



BAIL SLIP

Sivakumar, S/o. Palanivel, Appellant/3rd Accused is released on Bail vide court order dated 10.07.2018 made in Crl MP(MD)No.295 of 2018 in Crl.A(MD)No.27 of 2018.

Senthil Kumar, Aged about 39 years S/o. Haridoss Appellant/2nd Accused, in Crl MP(MD)No.305 of 2018 in Crl A(MD)No.28 of 2018.

Anand, aged about 44 yrs S/o. Ramakrishnan, Appellant/1st Accused in Crl MP(MD)No.306 of 2018 in Crl.A(MD)No.28 of 2018 was released on Bail vide Court order dated 10.07.2018.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	Pronounced on
18.03.2020	11.05.2020

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH
and
THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A(MD)Nos.27 and 28 of 2018

Crl.A. (MD) No.27 of 2018:

Sivakumar ..Appellant/Accused No.3

vs.

1) The Inspector of Police
Thirukalar Police Station
[Crime No.59 of 2008]

2) The Assistant Superintendent of Police
Muthupettai Sub Division
Tiruvarur District

..Respondents/Complainants

PRAYER: Criminal Appeal filed under Section 374 Cr.P.C., to call for the record in S.S.C.No.39 of 2009 on the file of the I Additional District Judge [PCR], Thanjavur, for conviction of the appellant/3rd accused under Section 120B r/w 302 IPC and 302 r/w 109 IPC, set aside the conviction, fine and sentence imposed on the appellant by the judgment dated 11.12.2017 and acquit the appellant.



Shajahan [PW23], held around 49 acres of lands, which were given on lease to various persons, one of whom was Ramakrishnan, the father of Anand [A1] and to whom 2.64 acres of land was given in Avelipattam area in 1992.

3.2 Rajendran was a Dalit and was the Kottur Union Secretary of the Communist Party of India. The Communist Party of India, Communist Party of India (Marxist) and A.I.A.D.M.K. had obtained 27.50 acres, 5 acres and 11.56 acres, of land, respectively, on lease, from the Nizam family and had them distributed to their party members for farming.

3.3 While so, a dispute arose between the members of the C.P.I and the members of the C.P.I.(M) in identifying the lands situated in Avelipattam area.

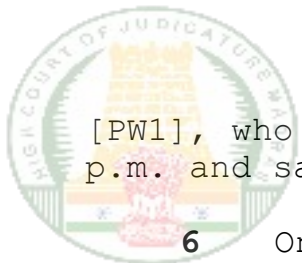
3.4 As stated above, Ramakrishnan, father of Anand [A1], had taken 2.64 acres of land in Avelipattam area, which Rajendran wanted for his party members.

3.5 It is alleged that on 27.08.1994, an altercation ensued between Rajendran and Anand [A1], in which, Anand [A1] was stripped and paraded around the village. So, Anand [A1] was nurturing grudge against Rajendran and had vowed publicly that Rajendran's death will be in his hands. He accomplished his vow with the help of his relative Senthil Kumar [A2] and Sivakumar [A3], driver of Rajendran, by hacking Rajendran to death on 16.10.2008 on the banks of the Ponnukondan rivulet in Panniyur Road. This is the nub of the police case in the final report.

4 The sequence of events that preceded the murder of Rajendran is as under:

One Thangavel, member of the C.P.I., Naduvakalapal village, died on 15.10.2008, on coming to know of which, Rajendran left his village by an Ambassador car bearing Regn. No.TAT 147 belonging to Sundar [PW13], member of C.P.I., driven by Sivakumar [A3]. Sivakumar [A3] was not the regular driver, but, he used to be hired by Rajendran whenever the need arose. Rajendran reached the house of the bereaved around 11.00 a.m. on 16.10.2008, paid homage and was returning to his village via Panniyur Road, which passes through the Ponnukondan rivulet. The car was suddenly stopped by Sivakumar [A3] near the banks of the Ponnukondan rivulet and Anand [A1] and Senthil Kumar [A2], who were closely pursuing the car in a motorcycle, fell upon Rajendran and belaboured him with a knife, resulting in his death. Thereafter, all the three fled from the place of occurrence.

5 On coming to know about the murder of Rajendran, the Communist Party cadres assembled in huge numbers from the adjoining villages and information was sent to Rajendran's widow Boopathi



[PW1], who reached the place of occurrence on 16.10.2008 around 1.00 p.m. and saw the lifeless body of her husband.

6 On the statement [ExP1] given by Boopathi [PW1], Baskaran [PW22], Sub Inspector of Police, Thirukalar Police Station, registered a case in Crime No.59 of 2008 on 16.10.2008 at 14.00 hours under Section 302 IPC and prepared the printed First Information Report [ExP29], which reached the jurisdictional Magistrate at 10.40 p.m. on the same day.

7 In her complaint statement [ExP1], Boopathi [PW1] has stated that her husband Rajendran was the Secretary of C.P.I.; their relative Thangavel of Naduvakalapal village had died; on getting this information, her husband left home around 10 a.m. on 16.10.2008 for paying condolence in the car bearing Regn. No.TAT 147 driven by Sivakumar [A3], S/o Palanivel of Neikunnam village; after paying homage, he left Naduvakalapal village after 12.30 p.m.; around 1.00 p.m., she received information that her husband's body with cut injuries was found lying on the banks of the Ponnukondan rivulet in Panniyur village; when she went to that place with her children, she found her husband's body there; the car by which he went was also there; she does not know what happened to the driver Sivakumar [A3]; hence, she prays for justice. In the foot note, she has stated that this statement was read out to her and the same was correct.

8 Therefore, in column No.7 of the printed FIR, regarding the details of the suspect/accused, it is stated as "not known". The investigation of the case was taken over by Sampathkumar [PW25], Inspector of Police, who went to the place of occurrence and prepared the observation mahazar [ExP13] and rough sketch [ExP30] in the presence of witnesses Kannaiyan [PW11] and Kasinathan [not examined]. From the place of occurrence, the Investigating Officer seized the Ambassador car and a mobile phone [MO4] of the deceased under mahazar [ExP14].

9 Inquest was conducted on the body of Rajendran at the place of occurrence and the inquest report was marked as Exp31. However, in the inquest report [Exp31] the names of accused 1 and 2 figured as the assailants, but, the inquest report [Exp31] reached the Court only on 17.10.2008. There is no reference to Sivakumar [A3] as "suspect" in the inquest report [Exp31]. The body of Rajendran was sent to the Government Hospital, Mannargudi, where Dr.Karimuthu [PW15] performed autopsy and issued the postmortem certificate [Exp16]. 18 cut injuries all over the body have been referred to in the post-mortem certificate [Exp16]. The samples of the visceral organs were sent to the Tamil Nadu Forensic Sciences Laboratory and the viscera report [Exp22] states that no alcohol or poison was detected. After obtaining the viscera report [Exp22], Dr.Karimuthu [PW15] gave his final opinion, which is as follows:



"Death occurred due to hypovolumic shock due to injury to vital organs, brain and lungs."

10 Anand [A1] and Senthilkumar [A2] were arrested by the police on 17.10.2008 at 10.00 a.m. Based on the confession statement of Anand [A1] and Senthil Kumar [A2], the police recovered a Hero Honda Splendor Motorcycle [MO8] on 17.10.2018 at 15.15 hours in the presence of witnesses Rajamanickam [PW7] and Kannaiyan [not examined] under mahazar [Exp7]. Thereafter, on the confession statement of Anand [A1], the police recovered a bloodstained bill hook [MO6] on 17.10.2008 at 17.30 hours in the presence of Rajamanickam [PW7] and Kannaiyan [not examined] under mahazar [Exp8]. The police arrested Sivakumar [A3], driver, on 17.10.2008 at 8.00 p.m. and recovered a black colour Nokia mobile phone [MO7] and two SIM cards [MOs9 and 10] in the presence of witnesses Subramanian [PW9] and Jayaraj [PW10] on 17.10.2008 at 8.30 p.m. under mahazar [Exp10].

11 The seized articles and the bloodstained apparel of Rajendran were sent through the jurisdictional Magistrate to the Tamil Nadu Forensic Sciences Laboratory for chemical examination. They were examined by Dr.Aveena [PW16], who, in her evidence as well in the Biological Report [Exp20], has stated that human blood was detected in the apparel as well in the bill hook [MO6].

12 Nirmalabai [PW17], Scientific Assistant Gr.II, who conducted Serological examination, in her evidence as well in the Serological report [Exp21], has stated that human blood detected in the apparel was of blood group B. The grouping with regard to the human blood found in the bill hook was inconclusive.

13 Since Rajendran was a Dalit, the case was transferred to Pravinkumar Abinabu, I.P.S. [PW26], Assistant Superintendent of Police, who obtained the community certificate of Rajendran from Jamunarani [PW18], Zonal Deputy Thasildar.

14 Jamunarani [PW18], Tahsildar, issued community certificate [Exp25] stating that Rajendran belonged to Adi Dravida community. She further issued community certificates [ExsP23 & P24] for Anand [A1] and Senthil Kumar [A2], respectively, stating that they belong to Backward Community. She also issued community certificate [Exp27] for Sivakumar [A3] stating that he was a Dalit.

15 After recording the statements of witnesses and collecting various reports, Pravinkumar Abinabu, I.P.S. [PW26], Asst. Superintendent of Police, completed the investigation and filed a final report in PRC No.17 of 2009 before the Judicial Magistrate No.I, Mannargudi, for the offence under Sections 120B r/w 302 IPC, 302 r/w 109 IPC and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 against Anand [A1], Senthil Kumar [A2] and Sivakumar [A3].



16 On appearance of the accused, the case was committed to the Special Court for SC/ST Act Cases, Thanjavur in S.S.C.No.39 of 2009 for trial. The trial Court framed charges against the accused for the aforesaid offences and when questioned, they pleaded not guilty.

17 To prove the case, the prosecution examined 26 witnesses and marked 35 exhibits and 10 material objects.

18 When the accused were questioned under Section 313 CrPC about the incriminating circumstances appearing against them, they abjured their guilt and denied their involvement in the offence. No witness was examined from the side of the accused nor any document marked.

19 After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 11.12.2017 in S.S.C.No.39 of 2009, acquitted all the three accused of the charge under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 but, convicted and sentenced them as under:

Accused	Provision of law	Sentence of imprisonment	Fine amount (in Rs.)
A1	120B r/w 302 IPC	To undergo imprisonment for life	10,000/-, in default, to undergo simple imprisonment for for one year
	302 IPC	To undergo imprisonment for life	10,000/-, in default, to undergo simple imprisonment for one year
A2	120B r/w 302 IPC	To undergo imprisonment for life	5,000/-, in default, to undergo simple imprisonment for six months
	302 r/w 109 IPC	To undergo imprisonment for life	5,000/-, in default, to undergo simple imprisonment for six months
A3	120B r/w 302 IPC	To undergo imprisonment for life	5,000/-, in default, to undergo simple imprisonment for six months
	302 r/w 109	To undergo imprisonment for life	5,000/-, in default, to undergo simple imprisonment for six months



20 Challenging the aforesaid conviction and sentences, the accused are before this Court.

21 Heard Mr.Veera Kathiravan, learned Senior Counsel representing the learned counsel on record for Anand [A1] and Senthil Kumar [A2], Mr.Deenadhayalan, learned counsel for Sivakumar [A3] and Mr. R. Anandharaj. learned Additional Public Prosecutor appearing for the respondent State.

22 The prosecution has proved the following facts beyond cavil:

(a) Rajendran was a prominent leader of the local Communist Party of India and was a Dalit;

(b) He attended the condolence of his party worker Thangavel in Naduvakalapal village around 11.00 a.m. on 16.10.2008;

(c) He left Naduvakalapal village; and

(d) While he was proceeding to his house, he was waylaid and murdered on the banks of the Ponnukondan rivulet in Panniyur Village.

23 The short question that arises for consideration in these appeals is whether the appellants were the perpetrators of the crime.

24 The prosecution has placed strong reliance on the evidence of Ramaiyan [PW5], Gunasekaran [PW6] and Rajendran [PW8] to show that Anand [A1], Senthil Kumar [A2] and Sivakumar [A3] entered into a conspiracy to eliminate Rajendran.

24.1 Ramaiyan [PW5], in his evidence, has stated that he knows Rajendran and also knows the accused; on 16.10.2008, he had gone to the house of the bereaved Thangavel in Naduvakalapal village, for condolence; at that time, Rajendran, who was the Kottur Union Secretary of the Communist Party of India, came to the house of Thangavel by a car; after the condolence, he [PW5] along with his friend Marimuthu, went to a nearby tea shop and were having tea; at that time, he saw Anand [A1] and Senthil Kumar [A2] coming by a motorcycle to the tea shop and they were talking with Sivakumar [A3] in the tea shop; he heard Anand [A1] telling Sivakumar [A3] "We should execute what we have planned", for which, Sivakumar [A3] said, "I will stop the vehicle at the place where you asked me to stop, you do your work"; then, they left the tea shop towards east; around 12.45 noon on the same day, he [PW5] heard the information that Rajendran's body was found with cut injuries on the banks of the Ponnukondan rivulet; he, along with other villagers, rushed



there; he saw Little Mary [PW2], Raja [PW3] and Selvam [PW24] at that place and the police were enquiring them; after some time, he returned to his house; on the next day, i.e., on 17.10.2008, he met Rajendran [PW8] (namesake of the deceased) in the tea shop and while they were talking about the murder of Rajendran, he [PW5] remembered about the discussion of the three persons in the tea shop and told Rajendran [PW8] about that, who, in turn, asked him to report the matter to the police; accordingly, he went to the police station on 18.10.2008 and narrated as to what he heard on 16.10.2008 at the tea shop; three months later, his statement was recorded by the Judicial Magistrate, Tiruvarur and the statement was marked as ExP4.

24.2 Gunasekaran [PW6], in his evidence, has stated that he knows Rajendran and also the accused; the lands belonging to the Nizam family were given by them for rent to various persons and one such beneficiary was Ramakrishnan, who was not regularly paying the rents; therefore, the Nizam family wanted to entrust the work of collecting rents to Rajendran; when Rajendran approached Ramakrishnan for rent, a quarrel ensued and in that quarrel Anand [A1], son of Ramakrishnan, declared at Rajendran "Your death is in my hands"; on 15.10.2008, one Thangavel of his village died; on 16.10.2008 around 11.00 a.m., Rajendran came with his driver Sivakumar [A3] to pay condolence; he [PW6] also went to the house of Thangavel for the condolence; after the condolence, he [PW6] came to the tea shop and there he saw Anand [A1], Senthil Kumar [A2] and Sivakumar [A3] having tea; he did not know what they were talking; on the same day, around 1.00 p.m., he [PW6] received information that Rajendran was murdered on the banks of the Ponnukondan rivulet; he along with others, rushed there and found the body of Rajendran on the banks with injuries and an Ambassador car was parked there; his (Rajendran's) wife and children also came there; he also saw Little Mary [PW2], Raja [PW3] and Selvam [PW24] there.

24.3 Rajendran [PW8] has stated that he knows Rajendran (deceased) and the accused; on 18.10.2008, he went to have tea in the local tea shop and at that time, Ramaiyan [PW5] came there and told him of what he heard on 16.10.2008 and that he [PW8] advised him [PW5] to inform the police of the same. In the cross-examination, he admitted that he is the Secretary of Kottur Union of Communist Party for the last ten years.

25 The learned counsel for the defence contended that the evidence of these three witnesses, viz., PWs 5, 6 and 8, that the accused hatched a conspiracy sounds unbelievable. There appears to be force in this submission. In the cross-examination of Ramaiyan [PW5] and Rajendran [PW8], they have admitted that they are Members of the Communist Party and Rajendran (deceased) was the leader of the party in that area. They also admitted that they knew Rajendran (deceased) and the accused. As regards Gunasekaran [PW6], he admitted that his sister Padmavathy was the M.L.A of the area of the

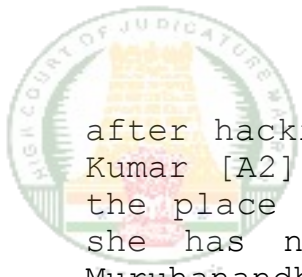


Communist Party and that his son-in-law was the District Secretary of the Communist Party. Dictates of common sense state that conspiracies are normally hatched in secrecy and one cannot expect conspirators to publicly discuss their evil design.

26 In this case, the evidence of Ramaiyan [PW5] that he heard Anand [A1], Senthil Kumar [A2] and Sivakumar [A3] discussing in the tea shop to the hearing of others, sounds credulous. As regards Gunasekaran [PW6], he had not heard the discussion and he had only seen the three of them coming to the tea shop and taking tea. According to Ramaiyan [PW5], he shared his suspicion with Rajendran [PW8] on 17.10.2008, but, according to Rajendran [PW8], he was informed about the discussion among the accused by Ramaiyan [PW5] only on 18.10.2008. According to Ramaiyan [PW5], he went to the police station and gave statement only on 18.10.2008 and the statement so recorded was received by the Court in January 2016. Ramaiyan [PW5] has stated that on coming to know of the murder, he went to the place of occurrence and found the body of Rajendran with injuries and the police were also there. He did not find Sivakumar [A3], driver of the car, at the place of occurrence. If he had really heard Anand [A1], Senthil Kumar [A2] and Sivakumar [A3] discussing the *modus operandi* for the murder before the incident, his natural conduct would have been to inform the police of what he had heard a few hours ago in the tea shop. His evidence that he told Rajendran [PW8] on 17.10.2008 and only thereafter, he went to the police on 18.10.2008 and gave his statement appears artificial. Apropos it is to point out that the accused were arrested on 17.10.2008 itself. Under such circumstances, we are unable to persuade ourselves to hold that the prosecution has proved the charge of conspiracy, much less satisfactorily.

27 Now, coming to the attack on Rajendran, we have the evidence of three alleged eye witnesses, viz., Little Mary [PW2], Raja [PW3] and Selvam [PW24]. Selvam [PW24] turned hostile and did not support the prosecution case. Therefore, we are left only with the evidence of Little Mary [PW2] and Raja [PW3].

27.1 Little Mary [PW2], in her evidence, has stated that on 16.10.2008, she went to Thiruthuraipoondi to buy grocery and took the bus to Thirupathur; she alighted at Tirupathur bus stand at 12.00 noon and was waiting in the bus stand to take the bus to her village Akkaraikottai; at that time, she saw her friend Raja [PW3] coming by bicycle and requested him to give her a lift to Akkaraikottai; Raja [PW3] gave her a lift and together, they were going by bicycle to Akkaraikottai via the Ponnukondan rivulet; while they were proceeding, they saw an Ambassador car parked on the banks of the rivulet and a two wheeler near the said car; a person got down from the Ambassador car and two others who came by a motorcycle, hacked him; she [PW2] raised alarm and rushed along with Raja [PW3] towards them and found Anand [A1] hacking Rajendran;



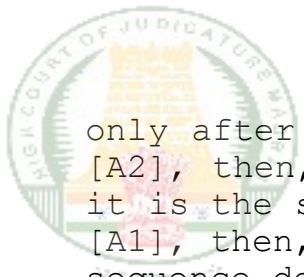
after hacking him, Anand [A1] got on to the motorcycle of Senthil Kumar [A2] and fled; she [PW2] was there along with Raja [PW3] in the place of occurrence; soon, several persons assembled there and she has named them as follows:-Sharmila, Anjammal, Gunasekaran, Muruhanandham and Muthukumar; shortly, the wife and children of the deceased also came there; the police also came there and started enquiry.

27.2 In the cross examination, Little Mary [PW2] admitted that at the time of occurrence, she was the President of the Women's wing of the party. She further stated that Raja [PW3] was also a party man and thus, she knew him. She further admitted that the route she and Raja [PW3] took from Tiruppattur to Akkaraikottai is 10 kms. more than the usual route through Karupukilar and that Karupukilar route has a motorable road. She further stated that the place where she asked Raja [PW3] to ride the bicycle fast, was one kilometre away from the scene of occurrence. Admittedly, her statement was recorded by the police only on 21.10.2008, which is five days after the occurrence and four days after the arrest of the accused.

27.3 Raja [PW3], in his evidence, has stated that on 16.10.2008, while he was going through the bazaar in Tirupatur, he saw Little Mary [PW2] standing in the bus stand; he gave her a lift in his bicycle to go to Akkaraikottai village; while both of them were going, they saw an Ambassador car on the bank of the Ponnukondan rivulet; a person alighted from the car; he was hacked by another person; he cycled fast to reach the place where the attack was being mounted and found that the attacker was Anand [A1] and the victim was Rajendran; after the attack, Anand [A1] got on to the motorcycle of Senthil Kumar [A2] and sped; while he [PW3] and Little Mary [PW2] were there, soon, Selvam [PW24] and others came there; the wife of Rajendran and the police also came there. He has further stated that two days later, the police examined him and four months later, he gave a statement under Section 164 CrPC.

27.4 In the cross-examination, Raja [PW3] admitted that he is a partyman. He has further stated that he was examined by the police two days later and till then, he did not tell anyone as to what he saw, whereas, Sampathkumar [P.W.25], the first Investigating Officer, has stated that he recorded the statement of Raja [PW3] on 21.10.2008.

28 The statement of the other alleged eye-witness, viz., Selvam [PW24], who turned hostile, was recorded by Sampathkumar [PW25], the first Investigating Officer, on 20.10.2008. We are unable to fathom as to how the police arrested Anand [A1] and Senthil Kumar [A2] on 17.10.2008 when the alleged eyewitnesses, viz., Little Mary [PW2], Raja [PW3] and Selvam [PW4] were examined three days later. Had it been the police case that the absence of Sivakumar [A3], driver of the car, aroused suspicion in them and



only after his arrest, they knew about Anand [A1] and Senthil Kumar [A2], then, the sequence would have been logical. On the contrary, it is the specific case of the police that they first arrested Anand [A1], then, Senthil Kumar [A2] and thereafter, Sivakumar [A3]. This sequence defies logic.

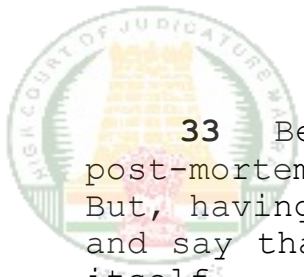
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29 Little Mary [PW2] and Raja [PW3] have clearly stated that they were present in the place of occurrence throughout, even after the wife of Rajendran, viz., Boopathy [PW1] came to the place of occurrence with her children. They [PWs2 and 3] have also stated that they were present when the police came. We are unable to understand as to how they remained silent and did not disclose the identity of the perpetrators of the crime immediately either to Boopathy [PW1] or to the police. It must be remembered that Little Mary [PW2] and Raja [PW3] are not some rustic villagers, but, were members of a cadre-based political party, committed to the Left ideology.

30 Boopathy [PW1], widow of Rajendran, has, in the cross-examination, stated that around 500 persons were there including Little Mary [PW2], Raja [PW3] and Selvam [PW24] at the place of occurrence. She has further stated in the cross-examination that on account of a dispute between the Communists and D.M.K. Partymen, the local Sri Maha Mari Amman Temple was closed and locked in the year 2006 and after her husband's death, it was re-opened. Initially, she admitted that after her husband's murder, the Communist party cadre went on a rampage in the area as they did not know who the perpetrators were and eight cases were registered against them in various police stations. Subsequently, she denied that.

31 The learned Additional Public Prosecutor contended that since Little Mary [PW2], Raja [PW3] and Selvam [PW-24] were available in the place of occurrence, the police knew the identity of perpetrators and that is why, the names of Anand [PW1] and Senthil Kumar [A2] figure in the inquest report [Exp31]. At the first blush, this argument did appear convincing, but, as stated above, Little Mary [PW2], Raja [PW3] and Selvam [PW24] were examined by the police only three days later.

32 The learned defence counsel submitted that the inquest report [Exp31] was prepared after the arrest of the accused and that is why, it reached the Court late. In support of this submission, the learned defence counsel submitted that the body was sent for post-mortem only after the inquest and till that time, the fact that the police were clueless about the perpetrators is borne out by the requisition letter [Exp18] that was given by the Inspector of Police to the Medical Officer, Government Hospital, Mannargudi, for conducting post-mortem, in which, it is clearly stated that some unknown persons have hacked Rajendran to death.



33 Be it noted that in the requisition letter [ExP18] for post-mortem, it is not necessary for the police to say all this. But, having said so categorically, they cannot wriggle out of it now and say that they knew the perpetrators of the crime during inquest itself.

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34 The motive projected by the prosecution for the murder is the dispute between Rajendran and the family of the accused relating to Nizam Zamin lands. Shajahan [PW23], the present descendant of the Nizam family turned hostile and did not support the prosecution case. From the evidence of Boopathy [PW1], wife of Rajendran, it is seen that Rajendran had disputes with others as well. Superadded, the alleged eyewitnesses, viz., Little Mary [PW2] and Raja [PW3] have not spoken a word about the driver Sivakumar [A3].

35 Thus, in the light of the aforesaid discussion, we have no hesitation in holding that the prosecution has failed to prove the involvement of Anand [A1] and Senthil Kumar [A2] in the offence.

36 Coming to the case of Sivakumar [A3], the prosecution has proved that Sivakumar [A3] was the driver of the car on that fateful day. The car had stopped on the banks of the Ponnukondan rivulet and someone had murdered Rajendran. The needle of suspicion points at Sivakumar [A3], inasmuch as, he absconded after abandoning the car near the Ponnukondan rivulet. This conduct of Sivakumar [A3] is relevant under Section 8 of the Evidence Act. Sivakumar [A3] could have either been the murderer himself or could have facilitated the murder by someone known to him.

37 The learned counsel for Sivakumar [A3] contended that Sivakumar [A3] ran away, because, he would have got scared of the attackers. This is a plausible argument. Assuming, however, for a moment that he had run away on seeing the attackers, he should have either gone to the police station or sought the help of the local partymen. He did neither.

38 The learned counsel for Sivakumar [A3] further submitted that in the cross-examination of Boopathy [PW1], she has stated that when she went to the police station, she saw Sivakumar [A3] in the custody of the police. Based on this stray answer given by Boopathy [PW1], the learned counsel for Sivakumar [A3] submitted that Sivakumar [A3] escaped from the attackers, fled to the police station and complained, but, instead of acting on his complaint, the police detained him in the police station, obtained a complaint statement from Boopathy [PW1] and thereafter, foisted the case on Sivakumar [A3].

39 This argument of the learned counsel for Sivakumar [A3] does not cut ice with this Court. Boopathy [PW-1], widow of Rajendran, rushed to the place of occurrence, saw the dead body and along with the members of the Communist Party, went to the police station and gave a statement [ExP1], wherein, she has clearly stated



that the whereabouts of Sivakumar [A3] are not known to her. Had she seen Sivakumar [A3] in the police station, where she had gone with the Communist partymen, she would not have stated so in the statement [ExP1] nor would the Communist partymen have allowed the police to include such an averment in the complaint. That apart, the best evidence for the police would have been provided by Sivakumar [A3] and they would not have been foolhardy to cover up his version, especially in a sensitive case of this nature, where, the deceased was a local political heavyweight. Appreciating the evidence on record, the stray statement of Boopathy [PW1] in the cross-examination that she saw Sivakumar [A3] in the police station, does not lead to the only inference that she saw him at the time when she went to the police station to give the complaint [ExP1]. It is possible that she would have seen him in the police station after his arrest.

40 When it has been proved beyond cavil that Sivakumar [A3] was the driver of the car at the time of the occurrence, then, under Section 106 of the Evidence Act, the onus is on Sivakumar [A3] to satisfactorily explain his movements at the time of occurrence to the Court. Section 106 of the Evidence Act facilitates the Court to draw an inference if the accused fails to offer a probable explanation of facts "especially within his knowledge" so as to discharge the onus cast on him. However, it is equally well settled that Section 106 of the Evidence Act, does not absolve the prosecution's burden under Section 101 to prove the case beyond reasonable doubt (See **Mangu Singh vs. Dharmendra**¹). On the facts obtaining in this case, we find that the prosecution has, unfortunately, not discharged this burden.

41 If this case were to have been tried in the United States, Sivakumar [A3] would have been required to face a Grand Jury of 24 jurors. He would have been questioned in the Grand Jury proceedings. If the Grand Jury finds his explanation to be unsatisfactory, they would have indicted him of murder after which he would have faced trial before an ordinary jury of 12 jurors who may have even returned a finding of guilt, albeit the inability of the police to find out the involvement of others in the crime.

42 It is an axiomatic principle of our criminal jurisprudence that suspicion cannot take the place of proof. In **Hari Charan Kurmi vs. State of Bihar**², Gajendragadkar, C.J. observed that a *true legal approach must be adopted, and suspicion, however grave, must not be allowed to take the place of proof*. The learned Chief Justice added that *in criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion.*" In the case at hand, Little Mary [PW2] and Raja [PW3] have stated nothing about the presence of Sivakumar [A3] at the time of occurrence. In the absence of any other material to implicate Sivakumar [A3], we are

¹ (2015) 17 SCC 488

² AIR 1964 SC 1184 <https://hcserv.adr.etp064.930.in/services/>



constrained to hold that the conviction of Sivakumar [A3] cannot be sustained.

43 Had we believed the testimonies of Little Mary [PW2] and Raja [PW3] with regard to the attack by Anand [A1] and Senthil Kumar [A2] on Rajendran, then, the conduct of Sivakumar [A3] in stopping the car at a desolate place and absconding, would have been sufficient to bring him under net of either conspiracy or abetment or, at the very least, under the rule of common intention under Section 34 of the Evidence Act. We are not able to understand as to how Little Mary [PW2] and Raja [PW3] remained silent and had disclosed as to what they saw to the police after five days. At the risk of repetition, it may be necessary to state here that in the complaint given by Boopathy [PW1], she has stated that the assailants were not known to her. Boopathy [PW1], widow of the deceased, admitted that immediately after the incident, riots broke out in the area, as Communist party cadres started going on a rampage and they mounted pressure on the police to arrest the offenders. Admittedly, both these witnesses, viz, PW2 and PW3 were examined by the police only on 21.10.2008. That being so, it is not known as to how the police arrested Anand [A1] and Senthil Kumar [A2] on 17.10.2008. This is an unresolved mystery that continues to remain in the realm of imponderables. On the face of it, the testimonies of Little Mary [PW2] and Raja [PW3] are superficial and unnatural. *Ex consequenti*, the convictions and sentences imposed on Anand [A1] and Senthil Kumar [A2] cannot be sustained.

44 Before parting, we would observe that the case against Sivakumar [A3] is aptly captured by the sagely and telling observations of Prof. Nageswara Rao that *absence of evidence of guilt is not evidence of absence of guilt*³.

45 In view of the above discussion, the impugned judgment and order of the trial Court is set aside and the appellants are acquitted of all the charges framed against them.

Resultantly, the criminal appeals are allowed. Bail bonds, if any, executed by the appellants shall stand discharged. Fine amount, if any, paid by the appellants shall be refunded to them.

Sd/-

Assistant Registrar (AD-I)

// True Copy //

/ /2020

Sub Assistant Registrar (CS)



To

1. The I Additional District Judge [PCR]
Thanjavur

2. The Judicial Magistrate I, Mannargudi.

3. The Superintendent,
Central Prison, Trichy.

4. The Inspector of Police
Thirukalar Police Station

5. The Additional Public Prosecutor
Madurai Bench of Madras High Court
Madurai

copy to

The Record Keeper	: with a direction
VR / ER Section	: to transmit the
Madurai Bench of Madras High Court	: original records
Madurai	: to the trial
	: Court,
	forthwith.

+1 CC to Mr.R.M.SIVAKUMAR, Advocate (SR-12730[F] dated 20/03/2020)

+2cc to Mr.R.Paulsukumar, Advocate Sr.No.12368

+1cc to M/s.Veera Associates, Sr.No.12705

**Common judgment in
Crl.A. (MD)Nos.27 and 28 of 2018
11.05.2020**

VB(19.05.2020) 15P 12C