

Bail Slip

The Appellant/Accused, namely Madan S/o. Marimuthu was directed to be released on bail as per order dated 14.06.2005 in CRL MP.NO.2627/2005 IN CRL A.NO.6/2005 on the file of this Hon'ble court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 30.01.2019
CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Crl.A.No.6 of 2005

Madan

... Appellant

Vs.

State: by Inspector of Police,
P.6 Kodungaiyur Police Station,
Chennai.
(Crime No.121 of 2001)

... Respondent

Prayer:

Appeal filed under Section 374 of Cr.P.C., against the judgment of the learned Additional Sessions Judge, Fast Track Court No.2, Chennai made in S.C.No.77 of 2002 on his file dated 20th October 2004, convicting the appellant herein under Section 392 read with 34 and 109 I.P.C. and sentencing him to undergo seven years R.I. And to pay fine of Rs.1000/- in default to undergo 3 months S.I.

For Appellant : Mr.S.Pushpakaran
Legal Aid Counsel

For Respondent : Mr.R.Ravichandran
Government Advocate (Crl. Side)

J U D G M E N T

The appellant has filed this appeal seeking to set aside the judgment dated 20.10.2004 made in S.C.No.77 of 2002 by the learned Additional Sessions Judge, Fast Track Court No.2, Chennai.

2.The appellant is the fourth accused in the case in S.C.No.77 of 2002. The brief facts of the case is as follows: On 16.02.2001 at about 10.00 a.m., two un-known persons entered into the house of P.W.1 at No.72, 4th Street, Eveready Colony, Kodungaiyur; one through the front gate and another through the backside gate. P.W.2/ mother - in - law of P.W.1 saw the person who entered through the

backside gate and enquired as to whom he is and why he has entered the house through the backside gate. He replied that he has come in search of house on rental basis and thereafter he along with the other person entered the house through the front side gate.

3. Thereafter, P.W.2 asked them to see the house at the upstairs of the house and also interacted with the persons as to the rent and advance for the house. Thereafter, the two persons went saying that they will come later. P.W.2 was working in ESI hospital and hence she left the house for her employment. At about 4.00 p.m. in the evening when P.W.1 was alone in the house and was giving Kanji for her child, the two unknown persons who came in the morning came again and enquired as to whether the rent and advance would be reduced. P.W.1 replied that it should be asked to her mother - in - law. Thereafter, they asked for water.

4. When P.W.1 brought water, one of the persons took the child from her and kept knife at her child's neck. Thereafter, they tied her hands, shut her mouth and committed robbery of a sum of Rs.2,400/- and stone studded necklace weighing five sovereigns, chain weighing two sovereigns, two bangles weighing two sovereigns, stone studded ear-ring weighing one sovereign, mattal weighing half sovereign, two finger ring weighing quarter sovereign, bracelet weighing two sovereigns, two finger ring weighing one sovereign, two finger ring weighing half sovereign, one finger ring weighing quarter sovereign, chain weighing half sovereign, three small finger rings, one doller, in her house. Hence, P.W.1 lodged Ex.P1 complaint. P.W.7 received the complaint and registered a case in Crime No.121 of 2001 under Section 392 of IPC under Ex.P6/ FIR.

5. Thereafter the Investigating Officer took up the case for investigation and went to the place of occurrence and prepared observation mahazer and rough sketch/ Ex.P7. However the said observation mahazer was not marked as exhibit. Thereafter, P.W.7 arrested accused 1 to 4 on 19.02.2001 and recorded their confession statements and recovered the theft articles from the accused and also seized the vehicle and weapons used for committing robbery under seizure mahazers/ Ex.P10 and Ex.P11 in the presence of one Gulasekaran and one Amirjan/ P.W.4. However, the said Gulasekaran was not examined as witness.

6. After completing investigation, the Investigating Officer laid final report as against the accused before the learned X Metropolitan Magistrate, Egmore, Chennai. The case was committed to the Court of Sessions by the learned X Metropolitan Magistrate, Egmore, Chennai and made over to the Trial Court. Based on the materials produced before

the Trial Court, the Trial Court framed charges as against the accused 2 and 3 for the offence under Sections 450, 392 r/w.397 of IPC and as against the accused 1 and 4 for the offence under Sections 450, 392, 397 r/w.34 r/w.109 of IPC.

7. When the Trial Court examined the accused under Section 313 of Cr.P.C., in respect of the incriminating evidences available against them, they denied their complicity in the crime and pleaded innocence. Hence, trial was proceeded against the accused.

8. On the side of the prosecution, 7 witnesses were examined as P.W.1 to P.W.7, 11 documents were marked as exhibits Ex.P.1 to

Ex.P.11 and material objects M.O.1 to M.O.20 were marked. The accused neither choose to examine any witness nor to mark any document.

9. It is relevant to here that after trial, the Trial Court acquitted the first accused and convicted accused 2 to 4. Challenging the conviction and sentence, the accused 2 and 3 also filed appeals in CrI.A.Nos.1365 of 2004 and 837 of 2006. However, they died during the pendency of the appeal and the appeals were dismissed as abated by this Court on 28.01.2019.

10. The Trial Court convicted the appellant/ fourth accused under Sections 392 r/w.34 and 109 of IPC and him to undergo 7 years rigorous imprisonment and to pay a fine of Rs.1,000/- in default to undergo three months simple imprisonment for the offence under Sections 392 r/w.34 and 109 of IPC. The sentences were ordered to run concurrently. The Trial Court acquitted the appellant/ fourth accused from the charge under 450 of IPC. Aggrieved by the said conviction and sentence, the appellant / fourth accused has filed this appeal before this Court.

11. The learned counsel appearing for the appellant/ fourth accused would submit that the prosecution mainly relied upon the evidence of P.W.1 and P.W.2. P.W1 is the eye witness to the occurrence and her evidence did not indicate the involvement of the appellant in the above said offence. P.W.2 merely says that the appellant/ A4 accompanied the other accused in the morning. He would further submit that except the evidence of P.W.2, no evidence is available to implicate the appellant as accused.

12. The learned counsel appearing for the appellant/ fourth accused would further submit that P.W.5 who is the

mahazer witness, in his evidence has deposed that he borrowed some jewels from the appellant/ A4 and the same were recovered by the law enforcing agency and the law enforcing agency has requested him to sign as mahazer witness, however, the law enforcing agency has not implicated P.W.5 as accused and has examined him only as prosecution witness, which is un-sustainable in law. He would further submit that the prosecution has miserably failed to prove the guilt on the appellant/ A4. Accordingly, he prayed for acquittal of the appellant/ A4.

13.Per contra, the learned Government Advocate (Crl. Side) would submit that P.W.1 in her evidence has clearly deposed that on 16.02.2001 at about 4.00 p.m. in the evening when P.W.1 was alone in the house and was giving Kanji for her child, the two unknown persons who came in the morning came again and enquired as to whether the rent and advance would be reduced. He would further submit that P.W.2 in her evidence has deposed that the accused 2 and 4 are the persons who came in the morning, on the date of occurrence. He would further submit that P.W.5 who is the mahazer witness, in his evidence has deposed that he borrowed some jewels from the appellant/ A4 and the same were recovered by the law enforcing agency. Hence, the Trial Court has rightly convicted the appellant/ A4. Accordingly, he prayed for dismissal of the appeal.

14.Heard the arguments of the legal aid counsel appearing for the appellant and the learned Government Advocate (Crl. Side) appearing for the respondent and perused the materials placed on record.

15.In the light of the above submissions, now it has to be analyzed whether the prosecution has proved the guilt on the appellant/ A4 beyond all reasonable doubt or not.

16.Perusal of records shows that P.W.1 in her evidence indicate that on 16.02.2001 at about 4.00 p.m. in the evening when P.W.1 was alone in the house and was giving Kanji for her child, the two unknown persons who came in the morning came again. In her evidence she has further identified A2 and A3 as the unknown persons. However, she did not identify the appellant/ A4 either during investigation or in Court. Admittedly, the law enforcing agency did not conduct any identification parade to identify the accused.

17.P.W.2 is the mother - in - law of P.W.1, P.W.3 is the father - in - law of P.W.1 and P.W.6 is the husband of P.W.1. Admittedly, P.W.2, P.W.3 and P.W.6 were not available at the time of occurrence. Though P.W.2 in her

evidence would indicate that the accused 2 and 4 are the persons who came in the morning, on the date of occurrence, there is no other evidence available to implicate the appellant/ A4 in the offence.

18. Even P.W.5 in his evidence would indicate that due to financial crises, he borrowed some jewels from the appellant/ A4. A4 gave some gold jewellery and asked him to mortgage the property in a

pawn broker shop. Accordingly he received the same and the same were recovered by the law enforcing agency in the presence of one Gulasekaran and one Amirjan/ P.W.4. However, the said Gulasekaran was not examined as witness and for the reasons best known to them, the law enforcing agency has not implicated P.W.5 as accused and has examined him only as prosecution witness. Mere evidence of P.W.5 is not sufficient to implicate the appellant/ A4 in the above said crime. It is relevant to note that the law enforcing agency did not recover any jewels from A4 and they recovered only from P.W.5, however, P.W.5 was only examined as witness.

19. It is useful to extract hereunder the relevant portion of the decision of the Hon'ble Apex Court reported in AIR 2007 SC 3234 (Dilawar Singh Vs. State of Delhi):

"22. The essential ingredients of Section 397 IPC are as follows:

1. Accused committed robbery.
2. While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.
3. "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable under that Section for acts of co-accused.

23. As noted by this court in Phool Kumar v. Delhi Administration (AIR 1975 SC 905), the term "offender" under Section 397 IPC is confined to

the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between 'uses' as used in Sections 397 IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with deadly weapon.

24. In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating terror in mind of victim is sufficient. It need not be further shown to have been actually used for cutting, stabbing or shooting, as the case may be. (See: Ashfaq v. State (Govt. of NCT of Delhi) AIR 2004 SC 1253).

25. Therefore, the offence under Section 397 IPC has clearly not been established. In addition, the ingredients necessary for offence punishable under Sections 392 and 452 have not been established in view of the highly inconsistent version of the complainant PW 1."

20. Further, in the present case identification parade was also not conducted and the prosecution also failed to establish as to which accused possessed the deadly weapon.

Hence, the prosecution has not established the guilt on the appellant/ A4 beyond reasonable doubt and the conviction and sentence imposed on the appellant/ A4 by the Trial Court are liable to be set aside.

21. In the result, the criminal appeal is allowed. The conviction and sentence as against the appellant/ fourth accused in the judgment dated 20.10.2004 made in S.C.No.77 of 2002 by the learned Additional Sessions Judge, Fast Track Court No.2, Chennai, are set aside. The appellant/ fourth accused is acquitted of all the charges. The fine amount, if any, paid by him is ordered to be refunded to him. The bail bonds and sureties, if any, executed by him, shall stand terminated/ discharged.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Additional Sessions Judge, Fast Track Court No.2,
Chennai.
 - 2.The Inspector of Police,
P.6 Kodungaiyur Police Station,
Chennai.
(Crime No.121 of 2001)
 - 3.The X Metropolitan magistrate,
Egmore, Chennai.
 4. The Chief Metropolitan Magistrate,
Egmore, Chennai.
 - 5.The Principal Sessions Judge,
Chennai.
 - 6.The Superintendent ,Central Prison, Vellore.
 7. The section officer,
Criminal Section,
High court Madras
 - 8.The District Collector/District Magistrate, Chennai.
 9. The Director of Genreal Police,
Mylapore Chennai. 4.
 10. The Public Prosecutor, High Court ,Madras.
- +1cc to Mr.S.Pushpakaran , Advocate SR.No. 7791

Cr1.A.No.6 of 2005

A.SK(26/02/2019)