

BAIL SLIP

The Appellant/Accused Nos.2 & 3 namely Babu @ Parthiban, S/o.Kuppusamy and Santhosh @ Santhosh Kumar, S/o.Kalimuthu were directed to be released on bail as per Order of this Court dated 10.11.2009 made in M.P.Nos.1 & 2 of 2009 in Crl.A.No.451 of 2009 on the file of this Court.

IN THE HIGHCOURT OF JUDICATURE AT MADRAS

Date of Reservation : 02.11.2016
Date of Pronouncement : 10.07.2017

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.Nos.451 of 2009 & 390 of 2012
and M.P.No.2 of 2013

1.Babu @ Parthiban
2.Santhosh @ Santhoshkumar ... Appellants in CRL.A.451/2009
/Accused 2 & 3
Chandrasekar @ Mani @ Sekar
...Appellant in CRL.A.390/2012/
1st Accused

Versus

State by Inspector of Police,
B-6, Peelamadu Police Station,
Coimbatore District,
Crime No.622/2006.Respondent in both the Crl.As.
/Complainant

Prayer in Crl.A.No.451 of 2009: Criminal Appeal filed under Section 374 of Cr.P.C., to set aside the conviction and sentence passed in S.C.No.154/2008 dated 30.06.2009 (on the file of the Additional District and Sessions Judge (FTC No.III) Coimbatore and acquit the appellants.

Prayer in Crl.A.No.390 of 2012: Criminal Appeal filed under Section 374 of Cr.P.C., to call for the records and set aside the conviction and sentence passed against the appellant on 25.02.2010 in S.C.No.154-A/2008 (on the file of the Additional District and Sessions Judge (FTC-3) at Coimbatore and acquit the appellant.

For Appellants in : No appearance
CRL.A.No.390/2012
For Appellants in : Mr.B.Vijayakumar
CRL.A.No.451/2009

For Respondent

: Mr.P.Govindarajan
Additional Public Prosecutor

COMMON JUDGMENT

These Criminal Appeals have been filed by the appellants/accused against the judgment of conviction passed by the learned Additional District and Sessions Judge (FTC-3) Coimbatore in S.C.No.154-A/2008 and S.C.No.154/2008 dated 30.06.2009 and 25.02.2010, respectively in which, the learned Judge had convicted the appellants for the commission of offence under Section 397 of I.P.C and sentenced her to undergo 3 years and 7 years rigorous imprisonment respectively.

2.The case of the prosecution as per the charge sheet is that the accused A1 Chandrasekar @ Mani @ Sekar once worked as temporary driver for two days at the house of complainant at door No.33 Annanagar 1st Main Road, Peelamedu, Coimbatore. The Accused A1, A2 and A3 are friends, they have joined together and had prepared a plan and accordingly that on 15.06.2006 at about 15.30 hrs, at the house of the complainant, Sivaneshwari situated at Door No.33, Anna Nagar, 1st Main Road, Peelamedu, Coimbatore City within B-6 Peelamedu PS Limit while the complainant Sivaneshwari after opening the back door and washed the clothes and entering inside the house during that time accused A1 to A3 trespass into the house, by back door, each were having knife, covered their faces by a white clothes, dragged the complainant still inside the house, atg the knife point, threatened her forcibly, seized the key of bureau while accused A2 Babu @ Parthiban at the knife point made the complainant to sit on the chair, meanwhile the accused A1 and A3 went to the first floor opened the two bed room bureaus, robbed properties viz., gold ornaments of 9 designs weighed around 12 sovereigns, One silver plate, 1 DVD player, One Camera, One walkman, Bank of Baroda bond and came down, closed the back side door at inside and at the knife point threatened the complainant and left her inside the house by locking the front door at outside and loaded the robbed properties in a TN 38-D-9343 Maruthi Omni Van white colour and escaped from the scene of occurrence with all robbed properties. By the above said act of commission, the accused A1 to A3 have committed an offence punishable under Section 397 IPC.

3. After the investigation, PW10, the Inspector of Police laid charge sheet in PRC.No.14/2008 on the file of the Judicial Magistrate -VI Coimbatore.

4. After completing the formalities, the learned Judicial Magistrate -VI Coimbatore, committed the case to the District and Sessions Judge, Coimbatore and the District and Sessions Judge after taking the case on file in S.C.No.154/2008 transferred the same to the learned Additional District and Sessions Judge, FTC-III, Coimbatore.

5. Considering the facts and circumstances of the case, the Additional District and Sessions Judge, FTC-III Coimbatore has framed the charge against the accused A1 to A3 under Section 397 IPC.

6. In order to prove the case of the prosecution., the prosecution has examined as many as 10 witnesses and marked 21 documents and 15 material objects. The PW1 has spoken about the occurrence. PW2 is the daughter of PW1 and she has spoken about the information received from her neighbour regarding robbery that took place in her house and also missed articles from her house. PW4- Judicial Magistrate has spoken about the conduct of the identification parade in this case. PW5, Premalatha is the neighbour of the PW1 who has spoken about the information passed to PW2 over telephone. The PW8 is the Sub-Inspector of Police, Peelamedu Police Station. He has spoken about the receipt of the complaint from PW1 and registered the case in Cr.No.622 of 2006 under Section 397 IPC. The PW9 is the Inspector of Police, who was holding the additional charge as Inspector of Police, B-6, Peelamedu Police Station has spoken about the investigation done in this case and also PW10 is the Inspector of Police, who has spoken about the further investigation of this case and also completion of investigation and about filing of the charge sheet. After the completion of the examination of prosecution witnesses, the accused were questioned with regard to the incriminating circumstances appearing against them in the evidence under Section 313 of Cr.P.C., and the accused denied the same as false. But, the appellants have not let in any oral evidence and also not produced any documentary evidence.

7. Considering the above said oral and documentary evidences, the trial court has found guilty of the accused A1 to A3 under Section 397 of IPC and convicted and sentenced to undergo Rigorous Imprisonment for seven years and three years respectively as stated above.

8. Aggrieved by the above conviction and sentence passed by the trial court, the accused 1 and 2 in S.C.No.154/2008 dated 30.06.2009 on the file of the Additional District and Sessions Judge, FTC.No.III, Coimbatore has preferred the present appeal in CrI.A.No.451 of 2009 and the accused in S.C.No.154/A/2008 dated 25.02.2010 filed CrI.A.No.390 of 2012 before this Court since both the appeals are arising out of the same charge sheet. Originally the case was tried in S.C.No.154/2008, after framing the charge recorded most of the witnesses since A1 Chandrasekaran appellant in CrI.A.No.390/2012 was absconded and therefore, the trial court has split the case against the A1 and proceeded further against the two accused and pronounced the judgment. After securing the accused A1 as well as appellant in CrI.A.No.390 of 2012, the case was proceeded further against him in

S.C.No.154/A/2008 separately and the judgment was pronounced on 25.02.2010 and he was convicted and sentenced as stated above.

9. A1 filed CrI.A.No.390/2012 and A2 and A3 filed CrI.A.No.451/2009. All of them are co-accused and involved in one crime. Therefore, this Court pronounced the common judgment in both the appeals.

10. The case of the prosecution is that the appellants entered into the house of PW1 on 15.06.2006 at 03.30 p.m., and a knife was placed on the neck of PW1 by one of the appellants viz., A2 and two other appellants went upstairs and thereafter, they brought a bag, they robbed 12 staircase of gold jewels and other articles and left from the scene of occurrence.

11. In order to prove the case of the prosecution, the prosecution has examined as many as 10 witnesses. PW1 is the Defacto complainant, who has deposed that when she was alone in her house at Annanagar, Peelamedu on 15.06.2006 at about 03.30 p.m., 3 persons gained entry into her house through the back door and one person placed knife on her neck and threatened her not to shout and other two persons went upstairs and after some time, come down with the bag containing several articles stolen from her house and also took away the DVD player, walkman and camera and left from the scene of occurrence in Maruti Omni Van belong to her daughter which was parked in front of her house. Further, she has deposed that each of them covered their faces with pieces of clothes separately and very often, the clothes slipped down and A1 to A3 were seen adjusting the clothes and she was able to see their faces and that A1 is a person whom they had engaged a taxi driver earlier. Of course, in the test identification parade, PW1 could identify A1 and A2 only and she could not identify A3. She has stated in her cross examination that she could not identify A3 because on that day, A3 had a close hair cut. But she was able to identify all the three accused before the court during trial.

12. PW2 is the daughter of PW1. she was employed as clerk in Bank of Baroda at Sivananda Colony, Coimbatore. On 15.06.2006 at about 5.00 p.m., her neighbour, Premalatha telephoned her and informed about the robbery that took place in her house. Immediately, she rushed home and found that bureaus in the ground floor and also in the first floor and jewels boxes and other articles lying scattered on the cot and found the telephone wires cut off. She learnt about the incident from her mother. Police arrived at their house and examined her mother and the neighbours. The next day morning at about 7.00 a.m., they were called to the police station and they identified the articles robbed from their house. The material objects are marked as MO1 to MO15.

13. PW4- Thiru.S.Padmanabhan is the Judicial Magistrate No.I, Udumalpet. On 21.06.2006, he received direction from the Chief Judicial Magistrate, Coimbatore to conduct identification parade in this case and accordingly, he conducted test identification parade on 27.06.2006 in the Central Prison, Coimbatore and in the identification parade, PW1 correctly identified A1 to A2 thrice and she could not identify A3 and the report was marked through him.

14. PW5 - Premalatha is the neighbour of PW1. On 15.06.2006 at about 03.30 p.m., she noticed PW1 shouting through her kitchen window. She went to PW1's house and opened the door which was locked from outside. She came to know about the incident from PW1 and informed the matter to PW2, who is the daughter of PW1. She accompanied PW1 to police station.

15. PW6 is the Manager of ABH Lodge, Palladam. On 16.06.2006 at about 11.30 p.m., Peelamedu police asked him to be the witness for recovery of articles from A1 to A3. Police interrogated A1 to A3 and recovered a DVD player, camera, cash and a knife and he signed the mahazar for the recovery of the articles, as a witness, along with another Manager of Lodge by name Subramani and also signed the confession statements made by the three accused and he identified his signature in the confession statement and also identified the above said articles before the court and also he identified the accused who are present in the court.

16. PW8 is the Sub Inspector of Police, Peelamedu Police Station. He received a complaint from PW1 and registered a case in Cr.No.622/2006 and printed FIR is marked through him as Ex.P16 and spoken about the sending of FIR to the court and higher officials. PW9 is the Inspector of Police, who was holding an additional charge as Inspector of Police (Crime) B6 - Peelamedu Police Station. On 16.06.2006, he took up investigation of the case and he prepared observation mahazar and rough sketch at the scene of occurrence and the documents prepared by him were marked through him. The PW10 is the Inspector of Police who took up the investigation from the PW9 and conducted further investigation of this case and on completion of investigation, filed a final report in the court and all the other documents were marked through him and exhibits were marked.

17. Learned counsel for the appellants would submit that as per the evidence of PW1, she has only lodged an oral complaint before the respondent police and the police has written the complaint at the scene of occurrence after inspection of the scene of occurrence, examination of witnesses and after due discussions by which FIR is hit under section 154 Cr.P.C.,

18. The important witness namely Mrs.Baby, examined by police at the scene of occurrence was wantonly not cited as prosecution witness and was also not examined before the trial court. As per the evidence of PW1, though the finger print experts has examined the scene of occurrence, the report was not produced before this court, which is suspicious. The PW1 has not identified the accused No.3 on the test identification parade at the Central Prison before the Learned Magistrate for all the 3 times, though she had perfectly identified the other two accused at all times. If she is able to identify the other two accused, then she should have identified A3 also. This shows that the A3 has not participated in any offence as alleged. No documents in support of the ownership of the alleged properties are produced. As per evidence of PW2, she is the one who has prepared the list of articles stolen and she has given the same to the police at their visit to scene of occurrence which proves that the prosecution version is concocted. As per evidence of PW2, she has seen only the accused No.1, in the police station being kept arrested on the next day morning at her visit to the police station. That means the other accused were not arrested along with A1 in the alleged time. Hence, the arrest, confession and recovery all are concocted. The PW6 and PW7 have turned Hostile. They have deposed that they have made 3 signatures in the police station. There by it is proved that the confession statements and recovery mahazars are prepared in the police station and not at the alleged place of arrest. The 161 Cr.P.C., statements, confession statements, recovery and other documents of the case has been written by various head constables, as per instructions of investigation officer, PW9. Hence, all the above has been prepared at police station and the same were not prepared at the alleged time, date and place. Further all the above has been dispatched to court only along with the charge sheet, after lapse of several months, which is illegal and proves the investigation to be fainted. The PW2 is the daughter of PW1, PW5 has close acquaintance and interest over PW1 family PW3 is the close friend of PW2's son. All are interested witnesses. Therefore, Judgment and sentence passed by the trial court is liable to be set aside.

19. Per contra, learned Additional Public Prosecutor would submit that the appellant/first accused in CrI. A.No.451 of 2009 is a taxi driver, who was engaged by the PW1 and PW2 two days prior to the occurrence and according to PW1, the clothes slipped down several times and as such she could very well identify the persons and jewels and other articles which were robbed and have been recovered and PW1 identified all the appellants before the court when they were present at the time of examination of the PW1. Therefore, the prosecution has proved the case against the accused beyond reasonable doubt. After considering all the

materials placed before the trial court, the trial Judges have come to the conclusion that the appellants only have committed the offence and none else. Therefore, trial court has convicted and sentenced them as above. There is no perversity in the Judgments of the trial court and no merit in the appeals. Therefore, the appeals are liable to be dismissed.

20. Heard both sides and rival contention made by the learned counsel for the respective parties and perused the oral and documentary evidences placed before the trial court and judgments passed by the trial court and grounds of appeal placed before this court in the both the appeals.

21. It is the specific case of the prosecution that on 15.06.2006 at about 03.30 p.m., when defacto complainant PW1 alone was present in her house, A1 to A3 trespassed into her house and committed robbery at the knife point threaten PW1 to not to shout. The prosecution mainly relied on the evidence of PW1, who is the eye witness as well as victim in this case and the evidence of PW6 and PW7 who were the witnesses for the confession and recovery mahazar and PW8 to PW10 are Investigation Officers.

22. Admittedly in this case, PW1 is an eye witness. Though the learned defence counsel would submit that PW2 and PW5 are interested witnesses, their evidences cannot be relied on and further in the identification parade, A3 was not identified by PW1 and further at the time of occurrence, they covered their faces by clothes. But it is doubtful to say that whether she could see the face of the appellants. Therefore, the benefit of doubt should go in favour of the appellants. The prosecution has not proved its case beyond reasonable doubt.

23. As stated earlier, defacto complainant, PW1 is an eye-witness, who has elaborately spoken about the scene of occurrence. Further, she has identified A1 and A2 during the identification parade conducted by the Judicial Magistrate-PW4 and she has also given an explanation during the examination before the court as to why she could not identify A3 at the time of identification parade was that A3 had a close hair cut. During the examination in the court, she was able to identify all the appellants(including A3). Further all the materials were recovered from the accused and same were identified by the PW1 and PW2 in the police station and got the same and the same were identified by them in the court also. Since PW1 alone is eye witness in this case, there cannot be any corroboration. But the PW2 and PW5 corroborated the date of incident and made a complaint. PW2, soon after the intimation given by the PW5, rushed to the house and saw the jewels and other things were missed and same were recovered by the police. In the next day, they were identified by PW1 and PW2 in the police station.

Therefore, though PW2 is the daughter of PW1 and PW5 is the neighbour, unless there is a reason to disbelieve their evidences, court need not discard the evidence of them because of the reason that they are relatives and neighbours and cannot give colour as interested witness and disbelieve their version. They have corroborated the evidence to the extent that robbery took place in Annanagar, Peelamedu on 15.06.2006 at about 15.30 hours. Complaint given before police station, identified the looted articles and first appellant was engaged by PW1 and PW2, temporarily, as car driver.

24. PW1 has clearly identified the appellants they have only involved in the offence. The looted ornaments and articles were seized at the instance of PW1 and aforesaid recovery of looted articles at the instance of PW1 is the relative circumstances and seizure and memorandum of statement have duly been proved and seized articles have duly been identified and further in this case, identification parade was conducted by the PW4- Judicial Magistrate. In that identification parade, PW1 identified A1 and A2. Of course, she could not identify A3. But she has given explanation during the examination before the court why she could not identify A3. Therefore, the evidence of PW1 is cogent and convincing and she was able to identify all the appellants/accused in the court during examination. At this juncture, it is relevant to place reliance on the decisions of the Hon'ble Apex Court:

In the matter of Sampat Tatyada Shinde vs. State of Maharashtra (AIR 1974 SC 791) it has been held by the Supreme Court that the evidence of test identification is admissible under Section 9 of the Evidence Act. It can be used only to corroborate the substantive evidence given by the witnesses in Court regarding identification of the accused. Relevant portion reads as under:

"The evidence of test identification is admissible under Section 9 of the Evidence Act; it is, at best, supporting evidence. It can be used only to corroborate the substantive evidence given by the witnesses in court regarding identification of the accused as the doer of the criminal act. The earlier identification made by the witnesses at the test identification parade, by itself, has no independent value. Nor that can be tendered to confirm the evidence of a witness regarding identification of the accused in Court, as the perpetrator of the crime. The identify of the culprit can be fixed by circumstances evidence also".

Kerala : (2013) 14 SCC 266 : (AIR 2013 SC 651) the Supreme Court has held that the evidence from a test identification parade is admissible under Section 9 of the Evidence Act. It has further been held that mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in Court. Further, conducting a test identification parade is meaningless if the witnesses know the accused, or if they have been shown his photographs, or if he has been exposed by the media to the public. Holding a test identification parade may be helpful to the investigation to ascertain whether the investigation is being conducted in a proper manner and with proper directions.

Recently, in the matter of Ashok Debbarma alias Achak Debbarma v. State of Tripura : (2014 (4) SCC 747) 2014 AIR SCW 1628), the Supreme Court has held that primary object of test identification parade is to enable witness to identify the persons involved in the commission of the offence if the offenders are not personally known to the witnesses. The whole object beyond test identification parade is really to find whether or not the suspect is really offender.

25. In this case on hand as already stated PW1 clearly identified A1 and A2 though she could not identify A3 during the identification parade due to close hair cut. However, she had identified all the three appellants in the court during the examination. Further when alleged incidents had taken in the house one cannot expect any eye witness as to how it took place and who are all the accused committed the offence. As per the case of the prosecution, the only available witness is PW1, hence, the prosecution has established his case through PW1 clearly and cogently and this court do not find any reason to discard the evidence of PW1. Under the said circumstances, this court is of the view that the appellants have committed the offence punishable u/s.397 IPC. The trial court after considering the entire oral and documentary evidences placed before it has correctly found that the appellant only committed the offence and none else and therefore, convicted and sentenced them as stated above. Thus, after appreciating the entire evidence on record, I do not find any illegality in appreciation of oral and documentary evidence and arrived at a conclusion as to the guilt of the present appellants by the trial court warranting interference by this court.

In the result, both the Criminal Appeals are dismissed. The conviction and sentence imposed on the accused are

confirmed. The bail bond, if any, executed by them shall stand cancelled. The trial court is directed to take steps to secure the custody of the accused to undergo the remaining period of sentence. Consequently, connected M.P.No.2 of 2013 in CRL.A.No.390 of 2012 is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gv

To

- 1.The Inspector of Police,
B-6, Peelamadu Police Station,
Coimbatore District,
- 2.The Additional District and Sessions Judge,
(FTC No.III), Coimbatore.
- 3.Do Through the Principal Sessions Judge,
Coimbatore.
- 4.The Judicial Magistrate No.6,
Coimbatore District.
- 5.Do Through the Chief Judicial Magistrate,
Coimbatore.
- 6.The Superintendent,
Central Prison,
Coimbatore.
(Induplicate for communication to Detenue)
- 7.The Public Prosecutor,
High Court, Madras.

CRL.A.Nos.451 of 2009 & 390 of 2012
and M.P.No.2 of 2013

SAI (CO)
CA(26/07/2017)