

BAIL SLIP

The Appellant/2nd Accused namely Sellamuthu was directed to be released on bail by order of this Court dated 03.01.2005 and made in CRL MP NO. 11365/04 in CRL A NO. 945/04.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.09.2006

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

Criminal Appeal No.945 of 2004

Sellamuthu

Appellant/2ND ACCUSED

v.

State represented by
the Inspector of Police,
Kaiyaralabath police station,
Ariyalur Taluk,
Perambalur District.
(Crime No. 254/02)

Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure against the judgment dated 31.03.2004 in sessions case No.120 of 2003.on the file of the Court of the District and Sessions Judge, Perambalur.

For appellant : Mr.S.Kamadevan

For respondent : Mr.P.Kumaresan,
Addl. Public Prosecutor.

JUDGMENT
(Judgment of the Court was delivered by
K.RAVIRAJA PANDIAN, J.)

The second accused in Sessions Case No.120 of 2003 on the file of the Sessions Judge, Perambalur filed the present appeal against the judgment of the trial Court convicting and sentencing him to undergo life imprisonment and to pay a fine of Rs.10,000/- and in default to undergo rigorous imprisonment for three months for an offence under section 302 read with 34 of the Indian Penal Code. The first accused was tried for an offence under section 302 of the Indian Penal Code and was convicted for the same and was awarded a like sentence. One Kalaivanan was also alleged to have been involved in the incident. The case against him was split up as he was a juvenile.

2. The respondent police laid a charge against the accused that on 21.11.2002 at 06.30 pm in the graveyard of Wallajahnagaram colony, with an intention to cause the death of the illicit arrack seller Ashok, as he refused to give arrack free of cost to the first accused, accused 1 and 2 along with one Kalaivanan, kidnapped the deceased Ashok to Kairalabath colony. The second accused and Kalaivanan caught hold of the deceased and the first accused launched a heavy blow on the head and beat on the deceased and thereby caused his death and thus the first accused committed an offence under section 302 of the Indian Penal Code and the second accused committed an offence under section 302 read with 34 of the Indian Penal Code. To prove the charge, the prosecution examined as many as 16 witnesses and marked 10 exhibits and three material objects.

3. The case of the prosecution proceeds as follows :

One Muruganandam and Ashok became friends, when they were in jail in respect of some other case. Muruganandam used to sell illicit arrack in Wallajahnagaram graveyard. From six days prior to the date of occurrence Ashok was selling illicit arrack on behalf of Muruganandam. P.W.1 Veeramani, on 21.12.2002 at 06.00 pm, went to WallajahNagaram, graveyard to have the pleasure of liquor, where Ashok, the deceased, was selling illicit arrack. The first accused was demanding illicit arrack free of cost from the deceased. However, P.W.1 consumed arrack from Ashok and went back to his house. After some time Muruganandam came to his house at 08.30 pm and called him to come along with him to find out the whereabouts of the deceased Ashok, as he did not return after selling arrack. When P.W.1 and Muruganandam proceeded in search of the deceased, P.W.2 Marimuthu also accompanied them on their way to the graveyard. As Ashok was not available there at the

graveyard, the three went to Manaleri, a nearby village where one Sukru informed them that accused 1 and 2 have dragged the deceased towards northern side. Thereafter, P.Ws.1 and 2 along with one Pulimoottai further proceeded in a bicycle and reached a temple near the colony. When they proceeded to the northern side of the temple, they heard a sound "don't assault me'. On hearing this sound, they went near, where accused 1 and 2 were assaulting the deceased. They also threatened P.Ws.1 and 2 with dire consequences if they interfere. Fearing of the consequences, they returned to their place. On the next day, when P.W.1 proceeded to the police station to inform about the incident, he saw the deceased Ashok lying dead with blood oozing out from his head. He gave a complaint to that effect to the Sub Inspector of Police of Kairalabath police station. On the basis of the complaint, Ex.P.1, P.W.15, the Sub Inspector of Police of the respondent police station registered a case in crime No.254/2002 for the offences under sections 364 and 302 of the Indian Penal Code and prepared the first information report, Ex.P.8 and sent the same, through P.W.13, constable, to the Judicial Magistrate's Court and to the higher authorities for taking further action.

4. P.W.16, the Investigating officer, on receipt of the first information report, reached the place of occurrence by 07.30 am and prepared rough sketch, Ex.P.9 and observation mahazar, Ex.P.2, attested by one G.Natarajan and M.Natarajan. He also recovered a watch from the place of occurrence under mahazar by 10.30 am. He conducted inquest over the dead body and prepared inquest report after examining the witnesses. Ex.P.10 is the inquest report. He caused the scene of occurrence and the dead body to be photographed. Thereafter, he sent the dead body for postmortem through P.W.14 Manivannan, constable with the requisition, Ex.P.6. Thereafter, he examined witnesses - Veeramani, P.W.1, Marimuthu, P.W.2, Thangavel, P.W.3, Mathialagan, P.W.4, Chinnadurai, P.W.5, Kannan, P.W.6 and recorded their statements. On information on that day evening by 06.45 pm he arrested accused 1 and 2 and Kalaivanan at Kattupirinkiam bus stand. At 07.00 pm the first accused voluntarily gave a confession statement and the same was recorded in the presence of P.W.10 Pandian and Murugesan. Pursuant to the confession statement, M.O.1 stick has been recovered from the field of one Karuppiyah under mahazar. Thereafter, on reaching the police station on 23.11.2002, P.W.16 remanded the accused after physically verifying them. He sent the material objects to the Court. On the same day, he examined Subramani, Dinakaran, P.W.12, Anbalagan, P.W.13, Manivannan, P.W.14 and Mohandas, P.W.15 and recorded their statements.

5. P.W.11, the Assistant Surgeon attached to Ariyalur Government Hospital, on receipt of Ex.P.6 requisition from P.W.16 conducted autopsy on the dead body of the deceased. He issued Ex.P.7 postmortem certificate. The doctor is of the opinion that the cause of the death would be shock and haemorrhage and due to skull fracture 12 to 14 hours prior to autopsy.

6. On 28.11.2002, P.W.16 examined the doctor and recorded his statement. On 29.11.2002 he completed the investigation and filed his final report for the offences under sections 364, 302 and 302 read with 34 of the Indian Penal Code and the case was committed to Court of Sessions.

7. When the accused were questioned under section 313 of the Code of Criminal Procedure, the second accused denied all the allegations. On perusal of the materials available on record and upon hearing the arguments on either side, the trial court ultimately convicted accused 1 and 2 as referred to above. As already stated, this appeal is at the instance of the second accused alone.

8. In this appeal, the conviction and sentence imposed against the second accused are challenged on the ground that the prosecution has failed to prove its case against the second accused under section 302 read with 34 of the Indian Penal Code. The evidence of P.W.1, who is alleged to have given the complaint, Ex.P.1 did not disclose the occurrence, as alleged in the complaint and there are material contradictions, which are vital to the prosecution case. The prosecution has totally failed to make out any motive for the said occurrence and the implication of the appellant to the incident could not be sustained on facts and in law, inasmuch as there is no motive or previous enmity attributed in order to form mens rea against the second accused. According to P.W.1, there was a quarrel at about 06.00 pm on the date of the occurrence between the first accused and the deceased, as the first accused was demanding arrack free of cost from the deceased and the deceased to refuse to give. Thereafter, P.W.1 was informed by the said Muruganandam that the accused kidnapped him. Even, thereafter, P.Ws.1 to 3 went in search of the deceased. It is also the further case of P.W.1 that near Mariamman temple, the first accused attacked the deceased with the stick and the appellant/second accused and Kalaivanan caught hold of the deceased. The evidence of P.W.1 that on the next day, he saw the dead body, while he was going to the police station, is totally unbelievable. The conviction based on P.W.1's evidence cannot be sustained as none of the witnesses among P.Ws.1 to 3 are eye witnesses. The prosecution failed to connect M.O.1 stick to the cause of the death, which is stated to be used by the first accused in the above incident. Though M.O.1 was stated to have been recovered, it did not contain any blood stain. Further, no steps, as required under law, has

been taken to get the material object chemically analysed by Forensic Science Department. The case of the prosecution is that the first accused attacked the deceased with the stick and the deceased succumbed to the injuries caused by the first accused. In the instant occurrence, the second accused caught hold of the deceased was the imputation made against the appellant. In the absence of any material to prove the offence under section 34 of the Indian Penal Code., the conviction, as stated above, is unsustainable.

9. We heard the learned counsel for the appellant and the learned Additional Public Prosecutor. On a perusal of the evidence, we are of the considered view that the prosecution has miserably failed to prove the guilt of the appellant for the following reasons.

10. In his complaint, Ex.P.1, P.W.1 has stated that on 21.11.2002 at about 06.30 pm when he had been to the graveyard to drink some arrack, he saw accused 1, 2 and Kalaivanan quarelling with the deceased by demanding arrack free of cost. When the deceased refused to budge to the request, the first accused attacked him and dragged him away with the help of the second accused and Kalaivanan. The complaint proceeds that P.W.1 witnessed the quarrel between the first accused, who proclaimed that he had five criminal cases to his credit and nobody could do anything against him and the deceased should give him arrack free of cost and attacked the deceased and thereafter, accused 1, 2 and Kalaivanan dragged him away. At 08.30 pm P.W.1 was in his house, one Muruganandam, at whose instance, the deceased was selling arrack, came his house and enquired the whereabouts of the deceased and P.W.1 informed that the deceased had been abducted by accused 1, 2 and Kalaivanan. Thereafter, Muruganandam directed P.W.1 to search for the deceased. Ex.P.1 further proceeds that immediately P.W.1 went to the house of P.W.2 Marimuthu and informed about the abduction of the deceased by accused 1, 2 and Kalaivanan. Thereafter, P.Ws.1 and 2 went to Manaleri in a bicycle, where one Pulimoottai also joined along with them and they proceeded to Kairalabath colony, where they were told by one Sukru that there was some noise near the Mariamman temple and therefore they were asked to go there. When they reached the temple by 09.30, they witnessed the first accused attacking on the head of the deceased with the stick while the second accused and Kalaivanan were holding the deceased. Contrary to the same, in his evidence, he has stated that he was not aware that who were all there along with the first accused, when he was taking arrack at 06.30 pm on 21.11.2002. It is also evident from his evidence that he came to know that the deceased had not turned back only when Muruganandam informed him at his residence on that night and thereafter, at the instance of the said Muruganandam, he accompanied him to the graveyard in search of the deceased. This piece of evidence falsifies the

complaint to the effect that accused 1, 2 and Kalaivanan attacked the deceased at the graveyard on the deceased refusing to part with the arrack free of cost and the deceased being taken away from the graveyard.

11. Further, there is also contradiction in the evidence as to when P.W.2 joined with P.W.1. In the complaint, Ex.P.1, it is stated that P.W.1 went to the residence of Marimuthu, P.W.2 and informed about the abduction of the deceased by accused 1 and 2 and Kalaivanan and took him in a cycle to Manaleri in search of the deceased. However, in his evidence, P.W.1 has stated that when he accompanied Muruganandam proceeded to the graveyard in search of the deceased, P.W.2 came on the way and they took him also to the graveyard in search of the deceased.

12. Further, P.W.1, in his cross examination, stated in uncertain terms, that the complaint has not been written by him. He only signed the complaint, which was written by the police. He further admitted in the cross examination that he came to know about the incident through the police only on the next day of the date of occurrence. He also admitted in the cross examination that the police took him, Muruganandam, Sukru and P.W.2 in their jeep on the next day and an hour after they reached the police station, they obtained his signature on the complaint. P.W.15, the Sub Inspector of Police, who registered the crime has stated in the evidence in cross examination that P.W.1 produced a written complaint on his own and it was not written by the police. The admission made by P.W.1 that the complaint has been written by the police, after taking him to the police station along with Muruganandam, Sukru and P.W.2 in police jeep, and his signature was obtained on it, shakes the substratum of the prosecution case.

13. P.W.2 in his evidence has stated that on 21.11.2002 at 08.30 pm when he was in his house P.W.1 came and informed him that the deceased Ashok is missing and accused 1, 2 and Kalaivanan quarrelled with him and they ought to have taken the deceased and called P.W.2 for searching the deceased. He further stated that when they reached the temple at Manaleri colony, the first accused was attacking Ashok with the stick and the other two were standing there. The first accused chased them away and they returned and in the morning they found the deceased lying dead. He has not spoken to anything about the joining of Pulimootai @ Thangavel in search of the deceased prior to their reaching the Kairalabath colony. In his cross, he has also admitted that on 22.11.2002 by 07.00 am the police took him, P.W.1 and P.W.3 to Kairalabath police station and they obtained their signature after 1 ½ hours and by 08.00 am in the morning police obtained the complaint from Veeramani, P.W.1 in the police station.

14. P.W.3 who accompanied P.Ws.1 and 2 has not spoken about the piece of information stated to be given by Sukru, who only pointed out that there was some sound coming near the Mariamman temple as per the evidence of P.Ws.1 and 2. He has just stated that when P.Ws.1 and 2 informed that Ashok was not available, he went along with them to Manaleri where they saw the second accused and Kalaivanan catching hold of the deceased and the first accused attacked him on his head. P.W.4 is a person residing at Manaleri, where the occurrence is stated to have taken place. He was examined to speak about the occurrence, but he turned hostile. So, is P.W.5, who is a resident of Kairalabath colony, examined to speak about the incident.

15. P.W.6 Kamaraj, is a resident of Kairalabath colony near the Mariammal temple, where the occurrence is stated to have taken place. He has deposed to the effect that on 21.11.2002 his wife on hearing some sound from the eastern side woke him up from his bed and told him to see what is the reason for the noise. When he came out he saw a person lying at his back and requested for water and he gave water and the injured person told him that somebody has attacked him and he came to know that the deceased was Ashok only on the next day morning. In his cross examination, which is crucial in nature, he has stated that at 02.30 am between 21.11.2002 and 22.11.2002, he came out of his house on hearing the barking noise of the dogs and saw a person lying in the street seriously injured. He immediately informed the police on the night itself. The police came to the spot on the next day morning and they enquired him. This piece of evidence categorically makes it clear that the fact of Ashok lying with serious injuries has been informed by him to the police in the night itself and that has been totally suppressed.

16. The medical evidence, i.e., P.W.11 has also not categorically stated that the injuries found on the body of the deceased has been made by M.O.1 stick. He has, in his cross examination, admitted that the injury would have been caused even by a motor vehicle accident.

17. The investigating officer has admitted that the body was lying only with the jatti. However, he admitted that he did not recover the blood stained earth and sample earth and send it for chemical examination. He has also not recovered the other apparels of the deceased and he has not sent the other parts of the body, after postmortem, for chemical analysis. Even, M.O.1 stick, recovered has not been sent for chemical analysis. The weapon, which is alleged to have been used to cause the death of the deceased, has not been sent for chemical examination, to find out whether the weapon contained any blood stains and if so, whether the blood is a human blood.

18. All these infirmities stare at the face of the prosecution and the entire story of the prosecution has been dislodged. Having regard to the fact that the appellant/second accused and Kalaivanan caught hold of the deceased, when the first accused launched the death blow on his head, has not been proved beyond reasonable doubts, we are of the considered view that the prosecution has failed to make out a case against the second accused under section 302 read with 34 of the Indian Penal Code. There is absolutely no material or no motive made available against the appellant/second accused for joining with the first accused to commit the offence. Even in the natural course of circumstances, on the refusal of the deceased to give arrack free of cost to the first accused, the immediate reaction of the first accused would have been to hit the deceased and grab the arrack from him. The Court while appreciating the evidence should visualise the situation at the time of occurrence of the incident. The evidence of the witness should be appreciated by keeping the ground reality and the fact situation in mind and separate the truth from falsehood and the chaff from the grain. On such visualisation, this Court is not able to accept the case of the prosecution.

19. For the foregoing reasons, we are of the considered view that the judgment of conviction and sentence of the trial Court as against the appellant has to be set aside by allowing the appeal. The criminal appeal is allowed. The appellant/second accused is acquitted of the charge. The bail bonds executed by the second accused shall stand cancelled. The fine amount paid by the appellant is directed to be refunded.
mf

Sd/
Asst.Registrar

/true copy/ सत्यमेव जयते

Sub Asst.Registrar

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To
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1. The District Sessions Judge, Perambalur.
2. - do - Thro The Principal Sessions Judge, Perambalur
3. The Judicial Magistrate, Ariyalur.
4. The Judicial Magistrate, Ariyalur, through the
the Chief Judicial Magistrate, Perambalur.
5. The Superintendent of Police, Central Prison, Trichy.
6. The Public Prosucutor, High Court, Madras.
7. The Inspector of Police, Kairalabath police station,
Ariyalur District.
8. The Director General of Police, Madras - 4.
9. The District Collector, Perambalur

+ one cc to Mr. S. Kamadevan, Advocate sr no. 46408

RA(CO)
NM(30.10.2006)

Crl.A. No.945 of 2004

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