

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.11.2016

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

Crl.R.C.No.16 of 2011

1 Selvaraj
2 Ravi

.. Petitioners/Accused 1 & 2

Vs.

The State rep. by
The Inspector of Police,
Vadalur Police Station,
Cuddalore District
(Crime No.69/2006)

.. Respondent/Complainant

This Criminal revision is filed under Section 379 & 401 of Cr.P.C., against the judgment made in C.A.No.73 of 2008, dated 29.9.2010 on the file of the Additional Sessions Judge (Fast Tract Court No.II), Cuddalore confirming the judgment, dated 18.8.2008 of the Judicial Magistrate No.III, Cuddalore in C.C.No.85 of 2006, dated 18.08.2008.

For Petitioners	:	Mr.S.N.Arunkumar for Mr.C.Ramkumar
For Respondent	:	Mr.R.Sekar, G.A.(Crl.side)

ORDER

A-1 and A-2 in C.C.No.85 of 2006 on the file of the learned Judicial Magistrate No.III, Cuddalore are the revision petitioners. They were prosecuted for the offences under Sections 457 and 380 I.P.C. before the said Court.

2. To substantiate the charges, prosecution examined P.Ws.1 to 11, marked Ex.P1 to P14 and exhibited M.Os.1 to 3.

3. The trial Court relying on the said evidence, convicted and sentenced A-1 and A-2 as under:

Conviction	Sentence
(i) 457 I.P.C	One year R.I. and fine Rs.1000/- each
(ii) 380 I.P.C.	One year R.I.and fine Rs.1000/- each

Both sentences were directed to run concurrently. Fine amount paid.

4. The case of the prosecution briefly runs as under:
P.Ws.1 and 3 are spouses. P.Ws.2 and 4 are their sons. They are residing in Karunguzhi in Cuddalore district. On 25.3.2006, P.Ws.1 and 3 left Puducherry. They returned home on 27.3.2006. When they went inside their house, there were house-breaking. 25 sovereigns of

gold jewels were missing from the bureau. They searched for the missing jewels. They cannot be traced. On 29.3.2007, at Vadalur Police station, P.W.1 gave Ex.P1 complaint to P.W.10 S.I. of Police. He registered this case (Ex.P10 F.I.R.). P.W.11 Inspector of Police took up his investigation. He visited the scene house. Prepared Ex.P2 Observation Mahazar in the presence of P.W.6. He drew Ex.P11 Rough sketch. On 12.4.2006 at about 9.40 a.m. near Vadalur Anandha Bhavan hotel, P.W.1 seized M.O.1 gold chain from A-2 based on his confessional statement Ex.P3. It was witnessed to by P.Ws.8 and 9. The accused 1 and 2 were produced before the Court. Case properties were also produced before the said Court.

5. The trial Court solely relying on Sec.27 Evidence Act recovery, convicted and sentenced A-1 and A-2 as stated above.

6. Aggrieved, A-1 and A-2 preferred an appeal in C.A.No.73 of 2008 before the learned Additional Sessions Judge (Fast Track Court No.2), Cuddalore. The learned Additional Sessions Judge confirmed the conviction and sentence and dismissed the appeal. In these circumstances, A-1 and A-2 directed this revision.

7. The learned counsel for the revision petitioner contended that the available incriminating evidence as against A-1 and A-2 is Section 27 Evidence Act recovery. In this case, it is a stage-managed show. It is a drama. It is a make-believe affair. No prudent man will believe this artificial recovery. There is inconsistencies in the evidence of the prosecution witnesses. Further, the evidence of recovery witnesses would show that they have not actually seen the recovery. Based on such evidence, conviction cannot be sustained. Consequently, accused cannot be punished.

8. In this connection, the learned counsel for the revision petitioner cited Vijayakumar @ Kutty Vs. State represented by Inspector of Police, Kovilpatti East Police Station, Thoothukudi District (2012(1) MWN (Cr.) 463 (DB) and Chinna Pillai & another Vs. State by the Inspector of Police, Krishnagiri (MANU/TN/1068/2012).

9. On the other hand, the learned Govt. Advocate (Crl.side) submitted that in this case recovery evidence is clinching. The case properties recovered from the accused were identified by P.W.1. Recovery items belongs to P.W.1. Recovery of the said items

were based on the confessional statement of A-1 and A-2. Recovery witnesses P.Ws.7 and 9 have clearly stated about recording of confession and recovery of gold items. This evidence is quite sufficient to pinpoint the accused to the charges framed as against them. In the circumstances, the trial Court as well as the Appellate Court rightly convicted the accused and punished them.

10. I have anxiously considered the rival submissions, perused the impugned judgments, entire materials on record and also the decisions cited at the bar.

11. Now, the question is whether the finding of guilty recorded by both the Courts below suffers from legality and propriety.

12. As rightly pointed out by the learned counsel for the revision petitioner, this case is solely based on Sec.27 Evidence Act recovery introduced in this case. With respect to recovery of M.Os.1 to 3, the prosecution relied on the evidence of P.Ws.7 and 9. The recoveries were effected by P.W.11 Investigation officer. M.Os.1 and 2 gold chain belong to P.W.1 defacto complainant who identified the same as of his properties.

13. The question arose whether both Courts were right in recording finding of guilty solely based on such evidence of P.Ws.7, 9 and 11 and Ex.P3 and P4 confessional statements.

14. Now, we will see two recoveries from A-1 and A-2 in this case.

15. With respect to proving of recovery at the instance of A-1, P.W.7 was examined. According to P.W.7, recoveries stated to have been taken place nearly 6 months after the occurrence. In chief examination, P.W.1 stated that at about 9.30 a.m., at tea stall in Vadalur, A-1 was having 5-1/2 sovereigns of gold chain M.O.2 in his hand and there were policemen. According to prosecution, A-1 is a thief. Whether he would carry the stolen items openly is a million dollar question. Even a prudent man will not believe this statement. Further, in his cross examination, P.W.7 has stated that the police obtained signature in some papers which were also prepared. It indicates that P.W.7 has not witnessed the alleged recovery. The same is to be viewed along with subsequent recovery effected based on the confessional statement of A-1 who went to Nataraj's land in Karunguzhi.

16. The other recovery is M.O.2. Recovery witness P.W.9 says that when he came out at about 9.45 a.m. at Vadalur Anandha Bhavan hotel, A-2 was having 2 sovereigns of gold chain in his hand and policemen was also there. He too did not directly witnessed the actual recovery of jewel. The other recovery witness is P.W.8 who turned hostile. Further, P.W.9 flatly stated in chief examination itself that he did not know anything about jewel.

17. One disturbing factor in this case is that both the recovery witnesses viz., P.Ws.7 and 9 stated to have told P.W.10 Investigation officer that A-1 and A-2 have stolen these jewels from the house of teacher P.W.1 Palanivel. This evidence has been recorded by the trial Court. This piece of evidence is totally inadmissible. In this connection, it is profitable to notice the following observation made by this Court in Vijayakumar @ Kutty (supra) which reads as under:

53. The last circumstance relied on by the prosecution is Section 27 Evidence Act recovery, namely, M.O.1 bill-hook.

54. Under Section 27 of the Evidences Act, so much of information leading to the recovery of a

material fact alone is admissible. Non-culpatory portion in the confession of an accused alone is admissible.

55. The scope and ambit of Section 27 were stated long ago by the Judicial Committee of the Privy Council in *Pulukuri Kotayya v. King Emperor* AIR 1947 PC 67 . It runs as under:

“It is fallacious to treat the ‘fact discovered’ within the Section as equivalent to the object produced, the fact discovered within the Section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and knowledge of the accused as to this, and the informations given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that “ I will produce a knife concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission, of the offence, the fact discovered is very relevant. But if to the statement the words be added ‘with which I stabbed A’, these words are

inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

56. Recently, in *Mustkeem alias Sirajupden v. State of Rajasthan* [AIR 2011 SC 2769](#) : (2011) 3 SCC (Cri) 473 : LNIND 2011 SC 650 : (2012) 1 MLJ (Cri) 151 , with reference to Section 27 of the Indian Supreme Today With All High Courts Page 9 of 11 Evidence Act, Hon‘ble Apex Court observed as under:

“25. With regard to Section 27 of the Act, what is important is discovery of the materials object at the disclosure of the accused but such disclosure alone would not automatically lead to the, conclusion!, that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the materials object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.”

57. It is not all the statements connected with the production or finding of property, which are admissible; only those which lead immediately to

the discovery of property, and so far as they do lead to such discovery alone are admissible. What is admissible under Section 27 of the Evidence Act is exculpatory/non-culpatory/non-incriminating part in the confessional statement of the accused. Inculpatory/incriminating part of the confessional statement is totally inadmissible under Section 27 of the Evidence Act.

58. From Exhibit P-4 confessional statement of the accused, the learned Principal Sessions Judge, Tuticorin, recorded that It means, if he is taken, from the concealed place, he will produce the bill-hook, which was used to kill Madasamy. Evidence recorded by the learned Principal Sessions Judge from the recovery witness P.W.10 Velusamy, V.A.O is also on similar line.

59. The Trial Court had admitted in evidence the culpatory part of the confessional statement of the accused also. It is the duty of the Court to dissect the evidence regarding the confession and to; divide the sentence into its component parts and only admit that part, which led to the discovery of the particular fact, viz., the hidden property."

18. In Chinna Pillai & another (supra), this Court held as under:

"41. It is stated that on 07.09.2008, at about 10 a.m., in the police station, P.W.9 had recorded Ex.P.4, confessional statement from A1 and in pursuance of that recovered M.O.6, axe and M.O.7, stick under Ex.P.6, mahazar in the presence of P.W.1 and his Assistant. This is the Section 27 Evidence Act Recovery pressed into service in this case."

19. As rightly contended by the learned counsel for the revision petitioner, the principles laid down by this Court in both cases squarely applicable to the facts of this case.

20. The recovery evidence introduced by the prosecution through P.Ws.7, 9 and 11 is unbelievable for the reasons which we have already stated. Section 27, Evidence Act recovery is effected by the Investigation officer. Such kind of evidence deserves close scrutiny. The Court must be very careful before recording conviction based on such evidence. The Court must be satisfied that the recovery witnesses are not obliging police witness. The Court must also be

satisfied that those recovery witnesses are not hand-picked witnesses of the police. In this case, both the trial Court as well as the Appellate Court failed to note this important aspect of law and they have not appreciated the said evidence in proper perspective. In the circumstances, the finding of guilty recorded by both the Courts based on such evidence is suffers from legality and also propriety which requires interference of this Court.

21. In the circumstances, ordered as under:

(1) This Criminal revision is allowed.

(2) The conviction recorded and sentence awarded by the trial Court as well as the Appellate Court are set aside.

(3) The revision petitioners/A-1 and A-2 are acquitted from the charges under Section 457 and 380 I.P.C.

(4) The fine amount paid by them shall be refunded to them.

10.11.2016

Index : Yes / No
Internet : Yes / No
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To

- 1 The Principal Sessions Judge, Cuddalore
- 2 The Additional Sessions Judge (Fast Tract Court No.II), Cuddalore
- 3 The Judicial Magistrate No.III, Cuddalore
- 4 The Government Advocate (Crl.side), High Court, Madras
- 5 The Superintendent, Central Prison, Cuddalore
- 5 The Inspector of Police, Vadalur Police station.

DR.P.DEVADASS, J.,

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