

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.08.2020

PRONOUNCED ON : 17.08.2020

CORAM:

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CRL.O.P.Nos.21266 & 21267 of 2014
M.P.Nos.1 & 1 of 2014

1.S.Vairakannu

2.S.V.Arul ... Petitioners/A3 and A4 in both Crl.O.Ps

Vs.

The Inspector of Police,
Uthukuli Police Station,
Uthukuli, Tiruppur District,
Crime No.1818/2010

and 1025/2011 ...R1 in Crl.O.P.No.21267 of 2014
and 21266 of 2014

P.Ravi ... R2 in Crl.O.P.No.21267 of 2014
(R2 is impleaded suo-Motu as per order
in Crl.O.P.No.21266 & 21267/2014 dated 02.03.2020)

T.C.Ramasamy ... R2 in Crl.O.P.No.21266 of 2014

(R2 is impleaded Suo Motu as per order
in Crl.OP.No. 21266 & 21267/2014 dated 02.03.2020)

Common Prayer : Criminal Original Petition filed under Section
482 of Cr.P.C., to call for the records pertaining to C.C.No.22
& 23 of 2014 on the file of the Judicial Magistrate Court,
Avinashi, Tiruppur District and quash the proceedings by
allowing this quash petition.

For Petitioners : Mr.S.Ashok Kumar,
in both Petitions Senior Counsel for Mr.P.Kannan Kumar

For Respondent : Mr.C.Iyyappa Raj
in both Petitions Additional Public Prosecutor
Mr. A.Ashwin Kumar for R2

C O M M O N O R D E R

The petitioners, who are accused A3 and A4 in C.C.No.22 of 2014 and C.C.No.23 of 2014 facing trial for offence under Section 454, 389 IPC, have filed these quash petitions.

2. The case of the prosecution is that on 08.10.2010, the defacto complainant had lodged a complaint to the first respondent police that his house was kept under lock, at that time, A1/Appas and A2/Lakshmanan had broken the lock and entered the house, robbed the jewels and valuables. They were habitually indulging in similar nature of offence regularly. When 2nd respondent entered into the house, the lock of the bureau was broken and all the jewels and cash in it were stolen by the accused. Hence, he lodged a complaint to the 1st respondent. Likewise, for occurrence on 09/08/2011, a complaint was received and registered a case. After investigation, the respondent police filed charge sheet in Crime Nos.22 & 23 of 2014 for offence under Section 454, 380 & 414 IPC. During investigation by Tiruppur Town Police, the accused A1 and A2 were arrested on 24.12.2011 in presence of Kanniappan and Selvaraj. The confession statements of the accused have shown the commission of similar nature of offence in and around Tiruppur. The accused/A1 & A2 hail from Ulunthurpet. Further, it is admitted that the accused knew the petitioners herein/A3 and A4, who were having jewellery shop and they used to dispose the stolen jewels through the petitioners. Further, they were taken to the house of A2, where some stolen jewels were recovered. Thereafter, on 24.02.2012, Uttukuli Police took A1 & A2 to Police custody, examined in the presence of Kandasamy and Rajendran. At that time, A1 & A2 gave confession statements about their involvement in robbery cases and disposed stolen jewels through the petitioners, who are the owners of S.V.Jewellery. The petitioners are engaged in Jewellery business at Panruti, Cuddalore District in the name of S.V.Jewellery. The petitioners are the persons through whom they disposed the gold jewels, a case was registered against the petitioners. When the petitioners were enquired, they denied about receiving any stolen jewels from A1 and A2 and no recovery was made from the petitioners. Hence, the respondent police registered a case against the petitioners under Section 414 of IPC.

3. The learned Senior Counsel appearing for the petitioners submitted that the accused were arrested by Thiruppur Police on 24.12.2011. When the police was on patrol duty, A1 and A2 came in motor cycle. At that time, the police intercepted and questioned them, the accused/A1 and A2 gave contradictory replies. On suspicion, the police interrogated them. A1 and A2 confessed about their involvement in cases of robbery at various places. Both A1 and A2 belong to

Ulunthurpettai and they came to Tiruppur for starting a bakery during the day time, the bakery was taken care by their wives. He further submitted that A1 and A2 were habitually indulging in such kind of offences. Although the accused claimed that the stolen jewels were disposed through the petitioners/S.V.Jewellery, there is no material except confession statements. It is also seen that Rajendran and Kandasamy are attesting witnesses. Both the petitioners denied about receiving jewels from A1 and A2. Apart from the confession statements, no other material is available. Further, the confession statements, admittedly, are given before the Police officials, which is hit under Section 25 of the Indian Evidence Act. With regard to second confession dated 24.02.2012, the confession statements were given by Apas and Lakshmanan during police custody. As per Section 26 of the Indian Evidence Act, any confession in police custody unless it is made in the immediate presence of Magistrate cannot be relied upon. In this case, no statement was recorded in the presence of Magistrate. As per Section 27 of the Indian Evidence Act, no recovery was made from the petitioners. Hence, the confession statements of the accused/A1 and A2 are of no use and based on which, the petitioner cannot be arrayed as accused.

4.The learned Senior Counsel further submits that during the said period, large number of theft cases were pending in Tiruppur District and for showing recovery, the police from Tiruppur District falsely implicated the petitioners. Further, there is no iota of materials to connect the petitioners in any manner and there is no recovery in this case. Hence, he prayed for quashing of the petitions.

5. Private notice received by the second respondent on 09.03.2020, despite the same, there was no representation on behalf of the respondent. Affidavit of Service filed. The names of the respondent printed in the cause list. Since the petition is kept pending for the past six years without any progress, this Court appointed A.Ashwin Kumar as Legal Aid Counsel by order dated 13.07.2020.

6. The learned Additional Public Prosecutor submits that in this case the accused (A1 and A2) belong to Villupuram District, now Kallakurichi District. The petitioners/A3 and A4 also belong to nearby places, the offences had taken place in Tiruppur District. The respondent police investigated the case from Tiruppur District, they have no axe to grind against the petitioners/A3 and A4, claiming to be falsely implicated. Further, the confession under Section 27 Cr.P.C is not only discovery of materials, it is also discovery of fact. In this case, the act of the petitioners/A3 and A4, who received the stolen properties from A1 and A2, was disclosed by A1 and A2 in

their confession. Since there was a long gap between the date of occurrence, the date of arrest and confession, the petitioners had disposed the jewels. Hence, there could be no recovery from them. Further, the petitioners had knowingly received the stolen jewels, they have not mentioned in any records about receipt of jewellery. The fact of disposing of jewels by the petitioners/A3 and A4 is supported by statements of witnesses, which has to be questioned during the trial not in the quash petition.

7. The learned counsel for the 2nd respondent/defacto complainant submits that the offence took place during the year 2010-2011, A1 and A2 were arrested, who confessed about their involvement in the offence. Initially, Tirpur Police investigated the case and arrested A1 & A2 on 24/12/2011, who confessed about the involvement of the petitioners. Further, during investigation, the Uluthurpet Police enquired about the robberies, A1 & A2 stated about how the stolen articles were disposed and the involvement of petitioners. A1 and A2 identified the petitioners and S.V.Jewellery at Panruti. Thereafter, the petitioners were questioned, they denied their involvement in the offence. He further submits that it is not a case of receipt of stolen properties, it is a case of disposal and concealment of stolen properties by the main accused A1 and A2.

8. This Court considered the rival submissions, perused the materials available on records.

9. It is seen that A1 and A2 were arrested by Tirupur Police on 24.12.2011. At that time, they gave confession statements in presence of Kanniappan and Selvaraj and admitted they habitually involved in offences regularly. In the confession, they admitted that the stolen jewels were disposed through S.V.Jewellery/petitioners. Thereafter, the accused/A1 and A2 were taken in police custody, on 24.02.2012, by the Inspector of Ulthurpettai and recorded their statements in presence of Kandasamy and Rajendran. It is admitted that there is no recovery from the petitioners herein/A3 and A4. Only on the confession of A1 and A2, the prosecution proceeded against petitioners. The confession given to the police officer is hit under Section 25 of Indian Evidence Act. As per Section 26 of Indian Evidence Act, no confession made by any person while he is in the custody of police officer, unless it be made in the presence of a Magistrate, to be considered.

9. Based on the confessions of A1 and A2, no recovery was made from the petitioners and a case cannot be proceeded against them. The confession statements of the co-accused is a weak piece of evidence. Section 30 of Indian Evidence Act has to be looked into, since it is a confession of co-accused. If it is to be proved in the absence of any other material, no conviction

could be held against the petitioners. The validity and purport of the confession of co-accused is explained in the case of PAKALA NARAYANA SWAMI Versus EMPEROR reported in (1939) PC 47. Even today, it was followed in the case of KASHMIRA SINGH Vs. STATE OF MADHYA PRADESH reported in 1952 SCR 526, the relevant paragraph Nos.8 to 11 are extracted hereunder:

8. Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in *Bhuboni Sahu v. King* [76 IA 147 at 155] .

"It does not indeed come within the definition of 'evidence' contained in Section 3 of the Evidence Act., It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination."

Their Lordships also point out that it is "obviously evidence of a very weak type ... It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities."

They stated in addition that such a confession cannot be made the foundation of a conviction and can only be used in "support of other evidence". In view of these remarks it would be pointless to cover the same ground, but we feel it is necessary to expound this further as misapprehension still exists. The question is, in what way can it be used in support of other evidence? Can it be used to fill in missing gaps? Can it be used to corroborate an accomplice or, as in the present case, a witness who, though not an accomplice, is placed in the same category regarding credibility because the Judge refuses to believe him except insofar as he is corroborated?

9. In our opinion, the matter was put succinctly by Sir Lawrence Jenkins in *Emperor v. Lalit Mohan Chuckerbutty* [ILR 38 Cal 559 at 588] where he said that such a confession can only be used to "lend assurance to other evidence against a co-accused" or, to put it in another way, as Reilly J. did in *In re Periyaswami Moopan* [ILR 54 Mad 75 at 77]

"the provision goes no further than this--where there is evidence against the co-accused sufficient, if believed, to support his

conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence".

10. 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 aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if 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.

11. Then, as regards its use in the corroboration of accomplices and approvers. A co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the "evidence" is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice provided the Judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it. Two of us had occasion to examine this recently in *Rameshwar v. State of Rajasthan* [Criminal Appeal No. 2 of 1951]. It follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed. As the Privy Council observe in *Bhuboni Sahu v. King* [76 IA 147 at 157] :

"The tendency to include the innocent with the guilty is peculiarly prevalent in India, as judges have noted on innumerable occasions, and it is very difficult for the court to guard against the danger ... The only real safeguard against the risk of

condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused."

10. This proposition is followed in Crl.A.No.714 of 2019 in the case of DIPAKBHAI JAGDISHCHANDRA PATEL vs. STATE OF GUJARAT AND ANOTHER. Thus, the Hon'ble Apex Court held that the confession of the co-accused is a weak piece of evidence. With that alone, the case cannot be proceeded. In this case, admittedly, apart from the confession of the co-accused, there is no recovery or material leading to any inference about the involvement of the petitioners/A3 & A4 .

11. In view of the same, this Court finds that the confession statements against the petitioners being weak piece of evidence, the continuation of the trial against the petitioners cannot be sustained. Hence, the proceedings against A3 and A4 alone are quashed. Accordingly, these Criminal Original Petitions are allowed.

12. This Court places its appreciation to Mr.A.Ashwin Kumar, Legal Aid Counsel, for making strenuous efforts in defending the case for the respondent.

Sd/-

Assistant Registrar (CS-IV)

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Sub Assistant Registrar

Ssb

To

1. The Judicial Magistrate,
Avinashi, Tiruppur District.

2. The Inspector of Police,
Uthukuli Police Station,
Uthukuli, Tiruppur District.

3. The Secretary,
Legal Service Authority,
High Court, Madras.

4. The Public Prosecutor,
High Court, Madras.

CRL.O.P.Nos.21266 & 21267 of 2014

PA(CO)
GN(28/10/2020)