

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.06.2017

PRONOUNCED ON : 06.10.2017

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Revision No.645 of 2017
and
Crl.M.P.Nos.5851 & 5852 of 2017

G.Sowmiya

..

Petitioner

Vs

State rep by

1. The Inspector of Police,
B-2, Vishnu Kanchi Police Station,
Kancheepuram District.
(Crime No.102/2014).
2. A.Jayakumar
(impleaded as per order in
Crl.M.P.No.6563 of 2017
dated 18.05.2017)

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Respondents

Prayer:-

This Criminal Revision is filed under Section 397 and 401 of Cr.P.C., to set aside the order passed by the learned Judicial Magistrate No.I, Kancheepuram, Kancheepuram District in Crl.M.P.No.2583 of 2016 in C.C.No.125 of 2014 dated 03.04.2017.

For petitioner : Mr. E.Kannadasan

For respondent : Mr.R.Ravichandran,
Government Advocate (Crl. Side)
for R1
: Mr.C.V.Raman,
for R2

ORDER

The petitioner is A2, in C.C.No.125 of 2014 on the file of the learned Judicial Magistrate No.I, Kancheepuram District. She stood charged for the offences under Sections 454 and 380 IPC. Earlier, the petitioner had filed a petition to discharge her from the above charges, the Court below dismissed the application. Challenging the same, the present revision has been filed.

2. The case of the prosecution in brief is as follows:

The petitioner/A2 was doing her second year MBBS Course at one Meenakshmi Medical College, Kancheepuram. She was a tenant under the defacto complainant, and she was living in the first floor of the building, whereas the defacto complainant is residing in the ground floor. A1 in this case is also a student studying second year MBBS in the same college and he is the friend of the petitioner. On 10.02.2014, while the defacto complainant left the house for attending some function, he locked the door and given the key to the petitioner. The petitioner and A1, who were in desperate need of money, have opened the front door of the defacto complainant's house using the key given to A2, and they broke open the bed room, and removed the safety locker, kept in the bed room. Then, they took the safety locker to a far off place, A1 opened the locker using a metal cutter and stolen the jewells kept inside the locker, worth

about Rs.75 lakhs. Thereafter both the accused had given the jewells to one Ms.Bharath parveen, a co-student studying with them, and staying in the hostel for safe custody.

3. When the defacto complainant came back to her house at 8.15 p.m., found the front door opened, and also found the locker missing from the bed room. Thereafter, he lodged a complaint before the respondent police stating that the jewels were missing from his house. Based on the same, the respondent police had also registered a case in Crime No.102 of 2014, for the offences under Sections 454 and 380 IPC against unknown accused and after investigation, a final report has been filed against the petitioner and one Manikandan, who was arrayed as A1. The learned Magistrate also taken cognizance, and taken the matter on file in C.C.No.125 of 2014. Then the petitioner filed a petition to discharge her from the charges. The Court below dismissed the above application on the ground that already trial has commenced, and there are materials available on record made out a prima facie case against the petitioner. Now, challenging the same, the present revision has been filed.

4. I have heard Mr.E.Kannadasan, learned counsel appearing for the petitioner and Mr.R.Ravichandran, learned counsel

appearing for the first respondent and Mr.C.V.Raman, learned counsel appearing for the second respondent.

4. The learned counsel appearing for the petitioner would contend that except the alleged confession said to have given by A1, absolutely there is no materials available on record to show the involvement of the petitioner. Merely because A1 in this case is a friend of the petitioner, she cannot be implicated in the crime. None of the witnesses examined by the prosecution has stated about the involvement of the petitioner in this crime. Eventhough the police has taken the finger prints from the scene of occurrence, the finger prints were not sent for comparison, to establish the involvement of the petitioner in the crime. Apart from that even in the complaint, the defacto complainant did not said about the handing over the keys of the house to the petitioner. In the complaint, he had only stated that he had locked the door and went to the office and thereafter he had attended a reception and came back at about 8.15 p.m., and found the door was kept opened. Therefore, the prosecution case that the keys were handed over to the petitioner, and using the key she opened the door and committed theft is totally false. Even in the alleged confession of A1, there is no incriminating material against the petitioner. From the materials available on record, no prima facie case is made out against the petitioner, and

the Court below without considering the case in proper perspective dismissed the discharge petition.

5. Per contra, the learned Government Advocate (Crl. Side), appearing for the first respondent would contend that the petitioner/A2, was a tenant under the defacto complainant, residing in the first floor of the building and A1 is her friend. Now, A1 had given a confession that only at the instigation of A2, both the accused have broke open the door and stolen the jewells. Based on his statement, A2 was arrested. She has also voluntarily given a confession and based on the disclosure statement, the jewells were recovered from their friend, a co-student in the medical college, and the other materials, which were used to broke open the safety locker, were recovered. The recovery was made based on the confession of the accused, which is admissible under Section 27 of the Evidence Act. The material available on record has made out a prima facie case against the petitioner. The trial Court after considering the same dismissing the petition and there is no illegality in it.

6. I have considered the rival submissions and perused the entire materials available on record carefully.

7. It is an admitted case that A2 was a tenant under the defacto complainant and living in the same house in the first floor. From the perusal of the complaint given by the defacto complainant, it is seen that on 10.02.2014 at about 5.15 p.m., the defacto complainant locked his house and went to his office and after attending a marriage reception, he came back at about 8.15 p.m., and found the front door was opened, when he went inside the house, saw the bed room door was broke open and the safety locker was found missing, thereafter, he has given a complaint. After registering the complaint, the respondent police proceeded with the investigation and recorded the statements of the witnesses and none of the witnesses examined by the respondent police had stated anything about the involvement of this petitioner. Thereafter, on suspicion, the respondent police arrested A1. On such arrest, he said to have given a voluntary confession in the presence of one Barhathbegam and Vinothkumar. Based on the disclosure statement of A1, the police has also recovered one electrical wood cutter and a crow bar and a safety locker at about 5.15 a.m. Thereafter, the respondent police had arrested this petitioner. On such arrest, she has also said to have given a voluntary confession and based on the disclosure statement, a Maruti Omni car was seized. Thereafter, both the accused were taken to the college hostel, and police had

recovered the stolen properties from one Bharathparveen, a friend of the accused.

8. From the perusal of the records, it could be seen that A1 was arrested on 13.02.2014 at about 3.15 a.m., and on such arrest, he has voluntarily given a confession and only on his confession, all the properties were recovered at about 5.15 a.m. Thereafter, based on the statement of A1, this petitioner was arrested at 5.40 a.m., and on her confession, the police only recovered a Maruti Vagon R belonging to the petitioner. The seizure mahazar also shows that only based on the disclosure statement of A1, all the other materials were recovered and based on the disclosure statement of this petitioner, only a Maruti Vagon R car of the petitioner was recovered. Thereafter, both the accused were taken to the college hostel, where they said to have handed over a parcel to one Bharath Parveen, thereafter the police have seized the parcel containing the stolen articles. From the perusal of the case diary, it clearly shows that already A1 has given a confession and only based on his confession entire materials had been recovered and thereafter, only on the identification of A1, the petitioner has been arrested and a Maruti Wagon R car was recovered based on her confession.

9. Now, the one and only material available against this

petitioner is confession of A1. The question is whether the petitioner can be implicated in the crime based on the confession of the co-accused/A1.

10. It is settled law that the confession of the co-accused cannot be elevated to the status of substantive evidence which can form the basis for conviction of the co-accused. The Court shall not start with the confession of the co-accused, and Court must consider the other available evidence and after forming an opinion with regard to the quality and veracity of the said witness, then the Court can use the confession of the co-accused in order to lend assurance to the other evidence.

11. A constitution of the Hon'ble Supreme Court of India in **Hari Charan Kurmi and Jogia Hajam /vs/ State of Bihar**, reported in **1964 AIR 1184** has held as follows :

Even so, S.30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by s.3 of the Act, it is an element which may be taken into consideration by the criminal court and in that

sense, it may be described as evidence in a non-technical way. But, it is significant that like other evidence which is produced before the Court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the Court, it is the duty of the court to consider that evidence. What weight should be attached to such evidence, is a matter in the discretion of the Court. But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the Court in dealing with a confession, because s.30 merely enables the Court to take the confession into account.

As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused

person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. "

In an another judgment in **Kashmira singh /vs/ State of Madhya Pradesh**, reported in **1952 AIR 159**, it has been held as follows:

Translating these observations into concrete terms they come to. This. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aide. But cases may arise where the judge is not prepared to act on the

other evidence as it stands even though, it believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

12. Keeping the above principle in mind, if we consider the instant case, there is no other material available against the petitioner, except the confession of A1. Eventhough the defacto complainant has earlier stated in his complaint that he has handed over the front door key to the petitioner, during investigation, he has stated that he has locked the door and took the key along with him. Hence, the only available material against the petitioner is the confession of A1. Even based on the disclosure statement of this petitioner, only a car belonging to the petitioner was recovered, which is no way connected with the crime. The stolen article and other materials were recovered based on the confession of A1 alone.

13. It is settled law that at the time of framing charges, the Court can sift and weigh the materials available on record for a

limited purpose to find out as to whether a prima facie case is made out against the accused and the materials available on record also disclose a clear suspicion against the accused. If the Court is satisfied that the materials produced before the Court give rise to some suspicion, but not grave suspicion against the accused, the Court can discharge him from the charges. The Hon'ble Supreme Court of India in **2002 (2) SCC 135 in Dilawar Balu Kurane /vs/ State of Maharashtra**, has held as follows :

"Now, the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two

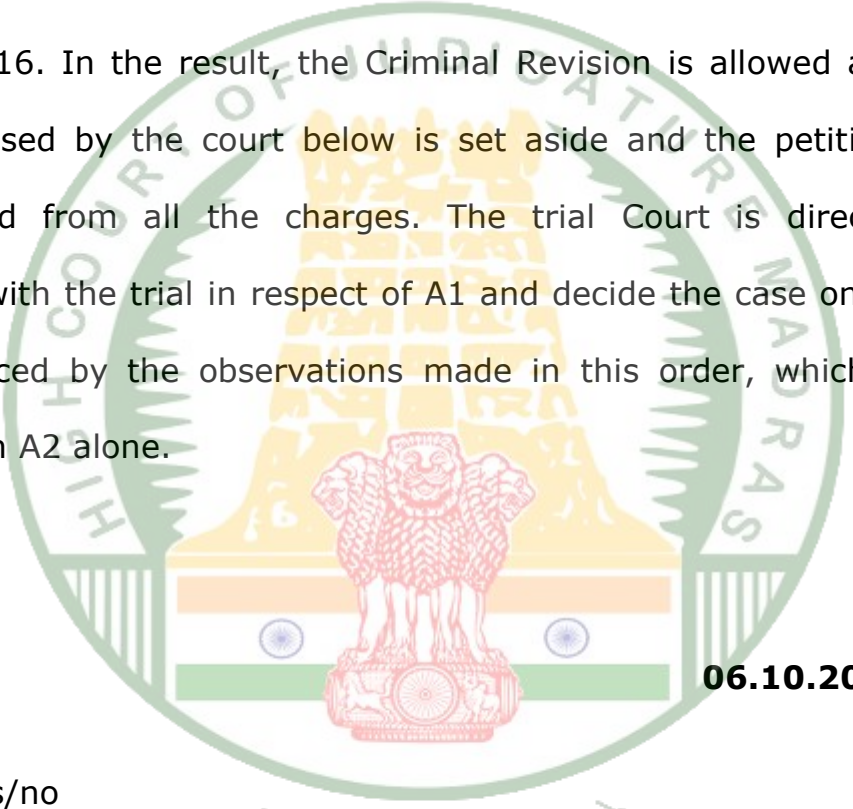
views are equally possible and the judge is satisfied that the evidence produced before him, while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial"

14. In the instant case, as stated earlier, except the confession of A1, there is no material available on record against the petitioner to show prima facie case against her and from the materials available on record, there is no strong suspicion is made out against her for proceeding with to implicate her in this case.

15. In the above circumstances, I am of the considered view that there there is no prima facie case is made out against the

petitioner to proceed with the complaint against her and hence, she is entitled to discharge from the charges. The Court below, without considering the case in a proper perspective, has dismissed the discharge petition, which is liable to be set aside.

16. In the result, the Criminal Revision is allowed and the order passed by the court below is set aside and the petitioner is discharged from all the charges. The trial Court is directed to proceed with the trial in respect of A1 and decide the case on merits uninfluenced by the observations made in this order, which only deals with A2 alone.



06.10.2017

mrp

Index:Yes/no

Internet : yes/no

Speaking order/non speaking order

To

1. The Judicial Magistrate No.I,
Kancheepuram.

2. The Public Prosecutor,
High court, Madras.

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V.BHARATHIDASAN, J.

mrp



**Pre-delivery Judgment
in**

Crl.R.C.No.645 of 2017

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