

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.03.2018
DELIVERED ON : 03.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.543 of 2010

Jayavelu

... Appellant

Vs

State by:

The Inspector of Police,
F-5 Chetpet Police Station,
Chennai.
(Cr.No.729 of 2004)

... Respondent

Prayer: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, to set aside the judgment of the trial Court against this appellant in S.C.No.184 of 2005 dated 22.07.2010 passed by the learned V Additional Sessions Judge, Chennai and allow this appeal.

For Appellant : Mrs.S.Sujatha
(Legal Aid Counsel)

For Respondent : Mrs.T.P.Savitha
Government Advocate (Crl.Side)

JUDGMENT

This criminal appeal is preferred by the appellant/accused No.2 against the judgment passed by the Learned V Additional Sessions Judge, Chennai in S.C.No.184 of 2005 dated 22.7.2010 wherein the learned trial judge convicted and sentenced the appellant for an offence under section 341 of IPC to simple imprisonment for one month, for offence under Section 392 r/w 397 of IPC to rigorous imprisonment for 10 years, for offence under Section 353 of IPC to simple imprisonment for one year, for offence under Section 506(ii) of IPC to simple imprisonment for one year and for offence under Section 336 of IPC to simple imprisonment for one month.

2.The brief case of the appellant:-

PW1 Ravi is a resident of Kalamegam Street, Mugaper West, Chennai went to Chetpet in order to meet his friend. On 31.8.2004 at 8.00AM he proceeded towards north to Chiti Babu Street. While so, Accused A1 Krishnasingh and A2 Jeyavelu joined together in furtherance of common intention waylaid PW1 and in the course of the same transaction A1 scolded PW1 in filthy language and forced to handover money kept in the pocket. When PW1 refused to part with the money accused A1 took out the knife from his waist and pin pointed the knife over the stomach of PW1 and by putting him to fear of death. Accused A1 took out Rs.70/- from the pocket of PW1 by force and during the course of the same transaction Appellant/accused A2 snatched the golden chain weighing about 4 grams from the neck of PW1 and thereafter A1 and Appellant/accused A2 attempted to run away from the spot of occurrence. At that time, PW1 had noticed the arrival of PW3 Ravindran, PW4 Sudhakaran, Sivaprakasam and PW5 Thiruneelakandan have shouted as "thief" "thief" On hearing the hue and cry, the police personals and the public chased accused A1 and A2 and rounded up them.

2.1. In order to escape from the clutches A1 took out the knife and attempted to stab the public who approached him and Appellant/accused A2 took out the blue metals from the road and belted towards the public and thereby caused traffic obstruction. Due to fear, the public of the locality started to run from the spot of occurrence. The shop keeper of the locality also down the shutters and try to run away from the spot of occurrence and due to that the free flow of the traffic was stalled. However PW3 Ravindran Head Constable and PW1 Ravi have caught holds A1 and recovered the stolen amount robbed from PW1 and handed over the same to PW1. The Police personnel namely Sivaprakasam and PW5 Thiruneelaknadan, Head Constable along with one Jothi chased Appellant/accused A2, caught him, recovered the chain and handed over to PW1. Thereafter, the police personnel's had taken A1 and A2 to the Police Station with an instruction to PW1 to accompany them to Police Station to lodge a complaint about the robbery committed by the accused persons. Therefore PW1 joined with the police officials and went to Chetpet Police Station at 8.30 a.m. and lodged Exhibit-P1 complaint and handed over the stolen article and the cash to the Inspector of Police with a request to take necessary action. PW6 Thiru.V.Sethu, Inspector of Police attached to Chetpet Police station had received Exhibit-P1 complaint from PW1 and on the basis of Exhibit P1 registered Exhibit P9 FIR against the appellant/accused under Sections 341, 397, 332, 336 and 506(2) of IPC and took up the same for investigation.

2.2. During the course of investigation PW6 arrested A1 and A2 at the police station and recovered the cash and the golden chain which were handed over by PW1 under Form-95. PW6 forwarded the stolen goods to the Court. The stolen goods were recovered by PW6 under cover of Mahazar in the presence of Jothi and Umapathi that is Exhibit-P7. PW6 also recovered the knife from A1 in the presence of PW2 and Umapathi went to the scene of occurrence and where he prepared Exhibit-P11 observation mahazar and obtained the signature of the witness thereon. PW6 also recovered blue metals scattered on the road under Exhibit-P8 cover and there after PW6 returned to the police station at 10.00 a.m. and where he interrogated the appellant/accused in the presence of PW2 Jothi and Umapathi and recorded the confession of A1. Simultaneously he also interrogated appellant/accused A2 in the presence of the same witnesses and recorded the confession of Appellant/accused A2. During the course of continuation of investigation PW6 examined PW1 Ravi, PW2 Jothi, Umapathi, PW3 Ravindran, PW4 Sudhakaran, Sivaprakasm, PW5 Thiruneelakandan, Venkatesan and Navaneetham and recorded their statements. After fulfillment of necessary formalities PW6 forwarded the Appellant/accused persons to the Court at 3.30 p.m. for remand.

3. On 29.02.2004 PW6 completed the investigation of the case and after obtaining the opinion of the Public Prosecutor filed the final report against the appellant/accused A1 under Sections 341, 392 read with 397, 353 and 506(ii) of IPC and under Sections 341, 392 read with 397, 353, 336 and 506(ii) read with 34 of IPC against appellant/accused A2.

4. The learned trial Court framed five charges against the appellants/accused under sections 341, 392 r/w 397, 353, 336 and 506(ii) of IPC. In support of its case, the prosecution has examined six witnesses i.e PW1 to PW6 and marked Exhibits-P1 to 11.

5. After recording of prosecution evidence, statements of accused under Section 313 of Cr.P.C. were recorded, wherein all the incriminating evidence was put to the appellants/accused persons, which the accused denied as incorrect. Both accused claimed to be innocent and stated that they have been falsely implicated in this case. They also stated that they do not want to lead evidence in their defence. On completion of trial, the learned trial Court convicted the appellant/accused and sentenced them to undergo simple imprisonment for one month for an offence under section 341 of IPC , 10 years Rigorous

Imprisonment for an offence under Section 392 r/w 397 of IPC, one year for an offence under Section 353 of IPC, one year for an offence under Section 506(ii) of IPC and one month for offence under Section 336 of IPC to Simple Imprisonment and ordered the sentences to run concurrently.

6.Challenging the conviction one Mr.T.K.Sampath, Advocate representing the T.K.Sampath Associates had filed this appeal for the appellant/A1. When the appeal has been taken up for final hearing, there was no representation for the appellant and later on it was informed to this Court that the appellant's counsel was no more and there was no representation for the appellant. Therefore, this Court appointed Smt.S.Sujatha as Legal Aid Advocate for representing the appellant. Accordingly, Smt.S.Sujatha, learned counsel appeared and argued on behalf of the appellant and Smt.T.P.Savitha, learned Government Advocate (Criminal Side) appeared and argued the case. I perused the entire documents available on record.

7.Smt.S.Sujatha, learned Legal Aid Counsel for the appellant submits that the learned trial judge has not properly appreciated the defence and convicted the appellant on the basis of conjectures and surmises.

8.The learned counsel for the appellant submits that the learned trial judge relied upon the sole evidence PW1 which is contradictory in nature and the other witnesses viz PWs-3, 4 and 5 are only official witnesses and whose evidence has to be rejected.

9.The learned counsel for the appellant submits that the learned trial judge has failed to appreciate the fact that the statements of the witnesses have been sent belatedly to the Court.

10.The learned counsel submits that the defacto complainant's evidence is full of contradictions and hence not reliable as PW2 also turned hostile.

11.The learned counsel submits that no public was included as witnesses and moreover the respondent failed to adduce any evidence regarding the presence of PWs-3, 4 and 5 at the place of occurrence prior to the occurrence.

12.I have also carefully considered the evidence adduced on behalf of the prosecution in support of its case.

13.Smt.S.Sujatha, learned counsel for the appellant produced a citation in the case of "Sukhdev Yadav and others Vs. State of Bihar" reported in JT-2001 (7) - SC-597, it has been laid down by the Hon'ble Supreme Court of India that:- "The Court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. The evidence is to be considered from the point of view of trustworthiness and once the same stands satisfied, it ought to inspire confidence in the mind of the Court to accept the stated evidence. It is indeed necessary however to note that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment sometimes, there would be a deliberate attempt to offer the same. Sometime, the witnesses in their over anxiety to do better from the witness box details out an exaggerated account."

14.Of course, it is true that P.Ws.3 to 5 were the Police witnesses but it does not mean that such official witnesses won't commit any mistake. In this case, they have stated that on the date of occurrence the appellant/accused were caught in the public road on hearing the sound from PW1 and arrested in front of the peoples standing nearby and handed over to PW6, Inspector of Police. The presence of P.Ws.3 to 5 in the scene of occurrence was not proved for the simple reason that the Notebook maintained by the Police was not filed nor corroborated by the independent witnesses. Further PW1 says the Police peoples were not in the uniform. In my considered view, when the entire evidences of P.Ws-1 to 5 are considered, it is very obvious that there are serious material contradictions and the entire incident alleged by the Prosecution is nothing but a stage managed and cannot be believed at all, which would, in any manner,affecting the substratum of the case.

15.It is true that no independent witnesses were examined to corroborate the presence of P.Ws-1 to 5 in the scene of occurrence and the 161 statements were sent belatedly to the Court. No explanation offered by PW6, the Inspector of Police regarding the delay in despatching the 161 statements and other connected materials.

16.The Criminal Courts decide cases and the question of acceptance of evidence of witnesses on sound common sense and when they find witnesses to be wholly independent they endeavour of fathom the reason as to why their evidence should not be

accepted. Ordinarily it is a safe and sound rule of appreciation of evidence to accept the testimony of an independent witness provided it is consonance with probabilities. It is better if it is corroborated by in-built guarantees which ensure the truthfulness of the prosecution case, such as a prompt FIR, recoveries at the instance of accused persons and the presence of injuries eye-witness etc. As seen above, the prosecution failed to prove these guarantees in the instant case.

17. Next, Smt. S. Sujatha, learned counsel for the appellant would submit that even assuming that the entire allegations are true, the offence would not fall under Section 397 of IPC. In this regard, I have no hesitation to accept the said contention. In order to make out this offence under Section 397 of IPC, at the time of committing robbery, the offender should have used any deadly weapon or should have caused grievous hurt to any person or to have attempted to cause death or grievous hurt to any person. In this case, no injury was caused to anybody by the accused. It is the case of the prosecution that the accused was holding knife in their hands. The said weapon may be termed as a deadly weapon. But there is no evidence to show that the same was used by the accused for committing robbery. Therefore, the act of the accused would not fall under Section 397 of IPC.

Section 397 of IPC reads thus :

"If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."

18. Whether the liability under Section 397 of IPC is a individual or conjoint one was considered by so many reported decisions of various High Courts and it was concluded that the liability under Section 397 of IPC was an individual one and not a conjoint one. A perusal of Section 397 of IPC would show that the aforesaid section would only have application if the evidence is that during the course of commission of robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person.' Unlike Section 396 of IPC, in which the principle of vicarious liability is explicit and which stipulates that if during the commission of dacoity, one or more of the persons committing dacoity commits murder then, all would be liable for identical punishment. Section 397 of IPC contains the principle of individual liability. The words used in it are the offender. In other words, before Section 397 of IPC, can have any application, prosecution has to establish as to who was

that offender or accused person who during the course of commission of robbery or dacoity was armed with a deadly weapon or caused grievous hurt to any person or attempted to cause the death or grievous hurt to any person.

19.A comparison of the language used in Sections 396 and 397 of IPC, justifies this inference. Had the Legislature intended that the expression 'the offender' used in Section 397 of IPC should include all such persons participating in the offence of robbery or dacoity then it could have used language similar to that contained in Section 396 and 397 of IPC, in place of its present text would instead have read as follows :

"If at the time of committing robbery or dacoity any person uses any deadly weapon or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person every one of those persons participating in the commission of such robbery or dacoity shall be punished with imprisonment which shall not be less than seven years".

20.The difference in the language used in Sections 396 and 397 of IPC, in our opinion, leaves no room for doubt that the expression 'the offender' used in Section 397 of IPC pertains to the actual offender or accused person who at the time of committing robbery or dacoity uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person and it does not include all such persons who participate in the commission of such robbery or dacoity.'

21.It is in the backdrop of this legal position that we have to examine the question as to whether the prosecution has been able to establish that the appellant was one of the persons who used a deadly weapon during the commission of the robbery. In my view, the answer has to be in the negative. The informant PW1, in his examination-in-chief deposed that he could not visualise as to who was pointing out the knife towards him. Further he could not place any documents to show that the chain belonged to him and only signed in the blank white sheet and Exhibit P1 was not written by him. On the face of this evidence, it cannot be said that the prosecution has proved the charges against the appellant that the respondent used a deadly weapon during the robbery and consequently, he cannot be convicted under Section 392 r/w 397 of IPC.

22.Thus, in view of the above discussion and observations and having regard to the fact and circumstances of the present case, I am of the considered opinion that the prosecution failed to prove the case beyond the reasonable doubt and the judgment passed by the Learned V Additional Sessions Judge, Chennai in S.C.No.184 of 2005 dated 22.7.2010 is liable to be set aside by allowing this criminal appeal. Hence, I hold the appellant/accused No.2 is not guilty of the offences punishable under Sections 392 r/w 397, 353, 336 and 506(ii) read with 34 of IPC.

23.In the result:

(a) this Criminal Appeal is allowed and the sentence and conviction imposed on the appellant/accused No.2 in S.C.No.184 of 2005, dated 22.07.2010, on the file of the learned V Additional Sessions Judge, Chennai, is set aside;

(b) the appellant/accused No.2 is acquitted from all charges;

(c) the bail bond, if any, executed by him shall stand cancelled;

(d) the fine amount, if any paid by the appellant/accused No.2 shall be refunded.

24.The Legal Aid Authority attached to this Court is directed to pay a sum of Rs.3,000/- to Smt.S.Sujatha, Legal Aid Advocate.

s/d-

Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

vs

To

1.The V Additional Sessions Judge, Chennai.

2. The Metropolitan Magistrate NO.V
Egmore, chennai.

3. The Chief Metropolitan Magistrate
Egmore, Chennai(for information)

4. The Superintendent , Central Prison
Puzhal, Chennai.

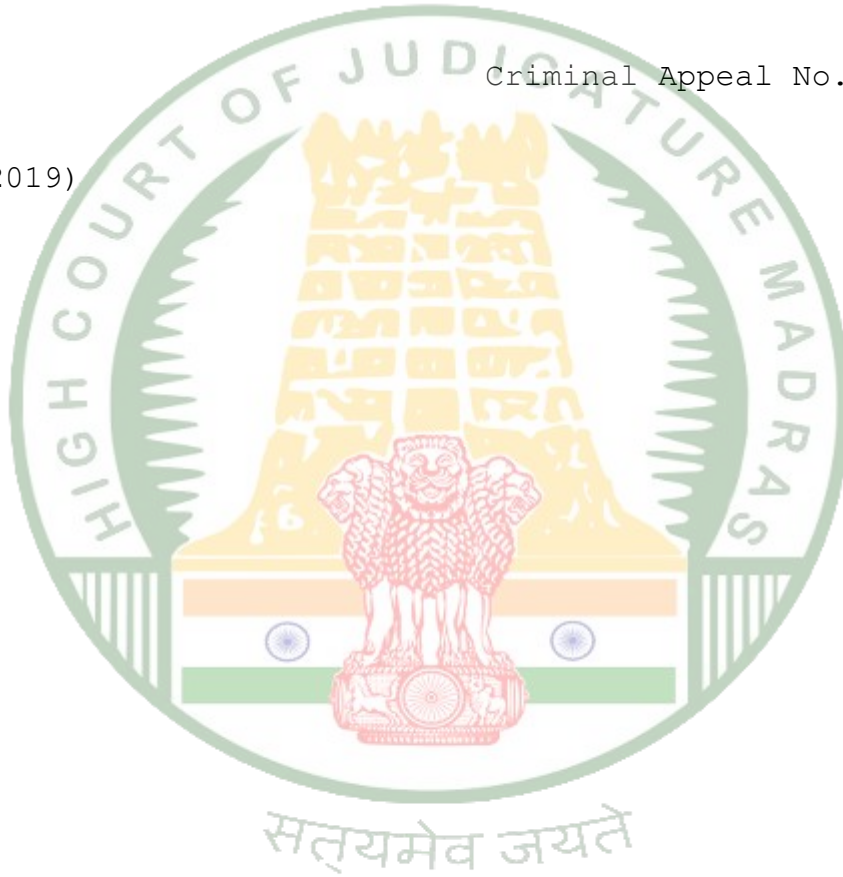
5. The Inspector of Police
F 5 Chetpet Police Station
Chennai.

6. The Public Prosecutor
High Court, Madras 104.

+2 Ccs to Mr.S. Sujatha, Advocate sr 278.

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