right wrist could have got amputated, but for timely medical treatment. When P.W.1 was taking treatment at the Hospital, P.W.12-Investigating Officer / the Sub Inspector of Police, attached to the Arumuganeri Police Station, reached the Hospital, recorded the statement of P.W.1. Thereafter, registered the case-Ex.P.1, prepared First Information Report-Ex.P.6 and forwarded Ex.P.6 to the higher officials. P.W.14-the Inspector of Police, attached to the Arumuganeri Police Station, who received First Information Report on 04.05.2009 at the early hours, visited the scene of occurrence, prepared observation mahazar-Ex.P.3 and rough sketch-Ex.P.8, examined the witnesses and Doctor, who gave treatment, thereafter, on transfer. P.W.15-the Inspector of Police, took up the case for further investigation. P.W.15 was carrying an investigation from 10.11.2009 to 03.10.2010. P.W.15 had also produced the history sheet records of the appellants. In the meanwhile, the case was transferred to the file of the respondent as per the orders of this Court and the Additional Director, C.B.C.I.D, Chennai and hence, the entire case diary and materials were handed over to the respondent. P.W.16-the Investigating Officer, on 09.06.2011 took up investigation. He had examined P.W.1 and other witnesses, recorded their statement, was informed about Accused No.1 / Sathik Ali assaulted P.W.1 along with two others. On 22.06.2011, P.W.16, visited the scene of occurrence, examined the witnesses and perused the observation mahazar, rough sketch prepared by the



Inspector of Police, Arumuganeri Police Station and thereafter, he made arrangements for recording 164 statement of P.W.1 on 22.09.2011. Thereafter, Accused No.1 was arrested on 28.10.2011 in the presence of P.W.5-Village Administrative Officer. Accused No.1 gave confession, since two years time had gone by then, the weapon could not be recovered as per the disclosure statement. Accused Nos.2 and 3 obtained anticipatory bail. When Accused Nos.2 and 3 appeared to sign before the Police, P.W.1 identified accused Nos.2 and 3 being the other assailants at the occurrence in the presence of P.W.16. In the meantime, P.W.16 was transferred on 30.06.2012. P.W.17-the Inspector of Police, C.B.C.I.D., took the case for further investigation from 04.07.2011. Perusing the C.D. file and documents, P.W.17 examined the witnesses and thereafter, filed a charge sheet against the accused for the offences under Sections 341, 307 and 506 (ii) read with 34 I.P.C.

- Before the Lower Court on the side of the prosecution, 17 witnesses were examined and 8 documents were marked and one material object was marked and on the side of the accused, two witnesses were marked.
- On perusal of the evidence and the materials, the trial Court had rightly convicted the appellants and hence, he prayed for dismissal of the appeals.
- The learned Additional Public Prosecutor relied on the judgment of the Hon'ble Supreme Court in the case of **Ashok Debbarma alias Achak Debarma Vs. State of Tripura** reported in (2014) 4 SCC 747 as well as in the case of **Baldev Singh Vs. State of Punjab** reported in (2014) 12 SCC 473 and in the case of **Pargan Singh Vs. State of Punjab and another** reported in (2014) 14 SCC 619.

10. The learned counsel appearing for the de facto complainant / P.W.1 made the following submissions and filed his submissions:-

- There is no delay in lodging the complaint and registering the First Information Report. As could be seen from Ex.P.1-complaint, P.W.1 was brutally attacked by the accused. Thereafter, he was immediately rushed to the K.M.T Hospital, Kayalpattinam, where, he was given treatment by P.W.8-Doctor, who gave first aid to P.W.1 on 03.05.2009 at about 10.30 p.m. and thereafter, he was rushed to the Sushrusha Hospital, Nagercoil for further treatment. He reached the Hospital at 04.05.2009 at 00.30 hours, where, P.W.12 came there, recorded the statement from P.W.1, which is Ex.P.1-complaint. Thereafter, registered the First Information Report-Ex.P6 on 04.05.2009 at about 05.00 a.m. The First Information Report sent to the higher officials and to the Court. It was received by the Court on 05.05.2009 at about 11.00 a.m. Hence, there is no delay in registering the First Information Report.



- The identification of the accused was not revealed immediately by P.W.1 for the reason that P.W.1 was put to \ fear and he did not mention the names of the accused persons. But on the other hand, he has clearly stated to the Doctors as well as in the complaint that three persons from M.N.P. had attacked him and he can identify them. The reason for not disclosing the identity of the accused has been clearly explained. Since Arumuganeri Police was not conducting the investigation in a proper manner, P.W.1 filed a petition in Cr1.O.P.(MD).No.1414 of 2011, before this Court. Thereafter, as per the order of this Court, the case was transferred to the respondent.
- P.W.1 had sustained grievous injuries which has been categorically spoken by P.W.9 / Doctor and Ex.P.5 is the wound certificate and M.O.1 is the x-ray series.
- The motive and the previous enmity between P.W.1 and accused has been clearly established in the evidence. P.W.1 belongs to Sunni Muslim, the accused belong to Manitha Neethi Pasarai. The People belong to Manitha Neethi Pasarai and Muslim Ikkiya Peravai were against the Sunni Muslim People and Muslim Iyakkiya Peravai were against P.W.1, since the year 2007 wherein, 15 persons damaged the wall of the Mosque at Kayalpattinam and a case was registered against the accused group. P.W.1 is the eye witness. The Manitha Neethi Pasarai is headed by Farook. The accused in these cases belong to Farook group. The M.N.P. Group headed by Farook believed P.W.1 was the reason for the complaint and developed enmity against him. One week prior to the attack, the accused who were travelling in a Bolero car had followed P.W.1, attempted to dash against him. P.W.1 escaped from the incident and did not give much importance. Thereafter, on 03.05.2009 P.W.1 was attacked with aruval by the accused. Further, P.W.1 had given 164 statement before P.W.13 / Judicial Magistrate which is Ex.P.2. He had identified the accused in the Police Station. Since the accused being known persons, the test identification parade is not necessary. In order to substantiate his submissions, the learned counsel relied upon the judgment of the Hon'ble Supreme Court in the case of **C.Muniappan and others Vs. State of Tamil Nadu** reported in (2010) 9 SCC 567. The relevant portion of the judgment is extracted hereunder:-

"Test Identification Parade :

"38. In *Lal Singh v. State of U.P.*, AIR 2004 SC 299, this Court held that the court must be conscious of the fact that the witnesses should have sufficient opportunity to see the accused at the time of occurrence of the incident. In case the witness has ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial and in that case, the evidence as a whole is to be considered. The prosecution should take precautions and should establish before the Court that right from the day of his



arrest, the accused was kept "baparda" so as to rule out the possibility of his face being seen while in police custody.

39. In *Suresh Chandra Bahri v. State of Bihar*, this Court held that the object of conducting Test Identification Parade is to enable witnesses to satisfy themselves that the accused whom they suspect is really one who was seen by them in connection with commission of crime and to satisfy investigating authorities that suspect is really the person whom witnesses had seen in connection with said occurrence.

"78. ...it furnishes an assurance that the investigation is proceeding on right lines, in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial". (*Suresh Chandra Case*, SCC p.126, para 78)

Therefore, the Test Identification Parade is primarily meant for investigation purposes. (vide *MalkhanSingh v. State of M.P.*, *Ankush Maruti Shinde & Ors. v. State of Maharashtra* and *Jarnail Singh & Ors. v. State of Punjab*)

40. But the position would be entirely different when the accused or the culprit who stands trial has been seen a number of times by the witness, as it may do away with the necessity of identification parade. Where the accused has been arrested in presence of the witness or accused has been shown to the witness or even his photograph has been shown by the Investigating Officer prior to Test Identification Parade, holding an identification parade in such facts and circumstances remains inconsequential. (vide *Shaikh Umar Ahmed Shaikh & Anr. v. State of Maharashtra*, *Lalli v. State of Rajasthan*, *Dastagir Sab v. State of Karnataka*, *Maya Kaur Baldevsingh Sardar v. State of Maharashtra*, and *Aslam v. State of Rajasthan*).

41. In *Yuvaraj Ambar Mohite v. State of Maharashtra*, this Court placed reliance upon its earlier judgment in *D. Gopalakrishnan v. Sadanand Naik*, and held that if the photograph of the accused has been shown to the witness before the Test Identification Parade, the identification itself loses its purpose. If the suspect is available for identification or for video identification, the photograph should never be shown to the witness.

42. Holding the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the purpose of corroboration; for believing that a person brought before the Court is the real person involved in



the commission of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. (Vide State of H.P. v. Lekh Raj, SCC p.253,para 3)).

43. In Mulla v. State of Uttar Pradesh, this Court placed reliance on Matru v. The State of Uttar Pradesh, and Santokh Singh v. Izhar Hussain and observed as under :-

"41. ...The evidence of test identification is admissible under Section 9 of the Indian Evidence Act, 1872. The Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court."

44.In Kartar Singh v. State of Punjab, a Constitution Bench of this Court has suo moto examined the validity of Section 22 of Terrorist and Disruptive Activities (Prevention) Act, 1987 and held that: (SCC p.711 para 361)

"361. If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result". This Court, thus, struck down the provision of Section 22 of the said Act.

45. The said judgment was considered by this Court in Umar Abdul Sakoor Sorathia v. Intelligence Officer, Narcotic Control Bureau, and the Court observed that in the said case, the evidence of a witness regarding identification of a proclaimed offender involved in a terrorist case was in issue. The courts below had taken a view that evidence by showing photographs must have the same value as evidence of a Test Identification Parade. The Court distinguished the aforesaid case on facts. The



Court further held that the court must bear in mind that in a case where the accused is not a proclaimed offender and the person who had taken the photographs was making deposition before the court was being examined by the prosecution as a witness, and he identified the accused in the court, that may be treated as a substantive evidence. However, courts should be conscious of the fact that during investigation, the photograph of the accused was shown to the witness and he identified that person as a one whom he saw at the relevant time.

46. Thus, it is evident from the above, that the Test Identification Parade is a part of the investigation and is very useful in a case where the accused are not known before-hand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what is given by the witnesses in the court. The Test Identification Parade provides for an assurance that the investigation is proceeding in the right direction and it enables the witnesses to satisfy themselves that the accused whom they suspect is really one who was seen by them at the time of commission of offence. The accused should not be shown to any of the witnesses after arrest, and before holding the Test Identification Parade, he is required to be kept "baparda".

- Though no records were produced from the K.M.T. Hospital, P.W.8 had clearly spoken about the injured P.W.1 got first aid treatment in the Hospital on 03.05.2009 at about 10.30 p.m. The Arumuganeri Police were immediately informed by the Hospital as could be seen from the evidence of P.W.12. D.W.1 has also spoken about the occurrence and the assault made on P.W.1 and injury inflicted on P.W.1. Except for identifying the accused, in other aspects D.W.1 corroborates P.W.1. In this case, motive is not disputed and the occurrence is proved. P.W.1's evidence corroborated with the evidences of P.W.2 and P.W.9. The medical records confirms the injuries.
- The defect in investigation cannot ensue acquittal from the charges levelled against the appellants. In order to substantiate his submissions, the learned counsel relied upon the judgment of this Court in the case of **Gajoo Vs. State of Uttarkhand** reported in **(2012) 9 SCC 532**. The relevant portion of the judgment is extracted hereunder:-

"21.The present case, when examined in light of the above principles, makes it clear that the defect in the investigation or omission on the part of the Investigating Officer ought to have obtained the Serologist's report both in respect of Ext.2



the deceased, This is a definite lapse on the part of the investigating officer which cannot be overlooked by the Court, despite the fact that it finds no merit in the contention of the accused."

- It is quite natural that after two years, no weapon could be available in the disclosed place. Hence, there is no recovery of weapon in this case. Hence, the non seizure of weapon is not a ground to interfere with the conviction, when the case is proved on facts and also the medical evidence satisfies that the injuries sustained by P.W.1 are possible with the weapon alleged by the prosecution.
- The learned counsel appearing for the de facto complainant / P.W.1 has relied upon the judgments of the Hon'ble Supreme Court in the case of **Dayal Singh and others Vs, State of Uttaranchal** reported in (2012) 8 SCC 263 and in the case of **Sankarapandian Vs. The State represented by the Deputy Superintendent of Police, Tuticorin Rural, (Crime No.95 of 2004) of Murappanadu Police Station, Tuticorin District** reported in **2015 SCC online Mad 48**.

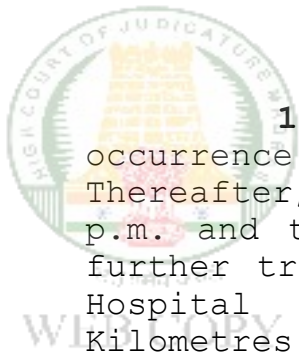
11. I have anxiously considered the rival submissions, perused trial Court's judgment and the entire materials on record.

12. Discussions:-

12. (1). Considering the rival submissions made on either side and on perusal of materials, it is seen that the occurrence is said to have been taken place on 03.05.2009 at 09.30 p.m., and P.W.1 was attacked by three persons after 2 ½ years. Accused No.1 was arrested in this case on 28.10.2011. Even in the complaint / Ex.P.1, P.W.1 had clearly mentioned that only three members of M.N.P. had attacked him and there is no material and evidence to show that the appellants were members of M.N.P. It is also admitted by P.W.1 that during the year 2007, there was a clash with regard to the damage of wall of Mosque, for which, a complaint has been lodged and there have been two groups and a group headed by Farook is against him. The said Farook has not been examined in this case.

12. (2). Further, P.W.1 had helped the accused in a case involving, kidnap and rape of one Barkath Jameen, for which, the M.N.P. had staged protest and also conducted agitation seeking ex-communication of P.W.1. Hence, P.W.1 had earned lot of enemies and he admits that he was moving in fear during the period.

12. (3). Further, P.W.1 in his evidence states that when he was walking along with P.W.2, the accused attacked him with aruval. On the contrary, P.W.2 in his evidence states that he went along with one Alimshahsmuthu, at that time, they saw P.W.1 being assaulted, which creates serious doubt about the presence of P.W.2.



12.(4). It is also seen that in the complaint, the occurrence is said to have been taken place at about 09.30 p.m., Thereafter, P.W.1 was taken to the K.M.T. Hospital at about 10.00 p.m. and thereafter, he sent Sushrushah Hospital at Nagercoil for further treatment at 00.30 hours. The Distance between the K.M.T. Hospital and the Sushrushah Hospital is roughly around 100 Kilometres.

12.(5). Further P.W.9-the Doctor, who treated P.W.1 categorically states that nearly for five hours, P.W.1 was in the operation theatre and was given treatment and during this period, no-one was allowed to meet him other than the person treating him. The presence of P.W.12 in the Hospital as well as recording the statement of P.W.1 has not been spoken to by P.W.9.

12.(6). Further P.W.12 states that the statement was recorded by Boomithan, Head Constable, the said Boominathan has not been examined as the witness.

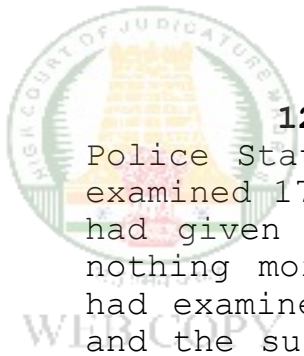
12.(7). On perusal of Ex.P.1., there is no mention of statement was recorded as per the request of P.W.1 and recording was read over, admitted to be true. Though the statement was recorded in the Hospital, it was not recorded in the presence of Doctor and no attestation was obtained from the Doctor.

12.(8). Further, there is some delay in lodging the complaint and the First Information Report reached the Court very belatedly.

12.(9). Further P.W.14-the Inspector of Police, received the First Information Report, reached the occurrence spot, prepared observation mahazar and rough sketch. From Ex.P.3-observation mahazar, it is seen that no blood stains or any incriminating materials were found in the scene of occurrence.

12.(10). P.W.2 is said to have accompanied P.W.1 to the Hospital and no blood stained clothes has been recovered in this case. Further, there is nothing to show that there was any blood stains available in the scene of occurrence. The place of occurrence as per Ex.P.3 and Ex.P.8 are contrary. The injuries sustained as per Ex.P.5 profuse bleeding of blood to have taken place.

12.(11). P.W.9-the Doctor, who treated P.W.1 in the Sushrushah Hospital had produced Ex.P.5 / Wound certificate and M.O.1/ X-ray series. He categorically states that he had not produced X-rays and there is nothing to show that x-rays were taken in the Hospital and there is no radiology report.

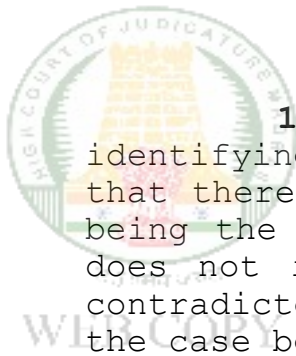


12. (12). It is seen that the Inspector of Arumuganeri Police Station, P.W.14 had examined eight witnesses and P.W.15 had examined 17 witnesses and six suspects. It is also seen that P.W.14 had given a request to obtain call details. Thereafter, there is nothing more. Hence, P.W.14 and 15 during the investigation they had examined 25 witnesses and six suspects. Who are the witnesses and the suspects and what is the description of the assailants all are withheld, kept in dark. Thereafter, on transfer of investigation, the respondent Police without any materials on 28.10.2011 shown arrest of first accused and thereafter, on his confession, the role of Accused Nos.2 and 3 seems to have unfolded. There is no disclosure statement or any material to show that the involvement of the appellants / accused.

12. (13). It is strange to believe that P.W.1, who sustained such injury for the two years was keeping quiet and thereafter, disclosing the name of the assailants. It is to be seen that P.W.1 had categorically stated in the complaint as well as to the Doctor that three persons were attacked with aruval. He states three persons attacked him can be identified. Accused Nos.1 to 3 and P.W.1 are residing in the same place and it is not mentioned that P.W.1 has been attacked by known persons. There is vast difference between the known persons and the persons identifiable. No description or any identified features been provided. In the complaint-Ex.P.1, P.W.1 mentions one person namely Mohammed Ali being present during the assault, said Mohammed Ali has not been examined. Added to it, P.W.17-Investigating Officer admits that the said Mohammed Ali was not in the country during the relevant period and certificate of Village Administrative Officer confirms the same. P.W.1 had not mentioned the name of the assailants for 2 ½ years from the date of the attack despite the appellants and P.W.1 hail from the same palce. The reason of fear given by P.W.1 for non disclosure of name of the appellants are not convincing. The presence of P.W.2 during the occurrence and the being eye witness is also highly doubtful. No blood stained clothes were produced. The injuries as per Ex.P.5 would indicate profuse bleeding of blood. Further P.W.12-Sub Inspector of Police had reached the Hospital at the same time, when P.W.1 was taken to Hospital by P.W.2. There is nothing in the evidence to show how P.W.2 had identified the appellants are the assailants.

12. (14). Further it is admitted that Accused Nos.2 and 3 were identified in the Police Station at the the instance of the Police.

12. (15). P.W.17 admits that there are no materials to show that the accused belong to M.N.P.



13. Considering the inordinate delay at the manner in identifying the assailants creates grave suspicion, this Court finds that there is no evidence and materials to show that the appellants being the assailants, who attacked P.W.1 and the evidence of P.W.1 does not inspire confidence. The evidence of P.W.1 and P.W.2 are contradictory to each other and the prosecution has failed to prove the case beyond reasonable doubts.

14. Considering the rival submissions as discussed above and the other materials available on record, this Court is inclined to interfere with the findings of the Trial Court.

Conclusion

15. In the result, the Criminal Appeals are allowed. The conviction and sentence imposed on the appellants in S.C.No.33 of 2013, on the file of the learned II Additional Sessions Judge, Thoothukudi, dated 10.09.2013 are set aside and the appellants are acquitted of the charges framed against them. The bail bonds, if any, executed by the appellants shall stand cancelled. The fine amounts, if any, paid by the appellants shall be refunded to them. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(Co)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

tsg

To

- 1) The II Additional Sessions Judge, Thoothukudi.
- 2) The Principal District and Sessions Judge, Thoothukudi.
- 3) The Judicial Magistrate, No.I, Kovilpatti.
- 4) The Chief Judicial Magistrate, Thoothukudi.
- 5) The Inspector of Police, Arumuganeri Police Station,
Crime Branch C.I.D., Thoothukudi.
- 6) The Officer Incharge, Borstal School, Pudukottai.
- 7) The Superintendent, Central Prison, Palayamkottai.



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

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copy to

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

+1 CC to M/s.N.DILIP KUMAR, Advocate (SR-2520[F] dated 23/01/2020)

+1 CC to M/s.S.M.A.JINNAH, Advocate (SR-2534[F] dated 23/01/2020)

COMMON JUDGMENT IN
CRL. A. (MD) Nos.306 & 320 of 2013
Dated: 22.01.2020

NS(CO)
TR(29.01.2020) 18P 13C