

Bail Slip

The Appellant/Accused,namely Babu @ Kulsath Basha, S/o.Abdul Razack (A1) and Ashma,W/o.Shafi (A2), were directed to be released on bail as per order dated 27.02.2015 made IN MP.NO.1/2015 IN CRL A.NO.24/2015.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 12.03.2021

CORAM :

THE HONOURABLE MR. JUSTICE A.D.JAGADISH CHANDIRA
Crl.A.No.24 of 2015

1.Babu @ Kulsath Basha,
S/o.Abdul Razack

2.Ashma,
W/o.Shafi

... Appellants/A1 & A2

Vs.

State by
Inspector of Police,
Thammampatti Police Station,
Thammampatti,
Gangavalli Taluk,
Salem District.
(Crime No.66 of 2012)

...Respondent/Complainant

PRAYER : Criminal Appeal filed under Section 374 r/w 389 of The Criminal Procedure Code, to call for the entire records in so far relate to S.C.No.200 of 2013, dated 06.01.2015 on the file of the Principal Sessions Court, Salem and set aside the same.

For Appellants : Mr.K.K.Senthilvelan

For Respondent : Mrs.V.Saradha Devi,
Government Advocate (Crl.Side)

JUDGMENT

This Criminal Appeal has been filed by the Appellants / A1 & A2 seeking to call for the entire records and set aside the Judgment of conviction and sentence passed by the learned Principal Sessions Judge, Salem in S.C.No.200 of 2013, dated 06.01.2015.

2.The case of the prosecution is that the 1st accused was running a hospital in the name of Rasak Hospital in Udayarpalayam, within the jurisdiction of Tammampatti Police Station. The victim / deceased Raju had gone to the 1st accused hospital for piles treatment and that the 1st accused had demanded a sum of Rs.7,000/- from him for piles treatment and

had received a sum of Rs.6,500/- and asked him to come to the hospital in the evening at 6.00 p.m. On 19.03.2012, when the victim / deceased Raju had gone to the 1st accused hospital at 6.00 p.m., he had given two injections in both the hands of the victim / deceased Raju and thereafter after giving treatment to the other patients had performed piles surgery for the victim / deceased Raju at 9.00 p.m., with the help of the 2nd and 3rd accused. Due to improper surgery conducted, the condition of the victim / deceased Raju became serious and thereafter, around 10.30 p.m., the 1st accused had taken the victim / deceased Raju in a Scorpio car bearing Registration No.TN 32 R 4432 owned by him to Deepam Hospital at Valappady. The Doctors who examined the victim / deceased had informed that the victim /deceased had died 1½ hours earlier. Since, the 1st accused without requisite qualification had practiced Allopathy Medicine and conducted improper surgery knowing fully well it is likely to cause death and due to the surgery, the victim / deceased suffered complication of perianal surgery resulting in the death of the victim / deceased and thereby, the appellant / A1 was charged for offence under Section 304 (II) IPC and under Section 15 (2) & (3) of the Indian Medical Council Act. A2 and A3 were charged for offences under Section 304 (II) IPC read with Section 34 IPC for having assisted A1 in the surgery.

3.The final report was filed before the learned Judicial Magistrate No.II, Attur and the learned Magistrate finding that the case was triable by the Court of Sessions, after furnishing the documents under Section 207 Cr.P.C., committed the case to the Principal Sessions Court, Salem, for trial.

4.The trial Court after examining the documents and hearing both sides framed charges against the 1st accused for offence under Sections 304 (II) IPC and Section 15 (2) & (3) of the Indian Medical Council Act and against the 2nd and 3rd accused for offence under Section 304 (II) IPC read with Section 34 IPC and the charges were explained to them and they were questioned. The accused denied the charges and the case was posted for trial.

5.In order to establish the case of the prosecution, the prosecution examined 17 witnesses as P.W.1 to P.W.17 and marked 12 documents as Ex.P1 to Ex.P12 and no material objects were marked.

6.When the accused were questioned, with regard to the incriminating materials found the 1st accused had given written submission denying having performed surgery and that the allegations were false. A1 had also submitted that he is an enlisted Siddha Medical Practitioner and submitted the certificate issued to him by the Tamil Nadu Siddha Medical Council. However, no witnesses were examined on the side of the defence.

7.The trial Court after hearing the arguments of the counsels found the 1st and 2nd appellants / accused guilty and acquitted the 3rd accused. The 1st appellant / accused was found guilty for offence under Sections 304(II) IPC and Section 15 (2) & (3) of the Indian Medical Council Act and convicted him and sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs.5,000/- in default of paying the fine amount, to undergo one year rigorous imprisonment for offence under Section 304 (II) IPC and was sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs.1,000/- in default of paying the fine amount, to undergo, three months rigorous imprisonment for the offence under Section 15 (2) & (3) of the Indian Medical Council Act. The 2nd appellant / accused was also found guilty for offence under Section 304 (II) IPC read with Section 34 IPC and convicted her and sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs.5,000/- in default of paying the fine amount, to undergo one year rigorous imprisonment.

8.Aggrieved against the said judgment of conviction and sentence passed by the learned Principal Sessions Judge, Salem in SC.No.200 of 2013 dated 06.01.2015, the Appellants / A1 & A2 have preferred the present Criminal Appeal before this Court.

9.The case of the prosecution as revealed from the prosecution evidence is that P.W.1 / Umamaheswari, is the wife of the Victim / Deceased Raju. P.W.5 / Dr.Suresh Kumar and P.W.4 / Dr.Akilammal are husband and wife and the Doctors who were running Deepam Hospital at Valappady. P.W.6 / Arokiasamy is the brother of the victim / deceased Raju. P.W.8 / Manimaran is the ambulance driver of Deepam Hospital. P.W.10 / Vijayaraghavan is a person who had taken the victim / deceased from the 1st accused hospital through the car belonging to A1 and admitted him at Deepam Hospital at Valappady. P.W.11 / Mohanraj is a resident of Tammampatti, Udayarpalayam. Since, the above witnesses did not support the case of the prosecution, they were treated as hostile witnesses and they were permitted to be cross examined by the prosecution.

10.P.W.1 viz., Umamaheswari who is the wife of the victim / deceased Raju. P.W.2 viz., Savuriammal is the mother of the victim / deceased Raju. P.W.3 viz., Manickam is the son-in-law of P.W.2 and P.W.12 is an astrologer having office near the shop of P.W.1. P.W.1 and the victim / deceased Raju were in love with each other and they got married were having a girl child aged about 7 years. The victim / deceased Raju was working as a driver in a Mill at Malliakkarai. Since, he was having piles problem, he was taking treatment. The victim / deceased Raju was advised to undergo a surgery for piles problem, the victim / deceased Raju along with P.W.1 had gone to the 1st accused hospital at Tammampatti on 18.03.2012 in the evening. At that time, the persons who was on duty in the hospital had administered injections to the victim / deceased and demanded a

sum of Rs.7,000/- for doing the surgery. Based on the demand, the victim / deceased and P.W.1 have arranged money and gone to the hospital on 19.03.2012 at 5.00 p.m., at that time, the 2nd appellant / A2 who is the daughter of the 1st appellant / A1 had administered two injections in both the hands of the victim / deceased Raju and done preparations to perform the surgery of the 1st accused. After performing surgery, since the condition of the victim / deceased Raju got deteriorated, the 1st and 2nd appellants / A1 & A2 with the help of P.W.10 / Vijayaraghavan had taken the victim / deceased Raju to Deepam Hospital, at Valappady which was run by P.W.4 and P.W.5. The P.W.4 / Dr.Akilammal after examining the victim had declared the victim / deceased Raju was brought dead.

11.P.W.14 / Sankar is an ambulance operator running ambulance in the name of K.V.Ambulance in front of Attur Government Hospital. On 20.03.2012 at 10.00 a.m., he received call for urgent need of ambulance from Senthoorapatti village and that he had gone to Tammampatti Village and taken the body of the victim / deceased Raju and brought it to the Tammampatti Police Station at 1.00 p.m.

12.P.W.13 / Ambika is the Sub Inspector of Police who was on duty at Tammampatti Police Station on 20.03.2012, P.W.1 appeared before her and gave a complaint (Ex.P7). Based on which, she registered a case in Crime No.66 of 2012 for offence under Section 174 (3) Cr.P.C., and after preparing FIR (Ex.P8) sent the original FIR to the learned Judicial Magistrate No.II, Attur and forwarded the copies to the higher officials through P.W.15 / Venkatesan, Head Constable. The signature of P.W.1 found the compliant is marked as Ex.P1.

13.Further, P.W.13 had conducted inquest in the presence of witnesses and Panchayatdars and prepared Inquest Report (Ex.P9). P.W.16 / Sivalingam, Head Constable took the Ex.P9 with a request to conduct postmortem on the victim / deceased Raju and forwarded the body to Salem Government Hospital through P.W.16. Thereafter, on 22.03.2012, P.W.13 visited the scene of occurrence in the presence of witnesses P.W.7 / Aruldass and Easuraj and prepared the Observation Mahazar (Ex.P2) and Rough Sketch (Ex.P10) and thereafter examined the witnesses and recorded their statements. After enquiry, on 30.05.2012, finding the death of the victim / deceased Raju was caused due to the act of the 1st and 2nd accused, altered the FIR from one under Section 174 (3) Cr.P.C., to Section 304 IPC and send it to the Court. The altered FIR is marked as Ex.P11.

14.On 21.03.2012, when P.W.9 / Dr.Panneer Selvam was on duty at Salem Government Hospital, based on the request (Ex.P3) given by the Inspector of Police and P.W.16, Head Constable identified the body of the victim / deceased and P.W.9 had conducted autopsy at 3.00 p.m., found the following injuries.

"1.A fresh circumstantial absence of skin

with Muco cutaneous junction all around anaus noted.

2.On proctoscopic Examination no active bleeding, No discharge, No visible Ligature, No Blood clot, internal mucosa intact up to scopy length (Antemortem). No other antemortem injuries seen any where in the body."

15.Thereafter, viscera of the victim / deceased Raju was collected and sent for chemical analysis. Since no alcoholic or poisonous substance was found in the viscera, P.W.9 / Dr.G.Panneer Selvam had given an opinion under Ex.P4 stating that the victim / deceased Raju would appeared to have died prior to 36 to 48 hours due to complications of PERIANAL surgery done by an inexperienced person. The Viscera Report was marked as Ex.P5 and the Final Opinion is marked as Ex.P6. However, during the cross examination he had deposed that the injury found on the body could have been due to rat bite in the mortuary and that there was no sign or indication of piles surgery being done on the body of the victim / deceased Raju.

16.P.W.17 / Natarajan, Inspector of Police had conducted further investigation in this case. After examining P.W.9 / Dr.Panneer Selvam and other witnesses and after recording their statements P.W.17 altered the case from Section 304 IPC to Section 304 (2) and 304 (2) r/w 34 and Section 15 (2) & (3) of the Indian Medical Council Act and forwarded the Alteration Report (Ex.P12) to the Court and thereafter completed the investigation and filed the final report.

17.After completion of trial, when the trial Court, questioned the appellants / A1 & A2 along with the other accused A3 under Section 313 (1) (b) Cr.P.C., to the incriminating circumstances found in the evidence of the prosecution witnesses the accused have denied the allegations stated in the complaint that it is a false case and that no such incident had happened and they do not have any witnesses or documents on their side to prove the case. However, the 1st Appellant / A1 had given a written explanation (statement) under Section 313 Cr.P.C., stating that he is a qualified Siddha practitioner having registered with the Tamil Nadu Siddha Medical Council and that for the past 30 years he was practicing Homeopathic and Siddha Medicine and was giving treatment to the patients at his house at Tammampatti Village and that he had not practiced Allopathic Medicine and had never given Allopathic Medicine to the patients. He had further stated that on 19.03.2012, the victim / deceased Raju and his wife had come to his hospital for piles treatment. Since there was no immediate relief for piles in Siddha Medicine, he had advised him to consult an Allopathic practitioner and that he had not performed any surgery / treatment and that a false complaint has been given against him. However, the Trial Court, based on the evidence and the

materials on record found the 1st and 2nd appellants / accused guilty for the offence and convicted and sentenced the 1st and 2nd appellants / accused and acquitted the 3rd accused as stated above. Against which, the present appeal has been filed.

18.While assailing the Judgment of conviction and sentence, Mr.K.K.Senthilvelan, learned counsel appearing for the appellants would submit that in this case, the prosecution has failed to prove the case beyond all reasonable doubts. Without there being any legal evidence on record the trial Court had erred in convicting the appellants / accused based on presumptions and assumptions. In this case, the allegation against the appellant / A1 and his daughter A2 is that they have performed piles surgery on the victim / deceased Raju, whereas, as per the medical evidence no surgery had been performed on the victim / deceased Raju. P.W.9 / the Doctor who had conducted postmortem on the victim / deceased Raju has categorically stated that no indication / symptom found on the body of the victim / deceased Raju to show that a surgery for piles was conducted on the victim / deceased. Even as per the Postmortem Report (Ex.P4) only two injuries were stated to be found on the body of the victim / deceased Raju.

"1.A fresh circumstantial absence of skin with Muco cutaneous junction all around anaus noted.

2.On proctoscopic Examination no active bleeding, No discharge, No visible Ligature, No Blood clot, internal mucosa intact up to scopy length (Antemortem). No other antemortem injuries seen any where in the body. "

The first injury was a fresh one and the second injury does not suggest that a surgery was conducted.

19.The learned counsel would further submit that P.W.9 / the Doctor who conducted postmortem had further stated that on the proctoscopic examination, no active bleeding, no discharge, no visible ligature marks were found in the body of the victim / deceased Raju and as per Ex.P4 / Postmortem Report, there was nothing to infer or suggest that a surgery was conducted and if at all a surgery had been conducted there would have been either bleeding / discharge or ligature marks but nothing was found on the body of the victim / deceased Raju thereby the entire case of the prosecution is baseless. Further in this case, P.W.1 / wife of the victim / deceased Raju is the person who is stated to have accompanied the victim / deceased to the hospital and she is the person who had preferred the complaint in the respondent police station. She has not supported the case of the prosecution and she has been treated as hostile witness. Though, the incident is stated to have happened on 19.03.2012 at 9.00 p.m., the complaint had been given only on the next day 20.03.2012 evening at 5.30 p.m., and there had been no

explanation by the prosecution for the delay and even as per the prosecution, the victim / deceased Raju is alleged to have died at 11.00 p.m., on the previous day.

20.The learned counsel would further submit that in this case, P.W.4, P.W.5, P.W.6, P.W.8, P.W.10 and P.W.11 have not supported the case of the prosecution and they have been treated as hostile witnesses. Though, P.W.12 had been examined in-chief to elicit the fact that the 1st appellant was practicing medicine in the village, P.W.12 has not stated that the 1st appellant was practicing Allopathic medicine. Admittedly, the 1st appellant is a qualified Siddha and Homeopathic Doctor, who has only given consultation and he has not performed surgery. The learned counsel would further submit that taking into consideration the entire materials on record the prosecution has failed to prove the case beyond all reasonable doubts and the trial Court gravely erred in convicting the appellants without there being any evidence to show that a surgery was performed.

21.Per Contra, Mrs.V.Saradha Devi, learned Government Advocate (Crl.Side) would vehemently oppose stating that P.W.2, the mother of the victim / deceased Raju and P.W.3, her son-in-law have categorically spoken about the admission of the victim / deceased Raju in the Razak hospital run by the 1st accused. P.W.2, the mother of the victim / deceased had spoken that the victim / deceased was taken inside the room and kept there for about 1 ½ hours and only thereafter, he was taken in a vehicle to Deepam Hospital at Valappady and his son was unconscious at that time, thereby, inferring that a surgery was conducted inside the room due to improper surgery, the condition of her son had become worsen. Further, P.W.3, her son-in-law has also corroborated the statement of P.W.2. Further, P.W.9/the Doctor had given an opinion stating that the death was due to improper piles surgery.

22.At this juncture, the learned counsel for the appellants would submit that P.W.1 is the person who had accompanied the victim / deceased Raju to the hospital and she is the one who had given a complaint, she has not spoken anything about the presence of P.W.2 and P.W.3 along with her in the hospital. The presence of P.W.2 and P.W.3 itself in the hospital is doubtful and that reliance cannot be placed on their evidence. Further he would submit that though P.W.9 has given the final opinion under Ex.P6, the Postmortem Certificate and the injuries found on the Postmortem Certificate (Ex.P4) do not support the final opinion and the evidence of P.W.9 before the Court is totally contrary to Ex.P4 and thereby, it is clear that the case of the prosecution is baseless and the prosecution thus has not proved its case beyond all reasonable doubt and the Trial Court without any legal evidence on record and on mere presumptions, assumptions and surmises had convicted the appellants / accused.

23.Heard the counsels. Perused the materials placed on record.

24. Now what is to be seen is whether the prosecution has proved its case beyond all reasonable doubts and whether the Trial Court is right in finding the appellants / accused guilty for the charges and convicting them.

25. In this case, the occurrence is stated to have been taken place on 19.03.2012 at 9.00 p.m. and the victim / deceased Raju is stated to have been admitted by P.W.1 at the hospital of the 1st appellant for piles surgery. P.W.1/ wife of the victim / deceased Raju is stated to have accompanied him and she is the person who is stated to have given a complaint / Ex.P1 on the next day at 5.30 p.m. However, strangely P.W.1, who is the wife of the victim / deceased Raju has not supported the case of the prosecution and she has been treated as hostile. Even in her evidence in-chief, she has not stated about the surgery being performed on her husband by the appellants. Though, she has been treated hostile and subjected to lengthy cross examination by the prosecution, no material evidence has been elicited by the prosecution from her cross examination. Though, P.W.2 and P.W.3 who are the mother and brother-in-law of the victim / deceased Raju respectively have spoken about being present in the hospital at the time of alleged surgery, their presence has not been spoken by P.W.1 and thereby the claim of the presence of P.W.2 & P.W.3 in the hospital is doubtful at the relevant point of time and further their evidence itself is contrary to each other. P.W.6, the brother of the victim / deceased Raju who is also stated to have accompanied P.W.1 and the victim / deceased Raju to the hospital has also not supported the case of the prosecution and he has also been treated as hostile. P.W.4 and P.W.5, the Doctors who are stated to have immediately seen the victim / deceased Raju have also not supported the case of the prosecution. Further, in this case, P.W.8, P.W.10 and P.W.11 have also turned hostile. Though, the incident is stated to have happened on the night hours on 19.03.2012, the complaint had been given only on the next day evening at 5.30 p.m. and no explanation has been offered by the prosecution for the long delay in giving the complaint and nothing had been elicited by the prosecution as to what transpired in between. Further, though P.W.9 had given the final opinion (Ex.P6) opining that the victim / deceased Raju ought to have died due to complications of PERIANAL surgery the opinion is contrary to the injuries noted in the Postmortem Certificate (Ex.P4). Further, it is a categoric admission of P.W.9, during his examination in Court that there was no sign or indication to show that the piles surgery was performed on the victim / deceased. It is apposite to refer to the relevant part of the evidence " gpnuij;jpy; K:yneha;f;fhf mWit rpfpr;ir bra;ag;gl;ljlw;fhd mwpFwp ,y;iy vd;why; rhpjhd; "

26. When such being so, the entire case of the prosecution that the victim / deceased Raju died due to complications in improper piles surgery is doubtful and baseless. Moreover, no evidence has been let in by the prosecution to prove that the 1st

appellant had practiced Allopathic medicine and the 2nd accused who is the daughter of the 1st appellant had assisted her father in his practice.

27.The Trial Court without any legal evidence supporting the case of the prosecution had erred in convicting the 1st and 2nd appellants / accused. The Trial Court had failed to properly analysis the evidence and committed the error in convicting the 1st and 2nd appellants / accused.

28.In view of the above discussions, this Court is of the opinion that the prosecution has failed to prove the case beyond all reasonable doubt and without their being any material and legal evidence on record, the Trial Court erred in finding the 1st and 2nd appellants / accused guilty and convicted them.

29.In the result, the Criminal Appeal is allowed. The Judgment of Conviction and Sentence passed by the learned Principal Sessions Judge, Salem in S.C.No.200 of 2013, dated 06.01.2015 is set aside. Bail bond if any executed by the Appellants / Accused shall stand cancelled. The fine amount if any paid by the Appellants / Accused shall be refunded to him.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Principal Sessions Judge,
Salem.
- 2.The Judicial Magistrate No.II,Athur Salem District.
- 3.The Superintendent,Central Prison,coimbatore.
- 4.The Superintendent,Central Prison(Women),Vellore.
- 5.The Inspector of Police,
Thammampatti Police Station,
Thammampatti,Gangavalli Taluk, Salem District.
- 6.The Public Prosecutor, High Court of Madras, Chennai.
7. The Section Officer,
Criminal Section,High Court,Madras

Cr1.A.No.24 of 2015

A.SK(01.07.2021)

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