



Bail Slip

Appellant/ Accused No.1 namely M.Venkatachalam @ Venkidu was released on bail as per order of this court dated 08.10.2020 made in CRL MP(MD)No.4151/2020 in CRL A(MD)No.13/2019.

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.03.2022

(Reserved on 21.02.2022)

CORAM:

**THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR**

Criminal Appeal(MD)No.13 of 2019

M.Venkatachalam @ Venkidu ... Appellant/ Accused No.1
vs.

The State rep by
The Inspector of Police,
Adivaram Police Station,
Palani, Dindigul District. ... Respondent/ Complainant

Appeal filed under Section 374 of the Criminal Procedure Code, to set aside the judgment of conviction and sentence dated 21.12.2018 made in S.C.No.136/2011 on the file of the learned Additional District and Sessions Judge, Dindigul, and allow this appeal.

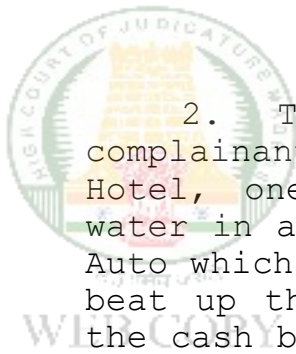
For Appellant : Mr.R.Srinivas for Mr.N.Dilipkumar

For Respondent : Mr.A.Thiruvadi Kumar
Additional Public Prosecutor

JUDGMENT

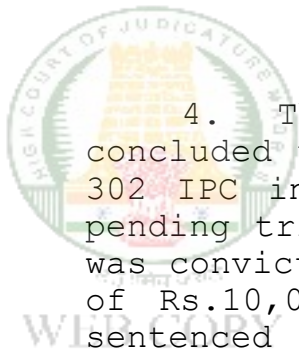
**R.SUBRAMANIAN, J.
AND
N.SATHISH KUMAR, J.**

The 1st accused in S.C.No.136 of 2011, who has been convicted for the offence under Section 302 IPC and sentenced to undergo life imprisonment and to pay a fine of Rs.10,000/- failing which, to undergo two years rigorous imprisonment, is on appeal against the said conviction.



2. The case of the prosecution is that on 07.05.2010, when the complainant Silambarasan was sitting in the cash box of Punnaigai Hotel, one Kannan, a mentally retarded person, was transporting water in a handcart. Since the said Kannan did not give way to the Auto which was driven by A2/Marimuthu, A2 got down from the Auto and beat up the said Kannan. The complainant therefore got down from the cash box, explained to A2 about the mental status of Kannan and took the said Kannan and the water cart to Punnaigai Hotel. Thereafter, one Krishnamurthy, uncle of the complainant, who returned from Palani, went to the Auto Stand and warned A2. At around 10.45 p.m., when the complainant and his employee Murugan were in Punnaigai Hotel, the accused persons came with deadly weapons to the Hotel and shouted at Krishnamurthy, as to how he could warn A2. Unexpectedly, the appellant/A1 pulled Krishnamoorthy and attacked him in the head with sickle. When Murugan and the complainant attempted to prevent, A2/Marimuthu beat up Murugan and the complainant. The appellant/A1 attacked Krishnamoorthy who had fallen down with the sickle and thereafter, the accused persons departed from the scene of occurrence. The complainant had taken his uncle Krishnamoorthy to Palani Government Hospital and the Police had enquired him at the Government Hospital and recorded his statement. The Sub Inspector of Police, Palani, visited the scene of occurrence and prepared the Observation Mahazar which is marked as Ex.P16. The signatures of the witnesses to Ex.P16 namely, PW2 and PW3 found therein, were marked as Exs.P2 and P4 respectively. The Sub Inspector of Police, Palani, also collected the earth with bloodstains and earth without bloodstains under recovery mahazar Ex.P18. The signature of the witnesses to Ex.P18 namely, PW2 and PW3 were marked as Ex.P3 and P5. A2/Marimuthu was arrested at 08.00 a.m., on 08.05.2010 and he had given a confession statement. The admissible portion of the confession was marked as Ex.P6. On the basis of the said confession, the sickle-M.O.1 and the wooden log-M.O.2 were seized under Ex.P7-Mahazar. The appellant/A1 surrendered before the Village Administrative Officer, Palani, about 02.00 p.m on 13.05.2010 and gave a confession statement. The said confession statement was marked as Ex.P8. The body of the deceased Krishnamoorthy was sent for postmortem under Ex.P9. The accident register was marked as Exs.P10 and P11. The forensic reports were marked as Exs.P12 to P14. Upon carrying out the investigation, the investigating officer had filed a final report for the offences under Section 302 IPC in respect of the appellant/A1 and for the offences under Sections 323, 302 r/w Section 114 IPC and Section 302 r/w with Section 34 IPC, in respect of A2.

3. Before the trial Court, in an attempt to prove the prosecution's case, the prosecution examined 19 witnesses and marked 22 documents. The sickle and the wooden log were marked as M.O.1 and M.O.2. No evidence was let in on the side of the appellant. Exs.B1 and B2 were marked on his side.



4. The trial Court on consideration of the evidence on record, concluded that the prosecution has proved the offence under Section 302 IPC in respect of the appellant/A1. Since A2 Marimuthu died pending trial, the case against him stood abated. The appellant/A1 was convicted and sentenced to undergo life imprisonment with a fine of Rs.10,000/-, in default of payment of the fine, he has been sentenced to undergo rigorous imprisonment for a period of two years.

5. We have heard Mr.R.Srinivas, learned counsel appearing for Mr.N.Dilipkumar, learned counsel on record for the appellant and Mr.A.Thiruvadi Kumar, learned Additional Public Prosecutor appearing for the State.

6. Mr.Srinivas, learned counsel for the appellant would vehemently contend that the trial Court overlooked the fact that it is a case of case and counter and the investigating officer should have scrupulously followed the Tamil Nadu Police Standing Order 566, while conducting an investigation in a case like this. According to the learned counsel, the procedure adopted by the investigating officer to have investigated only Crime No.326 of 2010 and to have allowed another officer to investigate Crime No.327 of 2010 which is a counter case, had lead to partial investigation and violation of a fundamental right of the accused. Drawing our attention to the Tamil Nadu Police Standing Order 566, the learned counsel would contend that non compliance of PSO 566 had resulted the entire investigation being flawed.

7. He would also contend that all the eye-witnesses who have been examined, are interested and related witnesses. It is also stated that PWs 1, 4 and 5 were accused in Crime No.327 of 2010 and PW6 being the sister of PW5 and PW9 being the relative of the deceased, are also witnesses interested in securing the conviction of the accused in the case on hand. The learned counsel would also point out that the evidence of PWs 1, 4, 5, 6 and 9 is contradictory and artificial and hence, the same cannot form the basis for conviction. The learned counsel would point out the following inconsistencies in the evidence of the eye-witnesses namely, PWs.1, 4, 5, 6 and 9. According to him, there is an inconsistency in the very scene of occurrence. PW1, the complainant in his evidence had stated that at the time of the occurrence, apart from the deceased Krishnamoorthy, only PW1 and Murugan were present in the Hotel namely, Punthagai Hotel. It is also stated that his sister and mother were in another shop called Rajan Hotel. PW4, the other eye-witness namely, Murugan, does not speak about the presence of any other person except himself, PW1 and the deceased. PW5 who is projected as eye-witness, admits that she did not see the occurrence and she would state that upon hearing the sound when she went to Punthagai Hotel, the complainant told her that the accused persons has attacked Krishnamoorthy with the sickle. Therefore, according to the learned counsel, the evidence of PW5 is only hearsay. PW6



had, in fact, claimed that she alone saw the occurrence and only upon hearing her noise, the complainant and Murugan came to Rajan Hotel. The evidence of PW6 according to the learned counsel, in fact, shifts the scene of occurrence from Punnagai Hotel to Rajan Hotel. PW9 who is a chance witness, according to the learned counsel, had given the entirely different version from that of the other witnesses, inasmuch as he says PW1's mother Pandiammal was also present at the scene of occurrence which is not the case of the other eye-witnesses. Therefore, according to the learned counsel, the evidence of the eye witnesses is contradictory and artificial.

8. The learned counsel would also draw our attention to the judgment of the Hon'ble Supreme Court in *Sadayappan vs. State* reported in (2019) 9 SCC 257, wherein, the Hon'ble Supreme Court has held that there is a distinction between related witnesses and interested witnesses. Relying upon the judgment in *Sudhakar vs. State* reported in (2018) 5 SCC 435, the Hon'ble Supreme Court had pointed out that a witness could be termed as an interested witness only if he or she derives some benefit from the result of the litigation or in seeing an accused person punished. Therefore, it is clear that in a criminal case, merely because the witness is related to the victim or the complainant, he or she cannot be treated as an interested witness.

9. The learned counsel would further argue that no independent witnesses have been examined even though the scene of occurrence was crowded and neutral third party witnesses were available. Drawing our attention to the evidence of PW1, wherein, he admits that shops around the scene of occurrence were opened and there were people in the shops namely, Kadhar Cassette Shop, Lakshmi Tea Stall and Om Muruga Bathing Centre. He would also draw our attention to the evidence of PW5 who states that the scene of occurrence was crowded at the time when the occurrence took place. PW6 and PW9 also corroborate the said claim. PW16, the investigating officer, has also admitted that the shops in the areas will remain open throughout the night. The learned counsel would also draw our attention to Ex.P17, the sketch which shows that the scene of occurrence was actually in front of Kadhar Cassette Shop and blood stains were also found near Kadhar Cassette Shop. The evidence of PW1 in cross examination is also relied upon by the learned counsel to buttress his submission that there is clear uncertainty about the scene of occurrence. It is also pointed out that PW4 Murugan has also deposed that the scene of occurrence was not exactly in front of Punnagai Hotel, but it was about 10 feet away from there. The admission by PW6 to the effect that the attack took place near Rajan's Hotel at about 10.45 p.m., is also relied upon by the learned counsel in support of his claim that there were very serious contradictions in the evidence of the so-called eye-witnesses which according to him, would make their evidence unreliable.



10. The learned counsel would also point out that there is a considerable delay in registration of the FIR and its despatch to the court. From the evidence, it is seen that the alleged crime occurred at about 10.45 p.m., on 07.05.2010 and though PW1 was examined at the Government Hospital, Palani, at 11.45 p.m., FIR was registered on the next day i.e., 08.05.2010 at 01.15 a.m. The evidence of PW1 to the effect that A2 was in the police station when he lodged a complaint on 07.05.2010 at 11.45 p.m., is also taken as the circumstance by the learned counsel to destabilise the case of the prosecution. The fact that the FIR registered at 01.15 a.m on 08.05.2010, reached the Judicial Magistrate's Court at 02.45 p.m., in the absence of any explanation, would vitiate the investigation. The distance between the police station and the Judicial Magistrate's Court which is about 1 k.m., is also pointed out by the learned counsel, to contend that there is no justification for the delay in sending the FIR to the Court. The learned counsel would also contend that the arrest of the accused and the recovery of material objects 1 and 2 is also false. According to PW16, A2 was arrested before the Village Administrative Officer-PW7 at Madhanapuram around 08.00 a.m., on 08.05.2010 and the material objects namely, the sickle and the wooden log were recovered. But, PW1's evidence would show that A2 was present in the police station even when he went there at 11.45 p.m., to lodge a complaint. This circumstance according to the learned counsel, renders the prosecution's case of arrest and recovery doubtful. The evidence of PW1 is also pointed out by the learned counsel to show that the theory of recovery itself is cooked up.

11. Apart from the above contradictions, non compliance of PSO 566 and the absence of explanation for the injuries suffered by the accused persons as well as the counter case, would according to the learned counsel, render the case of the prosecution unbelievable and hence, the conviction is liable to be set aside. The learned counsel would submit that the accused would atleast be entitled to the benefit of doubt in view of the serious contradictions in the evidence.

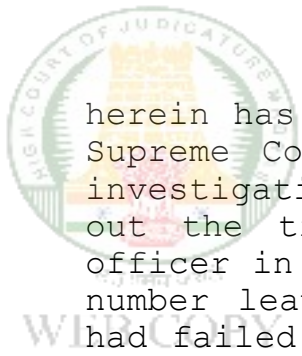
12. Justifying the conviction, Mr.A.Thiruvadi Kumar, the learned Additional Public Prosecutor appearing for the State would submit that no doubt, there are certain contradictions in the evidence of the eye witnesses as well as the investigating officer and those minor contradictions by themselves would not render the conviction liable to be set aside. The learned counsel would point out that the motive for the attack having been established, the conviction of the accused is justified. Arguing further, the learned Additional Public Prosecutor would submit that the mere fact that the case and the counter case were not taken up for investigation together and there has been a non compliance of PSO 566 on the part of the investigating officer, would not by itself lead to the conclusion that the prosecution's case should be



13. We have considered the rival submissions.

14. As rightly pointed out by the learned counsel for the appellant, the evidence of the eye witnesses namely, PWs.1, 4, 5, 6 and 9 are riddled with inconsistencies and contradictions. There is no unanimity even on the scene of occurrence and the persons who were present at the time of the occurrence. While PW1 has fixed the scene of occurrence as in front of Punthagai Hotel, PW5 and PW6 have deposed that the attack took place near Rajan's Hotel. Ex.P17 sketch would show that the scene of occurrence was near Kadhar Cassette Shop and not in the other two places as suggested by the eye-witnesses. So, there is an uncertainty regarding the scene of occurrence. There are also serious contradictions with reference to the persons who were present at the time of the occurrence. PW1 and PW4 would depose that no one else other than PW1, PW4 and the deceased Krishnamoorthy, were present at the time of occurrence. PW9 would state that PW1 and his mother Pandiammal were present at the time of occurrence. PW6 has deposed to the effect that it is only upon hearing there shouts did, the complainant and Murugan came rushing to the place of occurrence and she would add that she was in Rajan's Hotel along with her sister and mother. Therefore, the presence of PWs 4, 5, 6 and 9 at the time of the occurrence itself is doubtful. Atleast PW6 cannot be treated as eye-witness inasmuch as she has stated that she did not see the attack taking place, but she was told that her husband was attacked by the accused persons, by PW1-Silambarasan. Apart from the above, the contention of the learned counsel that the absence of neutral third party witnesses despite the fact that the area being crowded at the time of the alleged attack, also raises a doubt. All the witnesses including PW16 have admitted that the area where the occurrence took place was crowded and all the shops were open with customers and therefore, the absence of any third party witness raises a doubt in the mind of the Court as to the correctness of the prosecution version.

15. As regards the procedural infirmity namely, non investigation of the case and the counter case, PSO 566 requires an investigating officer to take up investigation in the counter case simultaneously along with the main case. Admittedly, there was a counter case which is registered as Crime No.327 of 2010 which was investigated by a different officer and the accused persons therein were acquitted of the offences by the Court. This has resulted in a very serious prejudice to the accused in the case on hand. The fact that there was a counter case, is admitted by PW1 in his evidence. Therefore, the violation of PSO 566, cannot be brushed aside lightly. The Hon'ble Supreme Court in State of M.P vs. Mishrilal (Dead) and others reported in (2003) 9 SCC 426, has pointed out that in case of case and counter, the investigating officer must take up the investigation together so as to avoid conflicting judgments on the same occurrence. This failure in the case on hand has, in fact, resulted in conflicting judgments, where PW1 and the deceased have been acquitted of the offences in Crime No.327 of 2010. The accused

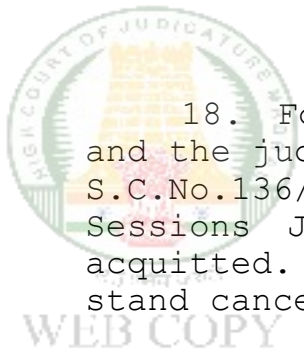


herein has been convicted on the very same occurrence. The Hon'ble Supreme Court has held that a legal obligation is cast upon the investigating officer to endeavour to find out the truth and cull out the truth from falsehood. The fact that the investigating officer in the case on hand has chosen to investigate only one crime number leaving the other to be investigated by the other officer, had failed in his duty to act fairly. It is also to be noted, the accused also sustained injury and on the basis, the witnesses were also prosecuted in a separate counter case. But, no details or papers have been filed by the prosecution for the proper assessment by the Court. During hearing, it also came to light that the place of occurrence in both the cases differ. The place of occurrence as per the counter case, is said to be the TASMAL lane. The witnesses who had spoken in this case also shifted the place of occurrence, which is almost the place shown in the counter case. Therefore, non-filing of the connected papers in the counter case and failure to explain the nature of the injury sustained by the accused will only lead us to the conclusion that the genesis of the occurrence has been suppressed by the prosecution.

16. The other contention of the learned counsel for the appellant that the injuries found on the accused were not properly explained and the fact that the deceased was under the influence of Alcohol, cannot also be ignored totally. The delay in sending the FIR to the Court also raises suspicion regarding the correctness of the prosecution version. There is always a possibility of prosecution version being tainted because of the delay. The learned counsel also claim that the overt acts attributed by PW1 do not support the injuries found on the body of the deceased which are shown in the postmortem report marked as Ex.P22, as follows:-

- '1. Partly healed sutured laceration 6 cms x 0.5 cms x bone deep noted on right frontal region.
- 2. Partly healed abrasions noted on the following areas:
 - 6 cms x 4 cms on right forehead;
 - 3 cms x 3 cms on top of right shoulder;
 - 4 cms x 3 cms on top of left shoulder;
 - 3 cms x 2 cms on the front of right knee.

17. PW1 in his evidence has specifically stated that both times the attack was only on the head of the deceased Krishnamoorthy but the postmortem report reveals that there is only one laceration on the right frontal region and partly healed abrasions on the right forehead of the deceased. Therefore, there is again a very serious doubt caused about the truthfulness of the prosecution theory. We are therefore constrained to observe that the prosecution has not proved its case beyond all reasonable doubt, so as to enable us to confirm the finding of the guilt and the consequential punishment rendered by the trial Court. We are certainly of the opinion that the accused would be entitled to at least benefit of doubt.



18. For the foregoing reasons, this Criminal Appeal is allowed and the judgment of conviction and sentence dated 21.12.2018 made in S.C.No.136/2011 on the file of the learned Additional District and Sessions Judge, Dindigul, is set aside and the appellant/A1 is acquitted. Fine amount, if any, shall be refunded. Bail bond shall stand cancelled.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

To

1. The Additional District and Sessions Judge,
Dindigul.
2. Do through the Principal District Judge,
Dindigul.
3. The Judicial Magistrate, Palani, Dindigul District.
4. Do through the Chief Judicial Magistrate, Dindigul District.
5. The District Collector, Dindigul District.
6. The Director General of Police, Mylapore, Chennai.
7. The Superintendent, Central Prison, Madurai.
8. The Inspector of Police,
Adivaram Police Station, Palani, Dindigul District.
- 10 The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to:

The Section Officer, Criminal Records,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.N.DILIPKUMAR, Advocate (SR-11371[F] dated 10/03/2022

JUDGMENT MADE IN
CRL.A(MD)No.13 of 2019
DATED : 09.03.2022

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<https://hcservices.ecourts.gov.in/hcservices/>