



BAIL SLIP

Crl.A.611/2018:

The Appellant/Accused No.1 viz., Velu, Male aged 36 years S/o.Periyasamy Gounder, was directed to be released on bail, as per order of this Court dated 21/11/2019 in Crl.M.P.16284/2019 in Crl.A.611/2018.

Crl.A.312/2018:

The Appellant/Accused No.2 viz., Durai, Male aged 41 years S/o.Pandu @ Pandurangan, was directed to be released on bail, as per order of this Court dated 04/04/2019 in Crl.M.P.4680/2019 in Crl.A.312/2018.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.02.2022

DELIVERED ON : 18.02.2022

CORAM :

THE HONOURABLE MR. JUSTICE P.N.PRAKASH
and
THE HONOURABLE MRS. JUSTICE R.HEMALATHA

Crl.A.Nos.312 & 611 of 2018

Crl.A. No.312 of 2018 :

Durai ...Appellant/Accused-2

Vs.

The Inspector of Police,
Melchengam Police Station,
Tiruvannamalai District. ...Respondent/Complainant

Crl.A. No.611 of 2018 :

Velu ...Appellant/Accused-1

Vs.

The Inspector of Police,
Melchengam Police Station,
Tiruvannamalai District. ...Respondent/Complainant

COMMON PRAYER: Criminal Appeals filed under Section 374 (2) Criminal Procedure Code, 1973 praying to set aside the judgment and order dated 05.12.2017 made in S.C.No.200/2007 on the file of the District and Sessions Judge, Tiruvannamalai.



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In both appeals :

For Appellant

:

Mr.V.Prakash Babu in both appeals

For Respondent

:

Mr.M.Babu Muthumeeran
Additional Public Prosecutor
in both appeals.

COMMON JUDGMENT

(R.HEMALATHA, J.)

The present appeals are against the judgment and order of the District and Sessions Judge, Tiruvannamalai, made in S.C.No.200/2007 dated 05.12.2007.

2.The appellants are the accused in S.C.No.200/2007 and they were convicted and sentenced as detailed hereunder :

S.No.	Rank	Conviction	Sentence
1.	A1 & A2	U/s.120 (b) IPC	Life imprisonment.
2.	A1 & A2	U/s.3 and 25(1b) of Indian Arms Act	Rigorous imprisonment for seven years (each) and a fine of Rs.1,000/- each, in default, to undergo two years rigorous imprisonment (each).
3.	A1 & A2	U/s.302 IPC	Life imprisonment (each) and a fine of Rs.1,000/- each, in default, to undergo two years rigorous imprisonment (each).

3.The case of the prosecution in nutshell is as follows:

- i. The victim Govindan along with his wife Kanchana (P.W.4) was residing in Manikkal Village, Chengam Taluk, Tiruvannamalai District. The prosecution case is that when the victim Govindan along with his brother-in-law Chinnaian (P.W.1) and Chinnathambi (died during the course of trial) were carrying jaggery bags to Korayaru where illicit liquor was being brewed by Durai (A2), the victim Govindan was shot at with a country rifle by Velu (A1) which caused instantaneous death of the victim Govindan. According to the prosecution one Durai (A2) who was also related to the deceased Govindan was having illicit relationship with Kanchana, the wife of the victim. This was objected to by the victim and this enraged the said Durai (A2). Kanchana (P.W.4) was the one who was earlier carrying the jaggery to Korayaru during the relationship between Kanchana (P.W.4) and



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Durai (A2) developed. The victim had stopped his wife Kanchana from going to Korayaru and he himself started carrying jaggery which was the reason for the grouse Durai had over the victim. It is also the theory of the prosecution that Durai sought the assistance of one Velu who had exposure in handling gun / rifle. On the fateful day i.e. 11.04.2004, at about 10.00 a.m., Velu ended up killing the victim with the country made gun as planned and conspired by Durai (A2). Chinnaiyan (P.W.1) was the direct eyewitness to the occurrence.

ii. Subsequently, at about 12.30 p.m. Velu (A1) went to the office of the Village Administrative Officer of Manikkal Village and gave an extra judicial confession and the same was recorded by one R.Narayanan (died during the course of trial), Village Administrative Officer in the presence of Manickam (P.W.5), his assistant. The Village Administrative Officer lodged a complaint (Ex.P5) along with the extra judicial confession of A1 with the Special Sub Inspector of Police, Melchengam Police Station. He also handed over Velu (A1) to the police.

iii. Thiru. Venkatesan (P.W.8), Sub Inspector of Police, received the complaint with extra judicial confession (Ex.P5) and registered FIR (Ex.P4) in Crime No.127/2004 against both the appellants for the offences punishable under Sections 302 IPC and 25 (1) (a) of Indian Arms Act.

iv. Sekar (P.W.10), the Inspector of Police took up investigation and arrested Velu (A1) who was handed over by Village Administrative Officer on the same day. He also visited the scene of offence and prepared a Rough Sketch (Ex.P7) and an Observation Mahazar (Ex.P2) in the presence of A.Sundaramurthy (P.W.6) Forest Guard and Munusamy (not examined), Forest Officer. He also summoned the photographer Ravi (P.W.7) who took photographs of the scene of offence and the dead body in his digital camera. Thereafter, P.W.10 conducted inquest (Ex.P8) on the body of the deceased in the presence of panchayatdars and sent the body for postmortem. In the meanwhile, he recovered a lungi (M.O.1), a shirt (M.O.2) and a banian (M.O.3) worn by the deceased under the cover of a mahazar Ex.P3 in the presence of P.W.6 and Munusamy.

v. He arrested A2 and recorded his confessional statement in the presence of Village Administrative Officer and his assistant Manickam (P.W.5) and based on his confessional statement recovered the country rifle which was hidden behind a rock under the cover of a mahazar Ex.P1 in the presence of the same witnesses.

vi. After completing investigation, a final report against both the appellants were filed for the offences under



Sections 302 read with 109 & 34 IPC and Sections 3, 25 (1-b) of Indian Arms Act in P.R.C.No.IX/2006 before the Judicial Magistrate, Chengam, who in turn committed the case to the Court of Sessions on 07.11.2006.

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vii. In the trial Court, the prosecution examined 10 witnesses and marked 9 exhibits and 4 material objects.

viii. When the accused were questioned under Section 313 Cr.P.C. with regard to the circumstances appearing in evidence against them, they denied of having committed any offence. They did not examine any witness on their side. The trial Court found both the accused guilty of the offences under Sections 120 (b), 302 IPC and 3 & 25 (1) (b) of Indian Arms Act and convicted and sentenced them as already stated.

4. The arguments of Mr.V.Prakash Babu, learned counsel appearing for the appellants are as follows:

- (a) Though according to the prosecution there was only one bullet fired, the postmortem report revealed that there were two wounds, one on the left chest and the other on the back shoulder of the deceased which was not explained by the prosecution.
- (b) The evidence of P.W.5, the assistant of the Village Administrative Officer ought not to have been accepted by the trial Court since the extra judicial confession was only made to the Village Administrative Officer and not to his assistant.
- (c) The weapon i.e. the Rifle recovered was neither marked as an exhibit nor any certificate regarding the working condition of the rifle was furnished.
- (d) It has also not been proved that A1 had the expertise of handling and using the rifle effectively.

Mr. V. Prakash Babu also highlighted the deposition of the doctor that the possibility of dark ring around the bullet injury at the exit point is ruled out. According to him black circle generally would be found only at the entry point of the bullet injury and in such circumstances, this is a fit case for acquittal and the judgment passed by the trial Court should be set aside.

5. Per contra, Mr.M.Babu Muthumeeran, learned Additional Public Prosecutor would contend that the prosecution had made out a clear case against the accused and that the alleged short comings pointed out by the learned counsel for the appellants cannot come in the way of the prosecution case and in no way weakens the case. According to him, it is well settled law that when there is a direct eyewitness coupled with the extra judicial confession of A1, the case of the prosecution cannot be demolished on flimsy grounds. The Village Administrative Officer, to whom the extra judicial confession



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was made and other eyewitness Chinnathambi died prior to the trial. He also contended that two injuries caused by one bullet in front and back of the victim was sufficiently explained as the entry and exit point of the bullets and cannot change the narrations of prosecution in any manner.

6. The two striking aspects of this case are the presence and the deposition of P.W.1, the eyewitness to the crime and also the extra judicial confession made by Velu (A1). In fact even before any formal complaint by P.W.1 could be lodged, the extra judicial confession made by the accused before the Village Administrative Officer and his assistant (P.W.5) formed the basis of registration of FIR in Melchengam Police Station. Strangely the prosecution though cited that the reason for the murder as the illicit relationship A2 allegedly had with the wife of the victim, there has been no suggestion at all regarding this during the course of cross examination of the prosecution witnesses. However, barring this aspect, the case of the prosecution is rock solid because of the deposition of P.W.1 and the extra judicial confession made by Velu (A1).

7. The deposition of P.W.2 also lends credence to the prosecution case since she had seen A1 with the rifle hiding behind a bush and also when questioned about the gun shot, he had retorted asking P.W.2 whether she would want to taste the meat of the deer which he had killed suggesting that he had only killed a deer. At the same time, it is to be observed that A1 who had given such an evasive reply at 10.00 a.m went to the office of the Village Administrative Officer and gave an extra judicial confession at 12.30 p.m. i.e. within a couple of hours of the incident. P.W.3 & P.W.4 have, to a large extent, supported the prosecution case. Both of them went to the scene of crime after knowing the victim was killed by A1.

8. The deposition of the doctor who performed autopsy on the body of the deceased victim regarding the possible nature of injuries due to a gun shot has been wholly relied upon by the learned counsel for the appellant. She had deposed that the outer ring would be present only at the entry point and not at the exit point. The defence taken was regarding the number of shots from the rifle. Two injuries were not found on two different sides of the body to create a doubt as to whether it was a single shot or two shots fired by the assailant. The bullets which entered on the left side of the chest came out of the left back of the victim. Therefore, it is clear that only one shot was fired and not two shots. The medical records also prove this.

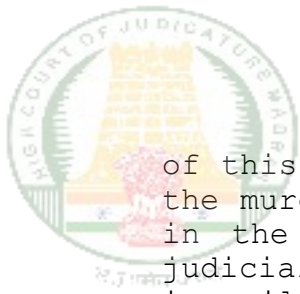
9. It has been admitted by the prosecution and also not questioned by the appellants that the rifle was a country made one without any license. There was also no suggestion as to the non-availability of ballistic report to the investigating



officer during the course of cross examination. It is not necessary that in every case where a fire arm is alleged to have been used by an accused person, in addition to the direct evidence, prosecution must lead the evidence of a ballistic expert, however good the direct evidence may be and though on the record there may no reason to doubt the said direct evidence. Therefore, the failure to produce a report by a ballistic expert who can testify the fatal injuries being caused by a particular weapon is not sufficient to impeach the credible evidence of the direct eyewitness. It is held by the Apex Court in State of Rajasthan Vs Arjun Singh reported in AIR 2011 SC 3380 that absence of recovery of pellets from the scene of offence or from the body of the injured person or of pistol or cartridge does not detract from the prosecution case. In the decision in Maqbool Vs State of Andhra Pradesh reported in AIR 2011 SC 184, the Supreme Court has held that in a case of killing by shooting, the failure on the part of Investigating Officer to collect the blood stained soil and empty shells from the scene of crime would not weaken the case of the prosecution if the eyewitness had deposed to the firing of shots resulting in death which was corroborated by medical evidence. In the instant case, the eyewitness to the occurrence namely P.W.1 had deposed cogently though he was examined only in the year 2017 with regard to the occurrence that took place in the year 2004. He also withstood the testimony of cross examination. The rifle was also recovered but omitted to be marked in the trial Court. This again does not prejudice the accused nor weaken the case of the prosecution.

10. It is also pertinent to mention that both the appellants did not appear before the trial court regularly consequent upon which a Non Bailable Warrant was issued against them. Only in the year 2017, i.e. 11 years after the committal of the case to the court of sessions, both A1 and A2 were secured. In the meanwhile, one of the eyewitnesses to the occurrence Chinnathambi and the Village Administrative Officer before whom A1 gave an extra judicial confession died. Hence, it may not be proper on the part of the appellant to contend that the trial court should not have accepted the extra judicial confession since it was made before the Village Administrative Officer and not before the assistant (P.W.5). In fact Manickam (P.W.5), the assistant of the Village Administrative Officer was very much present in the office of the Village Administrative Officer at the time of recording Extra Judicial Confession and also a signatory to the statement along with the deceased Village Administrative Officer.

11. However, as regards A2, the prosecution has not substantiated or pursued further their initial theory that A2 was in illicit relationship with P.W.4, the wife of the deceased and that he took the services of A1 to do away with the deceased victim. Surprisingly, there has been no whisper



of this alleged illicit relationship or as the real motive for the murder. No prosecution witness has claimed to have seen A2 in the scene of occurrence. Therefore, based on the extra judicial confession of A1, it is not possible to hold that A2 is guilty of the offences of which he is charged. Moreover, it is settled law that a mere common intention per se may not attract Section 34 of the Indian Penal Code without an action in furtherance and a Court has to analyse and assess the evidence before implicating someone under this provision. There may be cases where a person, despite being an active participant in forming a common intention to commit a crime may actually withdraw from it later. In fact the existence of common intention is obviously the duty of the prosecution to prove. In the instant case, as already observed, none of the prosecution witnesses had spoken about the presence of A2 in the scene of offence and therefore, the theory of prosecution that A2 handed over the country made SPML Rifle to A1 in the scene of offence fails. Similarly, the theory of criminal conspiracy between A1 and A2 also has not been proved.

12. The contention of the counsel for the appellants that since it is not proved by the prosecution that the wife of the deceased had an illicit relationship with A2, motive for the murder fails, cannot be accepted since it is settled law that the motive loses all its importance in a case where direct evidence of eyewitness is available. Here P.W.1 as already observed, had clearly deposed that A1 shot at the victim with a country fire arm causing the instantaneous death of the deceased Govindhan. In fact motive is a theory which is primarily known to the accused himself. Therefore in a case where there is a direct eyewitness account as to the commission of an offence, the motive part loses its significance. If the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the absence of motive, if otherwise, the evidence is worthy of reliance.

13. In view of the above reasons, while the conviction and sentence passed against A1 by the trial Court is confirmed, the conviction and sentence against A2 is set aside.

14. In the result,

- i. The appeal in CrI.A.611 of 2018 is dismissed and conviction and sentence passed by the District and Sessions Judge, Tiruvannamalai, in S.C.No.200/2007 dated 05.12.2017, is confirmed.
- ii. The appeal in CrI.A.312 of 2018 is allowed and conviction and sentence passed by the District and Sessions Judge, Tiruvannamalai, in S.C.No.200/2007, dated 05.12.2017, is set aside.



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iii. The appellant in CrI.A. No.611 of 2018 shall surrender before the learned District and Sessions Judge, Tiruvannamalai, within 15 days from today, failing which, the Trial Court shall take steps to secure him for undergoing the sentence.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

mtl

To

1. The District and Sessions Judge,
Tiruvannamalai.
2. The Judicial Magistrate,
Chengam, Tiruvannamalai District.
3. The Chief Judicial Magistrate,
Tiruvannamalai.
4. The District Collector,
Vellore.
5. The Director General of Police,
Mylapore, Chennai-4.
6. The Superintendent,
Central Prison, Vellore.
7. The Inspector of Police,
Melchengam Police Station,
Tiruvannamalai District.
8. The Public Prosecutor,
High Court, Madras.

Copy to :

The Section Officer,
Criminal Section,
High Court, Madras-104.

CrI.A.No.312 and 611 of 2018

CA (CO)
PR (03/03/2022)