

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reservation	02.07.2019
Date of Judgment	22.08.2019

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THE HONOURABLE MRS. JUSTICE **T.KRISHNAVALLI**

Crl.A.(MD)Nos.408 of 2008 and 90 of 2009

Crl.A(MD)No.408 of 2008:-

S.Kannappan : Appellant/8th Accused

Vs.

The State by the Inspector of Police,
Palani Taluk Police Station,
Dindigul District.

: Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code against the judgment made in S.C.No.127 of 2003, dated 24.07.2008 on the file of the Assistant Sessions Judge, Palani.

Crl.A(MD)No.90 of 2009:-

Jeeva @ Sivansamy : Appellant/2nd Accused

Vs.

The State by the Inspector of Police,
Palani Taluk Police Station,
Dindigul District.

: Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code against the judgment made in S.C.No.127 of 2003, dated 24.07.2008 on the file of the Assistant Sessions Judge, Palani.

For Appellant
in Crl.A(MD)No.408 of 2008 : Mr.D.Venkatesh

For Appellant in
Crl.A(MD) No.90 of 2009 : Mr.D.Vijayaraghavan
(Legal Aid counsel)



For Respondent
(in both appeals)

: Mr.A.Robinson,
Government Advocate
(Criminal Side)

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COMMON JUDGMENT

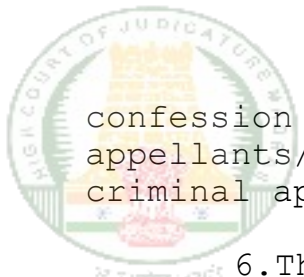
These Criminal Appeals have directed against the judgment passed in S.C.No.127 of 2003, dated 24.07.2008 by the Assistant Sessions Judge, Palani.

2.According to the prosecution, on 09.05.1998 at about 2.30 am, all the accused with an intention to commit robbery, entered into the house of the complainant and robbed articles and cash worth about Rs.900/-. The Inspector of Police attached to Palani Taluk Police Station, Dindigul District has filed a final report against the accused by examining the witnesses.

3.In the trial court, 10 witnesses were examined and 11 Exhibits and 6 material objects were marked. When the accused were questioned about the incriminating circumstances, they denied the same. On the side of the accused, no witness was examined and no document was produced. The trial court convicted the A1 to A6 and A8 for the offence under Section 395 r/w 397 IPC and sentenced them to undergo 7 years RI and to pay a fine of Rs.1,000/- in default to undergo 6months RI. The trial court ordered to run sentences concurrently with the sentence imposed in S.C.Nos.128 of 2003 and 129 of 2003. Aggrieved by the judgment passed by the trial court, the appellants/A2 and A8 are before this court.

4.Heard the learned counsel appearing for the parties in both criminal appeals and perused the entire materials available on record.

5.The learned counsel for the appellants/A2 and 8 submitted that the complaint (Ex.P5) lodged before the respondent police by the prosecution witness is a doubtful one and the delay in lodging the complaint before the respondent police has not properly explained by the prosecution and in this case, PW1 who was taken treatment before the Doctor (PW7) on 08.05.1998 at 3.00 pm and Wound Certificate marked as Ex.P4 and as per Ex.P4, six unknown persons entered into the house, but the prosecution charge sheeted against eight persons and in this case, identification parade was conducted on 29.05.1998 by PW9 (Judicial Magistrate) and A1 and A2 alone identified by the witnesses and according to the case of the prosecution, the occurrence said to have been taken place at 2.30 am and there is no light at the time of occurrence and hence, the prosecution witnesses could not have seen the accused and in this case, arrest and recovery could not be believable one and all the accused persons are falsely implicated only on the basis of the

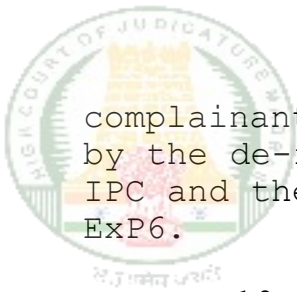


confession statement. In view of the above circumstances, the appellants/A2 and A8 are entitled to acquittal and prays that the criminal appeals have to be allowed.

6.The learned Government Advocate (Criminal side) appearing for the respondent/State submitted that the trial court after perusing the entire materials available on record, has passed order, which does not require any interference by this court and prays for dismissal of the criminal appeals.

7.The main contention raised on the side of the appellant/A8 in Crl.A(MD)No.408 of 2008 is that Ex.P5 complaint was given only as against six persons, hence, this clearly reveals that the appellant/A8 was no-way connected with the offence as alleged by the prosecution and except the confessional statement of the co-accused, no materials available on record to prove the presence of the appellant/A8 in the occurrence place and as per the dictum laid down by the Hon'ble Apex Court and the High Courts the confession statement of the co-accused could not make a base to sustain a conviction unless failed it was supported by other materials and as per the case of the prosecution, the accused were unknown persons and therefore, identification parade is vital to prove the prosecution case, but the prosecution did not accomplish any identification parade as far as this appellant/A8 is concerned which will severely affect the case of the prosecution and there is no recovery from the appellant/A8 and the prosecution did not come forward to give any acceptable reason for the same and hence, the prosecution has not prove beyond all reasonable doubt and prays that the appellant/A8 is entitled to acquittal.

8.The main contention raised on the side of the appellant/A2 in Crl.A.No.90 of 2009 is that Ex.P1 complaint, which was lodged before the respondent police by the prosecution witnesses is a doubtful one and as per the case of the prosecution, the accused person were covered face by mask, so the prosecution witnesses could not have identified any one of the accused and on the side of the prosecution, identification parade for three cases was conducted at a time, so the identification parade should be rightly rejected and in the identification parade, which was conducted on 29.05.1998 by PW7, A1 and A2 alone were identified by the witnesses and according to the case of the prosecution, the occurrence was said to have been taken place at 2.30 am and there is no light at the time of occurrence, so the prosecution witnesses should not have seen the accused and the arrest and recovery could not be believable one and all the accused person are falsely implicated based on the confession of the co-accused, hence, the conviction and sentence imposed on the appellant/A2 is not sustainable in law and therefore, judgment of the trial court is to be set aside and prays that the appellant/A2 is entitled to acquittal.



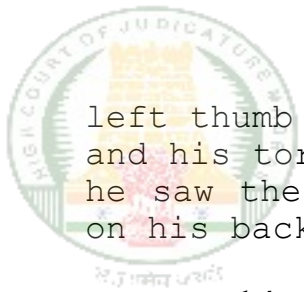
complainant gave complaint and on the basis of the complaint given by the de-facto complainant, the case was registered under section 395 IPC and the complaint was marked as Ex.P5 and the FIR was marked as ExP6.

10.On perusal Ex.P5, it is stated that the de-facto complainant, when he was sleeping in his garden house on 08.05.1998 at 2.30 am, six unknown persons came and one person with knife and other persons tied his hands with rope on his back side, at that time he sustained injuries in his left thumb finger by way of knife and two other persons assaulted him on his back side with wooden log and then they asked him where he kept the money and for that, he replied that he kept the money below the bed and then the accused took the money and also took torch light and remote control and calling bell, which were nearer to the pillow and at 5.00 am, when his neighbour Nataraj came, he informed the occurrence to him and the above Natarajan informed the above matter to his son Jagadeesh, he came and remove the rope, which was tied and in the next day morning, he went to the police station and gave the complaint.

11.PW1 is the neighbour of the Garden of the de-facto complainant. PW1 deposed that he proceeded his Garden during the year 1998 at 5.00 pm, when he attempted to cross the Garden of the de-facto complainant, he found PW1's hands were tied with rope on his back side and then he went and enquired the de-facto complainant, for that de-facto complainant replied that prior to two hours, five to six persons came to his Garden house and assaulted him and tied his hands with rope and took Rs.500/- and remote control, calculator and some articles from him and asked him to inform the matter to his son. From the evidence of PW1, it reveals that when he saw the de-facto complainant and the hands of the de-facto complainant were tied with rope on his back side.

12.PW2 is the son of the deceased/defacto complainant. PW2 deposed that on 08.05.1998, his father stayed in their Garden house and he heard from his neighbour of their Garden that some persons entered into their Garden house and assaulted his father and took away some materials objects and assaulted his father and when he went to the Garden house, he saw that his father with injury on his left hand thumb finger and then he took his father to the Hospital and the police recorded the statement from his father. From the evidence of PW2 it reveals that he went to see his father, he found some injuries on his thumb finger.

13.PW3 is the neighbour of Garden of the de-facto complainant. PW3 deposed that prior to nine years at 5.00 am, when he proceeded to take tea and while he was crossing the Garden of de-facto complainant, he found that the de-facto complainant hands were tied on his back side and when he enquired the de-facto complainant, he stated that six unknown persons came to his Garden house and assaulted him with wooden log and caused injury on the



left thumb finger and took Rs.500/-, remote control and calling bell and his torch light. From the evidence of PW3, it reveals that when he saw the de-facto complainant his hands were tied with rope with on his back side.

14.The Doctor, who gave treatment to the de-facto complainant was examined as PW7. PW7 deposed that on 08.05.1998 at 03.00 pm, when he was on duty, the de-facto complainant was brought by his son and the defacto complainant told him that on 07.05.2008 he was assaulted by six unknown persons in his Garden house and he found the following injuries:-

- "1)Abrasion over the left thumb ½ cm;*
- 2)A contusion over the back of the chest linear on 10 cm size; and*
- 3)Multiple abrasion over the front of the chest."*

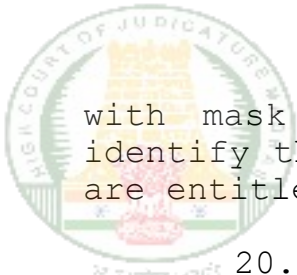
15.The de-facto complainant in his complaint stated that six unknown persons came and one person had knife in his hand and other persons awoke him and tied his both hands with rope on his back side, at that time the knife caused injury on his left thumb finger and two other persons assaulted him with wooden log on his back side. PW7 found injuries on the left thumb and back of the linear and front of the chest. Hence, the contents in respect of the injuries found in Ex.P5 is corroborated with the medical evidence of PW7.

16.PW4 is the mahazar witness. PW4 stated during his evidence stated that the police came to the place of occurrence and prepared the mahazer and rough sketch and recovered pieces of torn Kavi Dhoti, wooden logs by way of Athachi.

17.PW6 is the arrest and recovery witness. Pw6 deposed that in front of Dharapuram Taluk Office, the Inspector of Police attached to Palani Taluk, Kumaralingam and Madathukulam arrested the accused Palanisamy and the accused Palanisamy gave confession and the Inspector of Police recorded it.

18.In this case, Mr.Rengasamy, the Inspector of Police was examined as PW8. PW8 deposed that on 19.05.1998 at 10.30 am, he arrested the accused Palanisamy in front of Dharapuram Taluk Officer, at that time, accused Palanisamy gave confession and on the basis of confession, one remote control relating to the case in Crime No.292 of 1998 on the file of the Palani Taluk Police Station, calling bell, remote control and wrist watches in connection with Crime No.92 of 1998 on the file of the Palani Taluk Police Station were recovered by way of Athachi.

19.The learned counsel for the appellants/A2 and A8 argued that as per the prosecution case, all the accused covered their face



with mask and hence, it is not possible for the witnesses to identify the accused and hence, prays that the appellants/A2 and A8 are entitled to acquittal.

20.The learned Chief Judicial Magistrate, who conducted the identification parade was examined as PW9. PW9 deposed that on 29.05.1998, he conducted the identification parade and in the identification parade, the witnesses identified A1 and A2 only.

21.On perusal Ex.P5 complaint, the de-facto complainant categorically stated the description of all the accused as follows:-

"நான் அந்த ஆறு ஏதிரிகளை பார்த்தால் அடையாளம் காட்ட முடியும் "

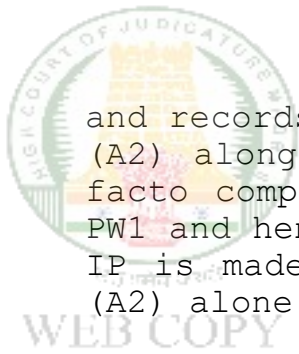
22.In this case, on perusal of Ex.P5, the de-facto complainant categorically stated that it is possible for him to identify the accused, when he saw the accused. Hence, the argument put forth on the appellants/accused stating that it is not possible for the de-facto complainant and other witnesses to identify the accused is not at all acceptable.

23.In this case, the learned counsel for the appellant in Crl.A(MD)No.408 of 2008 A8 argued that PW1 in his complaint stated that only six unknown persons assaulted him, but A8 was falsely implicated in this case and A8 was not arrested and no confession was recorded from him and no material object was recovered from him, hence prays that A8 is entitled to acquittal.

24.In this case, on perusal of Ex.P5 complaint, it is stated that six unknown persons with weapon trespassed in to the house of the de-facto complainant/PW1. In this case, A8 was not arrested and no confession was recorded and no material object were recorded from A8 and no explanation was given on the prosecution side, why A8 was not arrested in this case. It is seen that PW8 was implicated on the basis of confession given by the co-accused. On the basis of the confession of the co-accused, one cannot be implicated.

25.Considering above circumstances, it is held that the offence against appellant in Crl.A(MD)No.408 of 2008/A8 was not proved. Hence, it is held that no offence under Section 395 r/w 397 IPC as against A8 is not made out and hence, he is entitled to acquittal.

26.In respect of the appellant in Crl.A(MD)No.90 of 2009/A2, the de-facto complainant categorically stated in his complaint that A2 along with all other accused, trespassed in his house and assaulted him and took some jewels and money from his bureau and it was supported by the evidence of PW6, who was present at the time of arrest and recovery of the material objects, which were taken by the accused at the time of occurrence Further, before PW9, the learned Chief Judicial Magistrate. Hence, considering the above evidence



and records, it reveals that the appellant in Crl.A(MD)No.90 of 2009 (A2) along with other accused trespassed into the house of the de-facto complainant and assaulted him and took jewels and money from PW1 and hence, it is held that the offence under Section 395 r/w 397 IP is made out as against the appellant in Crl.A(MD)No.90 of 2009 (A2) alone.

27.On careful perusal of evidence of witnesses and documents produced, it is held that the prosecution has proved the case as against the appellant in Crl.A(MD)No.90 of 2009 (A2) and the appellant in Crl.A(MD)No.408 of 2008 (A8) is not found guilty under section 395 r/w 397IPC. Hence, the judgment passed by the trial court is set aside as against the appellant in Crl.A(MD)No.408 of 2009 (A8).

28.In the result, Crl.A(MD)No.**408 of 2008 is allowed**. The impugned judgment of conviction and sentence are set aside. The appellant/A8 is acquitted of the charge(s) levelled against him. The bail bond if any executed by him shall stand cancelled and the fine amount if any paid by him shall be refunded to him. The appellant/A8 may be set at liberty forthwith, unless his detention is required in connection with any other case. Crl.A(MD)No.90 of 2009 filed by the appellant/A2 is **dismissed**.

Sd/-

Assistant Registrar (Records)

// True Copy //

Sub Assistant Registrar(CS)

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To,

1.The Assistant Sessions Judge,
Palani.

2.The Principal District Judge, Dindigul.

3.The Judicial Magistrate, Palani.

4.The Chief Judicial Magistrate, Dindigul.

5.The Superintendent, Central Prison, Madurai.

6.The Inspector of Police, Palani Taluk Police Station,
Dindigul District.



7.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.D. Vijayaragavan, Advocate, SR-83120

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Crl.A. (MD) Nos.408 of 2008 and 90 of 2009
22.08.2019

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