

Bail Slip:- The Appellant/Accused was directed to be released on bail in and by the order of this court dated 14.12.2007 and made in M.P.NO.1 of 2007 in CrI.A.No.867 of 2007.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 01.12.2014

Date of decision: 30.03.2015

CORAM

THE HONOURABLE MR. JUSTICE R.S.RAMANATHAN

CRIMINAL APPEAL No.867 of 2007

Alwyin ... Appellant/ Accused

...vs...

State by
The Inspector of Police,
Pallavaram Police Station,
Chennai.
(Crime No.319/2002) ... Respondent/
Complainant

Criminal Appeal filed under Section 374 of the Criminal Procedure Code against the judgment dated 31.08.2007 made in SC No.504 of 2006 by the learned I Additional District Sessions Judge, Fast Track Court No.1, Chengalpattu.

For Appellant : Mr.S.Ashok Kumar, Senior Counsel
for Mr.N.Kanagaraj

For respondent : Mr.A.N.Thambithurai
Additional Public Prosecutor

JUDGMENT

The appellant/accused was convicted for offences under Sections 454 (ii) and 397 of the IPC and sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo six months rigorous imprisonment for offence under section 454(ii) IPC and seven years rigorous imprisonment for offence under section 397 IPC and both the sentences shall run concurrently, by the learned Additional District Sessions Judge, Fast Track Court No.I, Chengalpattu in SC No.504 of 2006 dated 31.08.2007. Aggrieved over the judgment of conviction and sentence, this appeal is filed by the accused.

2. The case of the prosecution is that on 13.5.2002, at about 10.00 a.m., the appellant and another accused by name Murugan, with a common intention to commit robbery went into the house of PW.1 to PW.3 by committing trespass and both of them were armed with knife and threatened PW.2 and PW.3 with knife and got MOs.3 to 9 from them and thereafter, they left the place and therefore, the appellant has committed the offence punishable under section 454, 392 r/w 397 and 34 IPC. The prosecution examined 9 witnesses and marked Exs.P.1 to 14 and also marked MOs.1 to 9 to prove the prosecution case. PW.1 is the informant, PW.2 is his sister and PW.3 is his mother and PW.4 is the Observation Mahazar witness, PW.5 is the landlord of the house where PW.1 to 3 were residing as tenants. PWs.6 & 7 were the witnesses to the confession and recovery of MOs.1 to 9. PW.8 is Pawn Broker with whom, the appellant alleged to have pledged jewels after committing the offence. PW.9 is the Inspector of Police who conducted investigation. Ex.P.1 is complaint given by PW.1. Ex.P.2 is the Observation Mahazar. Exs.P.3 and P.4 are the signatures in the Mahazar wherein the signature of PW.6 was admitted. Exs.P.5 and P.6 are the signatures of PW.7 in the confession of appellant and another accused Murugan. Exs.P.7 and P.8 are the signatures of PW.7 in the Mahazar. Ex.P.9 is the printed F.I.R. Ex.P.10 is the Plan. Exs.P.11 and P.12 are the admitted portions of the confession of the accused. Ex.P.13 is the Mahazar for recovery of MOs.1 and 2 knives. Ex.P.14 is the Mahazar in respect of recovery of MOs.3 to 9. MOs.1 and 2 are the knives. MOs.3 to 9 are the gold articles which were taken from PW.2 and PW.3 by the accused.

3. The learned trial Judge convicted the appellant for offence under section 454 and 397 of the IPC and sentenced to undergo imprisonment as stated above.

4. Mr.S.Ashok Kumar, learned Senior Counsel, appearing for the appellant submitted that the learned Sessions Judge without properly appreciating the discrepancies in the evidence of PW.1 to PW.3 and also the contradiction and omission in 161 Cr.P.C. Statement of PW.2 and PW.3 and also the admission of PW.3 that the jewels MOs.3 to 9 which were marked in Court were purchased by them after they were obtained from the Court before trial and those articles were purchased later, erred in convicting the appellant for having committed the offence punishable under section 397 and 454 of the IPC. The learned Senior Counsel further submitted that even according to the prosecution, the eye-witnesses are PW.2 and PW.3 and their evidence are contradictory to each other and according to PW.2 and PW.3, PW.2 was threatened with knife and the appellant gagged her mouth with cloth and also tied the hands of PW.3 with cloth and even though the police came to the spot immediately, after the occurrence, there was no recovery of cloth which were used to gag the mouth of PW.2 and PW.3 and tied the hands of PW.3 and this would prove that no such

occurrence had taken place as alleged by the prosecution. He also submitted that PW.3 did not state anything about the act of the appellant in threatening PW.2 with knife or gagging the mouth of PW.2 with cloth and having regard to the evidence of PW.2 and PW.3, it would be made clear that both of them have not come out with truth. The learned Senior Counsel submitted that as per the Observation Mahazar and as per the Rough Plan, there is no way to come to the terrace from outside and the only way to go to terrace is through the house of PW.1 to PW.3. It is also the case of the prosecution that five minutes prior to the occurrence, the appellant and another accused came to the house of PW.2 and PW.3 and enquired about one John and five Minutes later, the accused were coming from the upstairs and threatened PW.2 with knife, gagged her mouth with kerchief, got her jewels and thereafter, went inside the house and gagged the mouth of PW.3 with cloth and tied the hands of PW.3 with cloth and got jewels from her. The learned Senior Counsel submitted that in the absence of any access to the terrace from outside, it is highly improbable and impossible for the accused to have access to the house from the terrace, that too, within five minutes after visiting the house and enquired about John. He further submitted that as per the evidence of PW.1, he was informed about the occurrence by PW.5 and when he came to the house, he saw the almirah in a broken condition. He did not state that the clothes from almirah were found on the floor. On the other hand, PW.2 and PW.3 have deposed that with the help of key, almirah was opened by the appellant and another accused, and they threw away the clothes from almirah. Strangely, in the Observation Mahazar, there was no mention about the clothes found on the floor nor any reference to the almirah which was broken, according to PW.1. He therefore submitted that having regard to these discrepancies regarding the manner of occurrence and the absence of any clothes on the floor and the absence of any recovery of clothes which were used to gag the mouth of PW.2 and PW.3 and tying the hands of PW.3, would throw suspicion on the prosecution case and the benefit of doubt arising there from must be given to the accused. He submitted that PW.5 the landlord to whom PW.2 informed about the occurrence and who informed PW.1 about the occurrence over phone has stated that he removed the cloth from the mouth of PW.2 and PW.3 and threw them away in the canal and that was not spoken to by PW.2 and PW.3 and PW.2 and PW.3 did not state that cloth from the mouth of PW.2 and PW.3 was removed by PW.5. He therefore submitted that the evidence of PW.2 and PW.3 cannot be believed. He also submitted that from PW.8, MOs.3 to 9 were recovered as per Ex.P.14 recovery mahazar. Having regard to the evidence of PW.3, recovery cannot be believed. He submitted that PW.3 admitted in Cross-examination that after the jewels were received from the Court by PW.1, those jewels were sold for operation of PW.2 and after receipt of summons, they purchased similar jewels and produced before the Court and therefore, the recovery of jewels MOs.3 to 9 and identification of MOs.3 to 9 by PW.2 and PW.3 and the evidence to that effect, and the evidence of PW.8 cannot be believed. He

therefore submitted that when recovery cannot be believed, articles which were used to gag the mouth of PW.2 and PW.3 and to tie the hands of PW.3 were not recovered and when there was no access to the house from the terrace from outside, the case of the prosecution cannot be believed and those aspects were not properly appreciated by the trial Court. The learned Senior Counsel further submitted that the omission and contradiction in the statement of PW.2 and PW.3 recorded under section 161 Cr.P.C., were also not properly appreciated by the trial Judge and submitted that the benefit of doubt arising therefrom must be given to the accused and the appeal may be allowed.

5. Mr.A.N.Thambithurai, learned Additional Public Prosecutor submitted that the evidence of PW.2 and PW.3 fully supports the case of the prosecution and PW.2 has spoken about the presence of PW.3 in the F.I.R and the act of the appellant and another in gagging her mouth and the mouth of PW.3 and tying the hands of PW.3, removal of jewels from them. Therefore, having regard to the evidence of PW.2 and PW.3, who are eye-witnesses, the trial Court has rightly convicted the appellant for offence under sections 454 and 397 IPC. Though the recovery witnesses PW.6 and PW.7 turned hostile, MOs.1 and 2 were recovered and they were also identified by PW.2 and PW.3 and the evidence of PW.2 and PW.3 coupled with the recovery of materials can be relied on to convict the appellant for the aforesaid offences. He also submitted that though PW.2 and PW.3 have stated in cross-examination that the gold articles which were received from the Court were sold, PW.2 has clearly stated that articles were received from the Court were identified in the Court during trial and having regard to the nature of articles which are gold, it cannot be stated that these articles MOs.3 to 9 must have been purchased for the purpose of this case and the trial Court considered all these aspects convicting the appellant. He also submitted that the statement recorded section 161 Cr.P.C. was considered by the trial Court and even assuming that there were contradictions, the evidence of PW.2 and PW.3 are cogent and convincing and therefore, the trial Court has rightly convicted the appellant, the Appeal is liable to be dismissed. He also submitted that the appellant was armed with knife, threatened PW.2 and PW.3 and snatched the jewels and therefore, he has committed the heinous crime punishable under sections 397 of the IPC and a minimum sentence of seven years rigorous imprisonment was imposed and therefore, no mercy can be shown to the appellant.

6. Considering the submission of the learned Senior Counsel for the petitioner and the learned Additional Public Prosecutor for the respondent/State, the point that arises for consideration in the Appeal is whether the prosecution can be believed to sustain the conviction.

7. As stated supra, though the prosecution examined 9 witnesses, PW.2 and PW.3 were eye-witnesses. PW.1 who gave the F.I.R on being informed by PW.5 about the occurrence and PW.4,

PW.6 and PW.7 were witnesses to Observation Mahazar and confession recovery and PW.8 was the pawn broker with whom, the appellant was alleged to have pledged the jewels after committing the offence. As rightly pointed out by the learned Senior Counsel for the appellant, as per the Observation Mahazar and Rough Plan, there was no way to reach the terrace except through the house. The specific evidence of PW.2 and PW.3 was that five minutes earlier to the occurrence, the appellant and Murugan came to the house and enquired about one John and left and thereafter, they were found coming from the terrace. In the absence of any access to the terrace from outside, it is highly impossible for the appellant to come through terrace. That was not explained by the prosecution. PW.2 would state that when she was sitting in the staircase leading to the terrace, the appellant and another accused Murugan came from the terrace and they threatened PW.2 with knife, gagged her mouth with cloth, got jewels from her and then, they went to the house and tied the hands of PW.3 with cloth and gagged her mouth with cloth and got jewels from her and asked PW.3 to give the key of almirah and got key and threw away clothes from almirah. PW.3 stated in her evidence that when she was sitting in the staircase leading to the terrace, the appellant and another accused came from terrace and threatened her with knife, gagged her mouth with cloth and tied her hands with cloth and got the jewels. PW.3 did not state anything about the act of the appellant towards PW.2. According to PW.2, the appellant and another accused came from the terrace and when she attempted to shout by calling mother, the appellant and another accused Murugan threatened her with knife to stab if she made any noise and the accused Murugan took kerchief from his pant pocket and gagged her mouth with kerchief. He also removed jewels from PW.2. The appellant tied the hands of PW.3 and gagged her mouth with cloth and she saw the mother in that position when she was taken by the appellant into the house. The evidence of PW.2 regarding the conduct and behaviour of another accused was contrary to the evidence of PW.3, as stated supra, PW.2 deposed that her mouth was gagged first by Murugan and thereafter, the appellant tied her mother's hands and got her mouth gagged and she saw the mother when she was taken into the house but according to PW.3, she first saw the accused and they threatened her and gagged her mouth and tied her hands and she did not say anything about the act of the appellant and another accused against PW.2. These omissions are not properly appreciated. If really, PW.2 and PW.3 were gagged with cloth and PW.3 hands were tied with cloth, those cloths could have been recovered by the police who came to the spot immediately after the occurrence. Though PW.5 deposed that he removed the cloth from the mouth of PW.2 and PW.3 and threw them away in the canal, that was not corroborated by the evidence of PW.2 and PW.3. Therefore, the absence of recovery of kerchief which was used to gag the mouth of PW.2 and PW.3 and hands of PW.3 would throw doubt about the evidence of PW.2 and PW.3. Further, according to PW.1, when he came to the house, after receiving information from PW.5, he saw the almirah broken and the clothes were scatted on the

floor. PW.2 and PW.3 did not state that almirah was broken but stated that by using key, the almirah was opened by the appellant and another accused and threw away the clothes on the floor. When the police inspected the scene of occurrence and prepared Observation Mahazar, they did not find any clothes on the floor and that would also falsify the evidence of PW.1 to PW.3. Further, PW.3 is admitted in the cross-examination that the gold articles were received from the Court by PW.1 and for the operation of PW.2, the same were sold and after receiving the summons from the Court, they purchased similar gold articles and produced before the Court, which were marked as MOs.3 to 9. Therefore, from the evidence of PW.3, it can be presumed that MOs.3 to 9 were not the gold articles which were taken from PW.2 and PW.3 and they were sold and the evidence of PW.8 that MOs.3 to 9 were pledged by PW.2 also cannot be believed. Therefore, having regard to the evidence of PW.3 that the jewels were sold and they produced new jewels which were marked as MOs.3 to 9, as rightly pointed out by the learned Senior Counsel, the case of the prosecution that MOs.3 to 9 were pledged by the appellant with PW.8 and from PW.8, those jewels were recovered falls to the ground. Therefore, the prosecution failed to prove the recovery of articles from the appellant and the prosecution evidence proved that MOs.3 to 9 were not the articles which were the subject matter of robbery but produced later by PW.3.

8. Therefore, in the absence of any recovery connecting the appellant with the crime and the contradiction in the evidence of PW.2 and PW.3 regarding the manner in which they were attacked by the appellant and another accused and non-recovery of clothes from PW.2 and PW.3 or from the scene of occurrence and the absence of clothes on the floor in the scene of occurrence could create doubt regarding the manner in which the incident had taken place as spoken to by the prosecution and these aspects were not properly appreciated by the trial Court.

9. Further, even according to the prosecution, the appellant was known to PW.1 to PW.3. It is the case of defence that the appellant demanded money from the accused for giving pass marks and when the accused threatened to report the matter to the Church people, in order to escape from that, a false complaint was given with the help of PW.2 and PW.3. PW.2 also admitted that he was examined by Church people on the complaint given by the appellant. Therefore, having regard to the admission of PW.2, that she was enquired by the Church people on the complaint against PW.2 and having regard to the discrepancies found in the evidence of PW.2 and PW.3 and the fact that MOs.3 to 9 were purchased by the witnesses and produced before the Court, in my opinion, the prosecution failed to prove the case beyond reasonable doubt and the benefit arising there from shall be given to the accused.

10. In the result, the Criminal Appeal is allowed and the impugned judgment of conviction and sentence imposed on the appellant is set aside and the appellant is acquitted of the charges levelled against him. He is set at liberty. The bail bond executed by him shall stand terminated and the fine amount, if any, paid by him shall be refunded.

Sd/-

Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

asvm

To

1. The First Additional District Sessions Judge,
Fast Track Court No.1, Chengalpattu.
- 2.The Inspector of Police,
Pallavaram Police Station,
Chennai.
(Crime No.319/2002)
- 3.The Public Prosecutor,
Madras High Court, Chennai.

1 cc to Mr.T.R. Ravi, Advocate, Sr. 17585

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Criminal Appeal No.867 of 2007

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