

IN THE HIGH COURT OF JUDICIATURE AT MADRAS

Reserved on : 18.02.2020

Pronounced on : 10.03.2020

CORAM :

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

CrI.A.No.589 of 2018
and
CrI.M.P.No.13062 of 2018

Ganesan ...Appellant/Accused

VS.

State by Inspector of Police,
Tiruppur South Police Station,
Tiruppur District. ...Respondent/Complainant

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the conviction and sentence passed by the learned Additional District and Sessions Judge (Fast Track Court No.5), Coimbatore at Tiruppur, Tiruppur District in S.C.No.36 of 2007 dated 28.05.2007.

For Appellant : Mr.V.Murugesan
for Mr.S.Parameswaran

For Respondent : Mrs.M.Prabhavathi
Additional Public Prosecutor

JUDGMENT

(Judgment of this Court was made by R.PONGIAPPAN, J.)

The appellant in this appeal is the sole accused in S.C.No.36 of 2007 on the file of the learned Additional District and Sessions Judge (Fast Track Court No.5), Coimbatore at Tiruppur, Tiruppur District. He stood charged for the offences under Sections 451, 392, 394, 392 r/w 397 IPC. The trial Court by judgment dated 28.05.2007 convicted the accused and sentenced

as detailed below:-

Sl.No.	Offence	Period of Punishment
1	451 IPC	Sentenced to undergo Rigorous Imprisonment for 7 years.
2	392 r/w 397 IPC	Sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs.5000/-, in default to undergo Rigorous Imprisonment for 2 1/2 years.
3	394 IPC	Sentenced to undergo Life Imprisonment.

The trial Court ordered the sentences to run concurrently. Challenging the conviction and sentence, the accused is before this Court with the present Criminal Appeal.

The case of the prosecution in brief, is as follows:-

2. P.W.1/Natarajan is the resident of Amarjothi Sathyamoorthy Nagar, Tiruppur. P.W.2/Ramya is the daughter of P.W.4/Ramasamy. On 22.11.2006, at about 3.00p.m., while she was watching T.V. in her house, a known person came and after making threat asked the details of gold jewels. Since she was refused to say anything, the said person by using the knife (M.O.1), attacked on her abdomen and thereafter, he stolen away the gold jewels, which were kept in wardrobe.

3. On the same day, at about 3.30p.m., P.W.4 called P.W.1 over phone and invited to his house by saying that her daughter/Ramya was found in the pool of blood with injuries in her abdomen. Immediately, P.W.1 along with his wife/Sivagami went to P.W.4's house. After reaching the house of P.W.4, they found P.W.2/Ramya with multiple injuries on her abdomen. Immediately, P.W.1 made arrangements to admit the said Ramya in D.S.K.Hospital, Tiruppur. Thereafter, as per the advise given by the Doctor, who was working in the D.S.K.Hospital, the said Ramya referred to the Coimbatore Medical College Hospital for further treatment. After sending the said Ramya to Coimbatore, P.W.1 went to the Police Station and lodged a complaint (Ex.P.1) before P.W.14 through Shyamalan.

4. On receipt of the complaint, P.W.14/Sub Inspector of Police attached to the respondent police registered a case in Crime No.1526 of 2006 under Section 307 IPC and prepared a First Information Report Ex.P.9. After preparation of the First Information Report, he sent the same to the learned Judicial Magistrate, Tiruppur and copies of the same were sent to the

higher officials.

5. P.W.15/R.Krishnasamy, the then Inspector of Police, Tiruppur South Police Station, on 22.11.2006, at about 18.45 hours, received the First Information Report and took the same for investigation. On receipt of the First Information Report, he proceeded to the scene of occurrence and prepared an Observation Mahazar (Ex.P.8) and drawn Rough Sketch (Ex.P.10). He examined the witnesses, who are all present in the place of occurrence and recorded their respective statements and on the same day, at about 11.00p.m., in the presence of P.W.6/Geetha and one Sivagami, he recovered blood stained chudidhar pant (M.O.43) and one Chudidhar shirt (M.O.44) under the cover of mahazar (Ex.P3). Thereafter, he forwarded the same to the Magistrate with a request to send the same for chemical examination.

6. On 30.11.2006, P.W.17/Ramesh, the then Inspector of Police, Tiruppur South Police Station, took up the case for investigation. On 01.12.2006, he rushed to the Coimbatore K.M.C.H. Hospital and recorded the statements from the victim girl/Ramya and her parents. The statements given by P.W.2 reveals the fact that during the time of occurrence, the gold jewels weighing about 45 sovereigns, cell phone and one wrist watch were stolen away after causing injury to her. Thereafter, the section of law was altered as Sections 450, 394 and 397 IPC (Ex.P13).

7. On 12.12.2006, while at the time P.W.8/Sundaramoorthy, Village Administrative Officer and his Assistant, were in Muttam Big Street, P.W.17, the investigation officer in this case, arrested the accused. On such arrest, the accused herein has voluntarily given confession and based on the said disclosure statement, P.W.17 recovered M.O.3 to M.O.42 under the cover of mahazar (Ex.P5). The disclosure statement given by the accused is Ex.P4. On the same day, at about 18.30 hours, the accused brought the police to one Manickam Bankers, which was situated in Kattumannarkoil and identified to one Muthukumarasamy by saying that M.O.42 (gold bangles-five in number) were pledged with him. Thereafter, the said M.O.42 has also been recovered under the cover of mahazar (Ex.P6).

8. On 13.12.2006, at about 4.00a.m., the accused identified the knife and belt (M.O.1 and M.O.2), which were hidden in the thorny bush, situated on the northern side of the occurrence house. Immediately, the same have also been recovered by P.W.17 in the presence of P.W.9/Ramesh. Thereafter, the Investigating Officer had forwarded the recovered articles to the learned Magistrate, Tiruppur through Form-95 under Ex.P.14.

9. In the meantime, P.W.3/Dr.Visagan, on 22.11.2006, at about 3.40p.m., treated P.W.2/Ramya and thereafter, referred her to Coimbatore Medical College Hospital for further treatment. In this regard, he issued a Certificate under Ex.P2. In K.M.C.H. Hospital, on the same day, at about 6.30p.m., P.W.16/Dr.K.Keshavamurthy treated P.W.2 and found the following injuries:-

"1.Irregular sutured wound over the upper abdomen just to the (L) of the midline - 5cm. CT + Massive haemoperitoneum with bleeding into retroperitoneum associated with pneumoperitoneum. Ot Laprotomy - 4 litres of blood in the peritoneal cavity multiple small perforations of proximal jejunum (15 in no). Perforation of the stomach & transverse colon. Mesentric tear c bleeding.

2.Abrasive wound around upper part of the neck. (strangulation mark) Sub conjunctival haemorrhage both eyes."

According to him, the injury sustained by P.W.2 is grievous in nature. In this regard, he issued a Wound Certificate under Ex.P12.

10. In continuation of the investigation, P.W.17 received the Certificate from the Doctor and recorded the statements and after completion of investigation, he laid a charge sheet as against the accused.

11. Based on the above materials available, the trial Court framed the charges under Sections 451, 392, 394, 392 r/w 397 of IPC against the accused. He denied the same as false and opted for trial. In order to prove the case of prosecution, as many as 17 witnesses were examined on the side of prosecution, as P.W.1 to P.W.17 and 14 documents were marked as Ex.P1 to Ex.P14, besides 45 Material Objects.

12. Out of the said witnesses, P.W.1/Natarajan is the friend to the father of victim/P.W.2. He has spoken about the information received from P.W.4 and after seeing the occurrence place, he has lodged the complaint before the Police.

13. P.W.2/Ramya is the victim in this case. According to her, at the time of occurrence, the present accused trespassed into her house and after causing grievous hurt, he stolen away the gold jewels, which were kept in a wardrobe.

14. P.W.3/Visagan is a Doctor, initially treated P.W.2 and

thereafter, referred her to Coimbatore Medical College Hospital for further treatment.

15. P.W.4/Ramasamy is the father of P.W.2, he has stated about details of information given to P.W.1 and about the treatment given to P.W.2 in D.S.K. Hospital and K.M.C.H. Hospital. He has also identified the stolen properties before the Investigating Officer.

16. P.W.5/Rajeswari is the mother of P.W.2. She has also stated about the occurrence and about the treatment given to P.W.2 in the Hospitals.

17. P.W.6/Geetha is the relative of P.W.2. On the day of occurrence, after hearing the news, she went to the scene of occurrence and made arrangements for admitting P.W.2 in the Hospital. She has also signed as a witness for the recovery of M.O.43 and M.O.44 by the Investigating Officer.

18. P.W.7/Muthukumarasamy is the receiver. According to him, on 30.11.2006, the accused herein pledged 2 gold bangles and received Rs.15,500/-. Further, on 01.12.2006, the accused received Rs.7,500/- after pledging 1 gold bangle. Similarly, on 02.12.2006, the accused received Rs.11,500/- after pledging 2 gold bangles. For the pledge made by the accused, P.W.7 issued Certificates.

19. P.W.8/Sundaramurthy is the Village Administrative Officer. He has spoken about the recovery of stolen properties made by the Investigating Officer.

20. P.W.9/Ramesh is also a witness to the recovery. He has attested in the Mahazar, which were prepared during the time of recovery of M.O.1 and M.O.2.

21. P.W.10/Palraj and P.W.11/Selvaraj are the neighbours residing near to the house of P.W.2. On the date of occurrence, both of them had seen the accused near to the house of P.W.2.

22. P.W.12/Rajesh is the Head Constable administering Sniffer Dog. P.W.13/Chandramohan is the witness attested in the Observation Mahazar. P.W.14/Shyamalan, is the Sub Inspector of Police. He has spoken about receipt of complaint from PW1 and about the registration of case.

23. P.W.15/Krishnasamy, is the Inspector of Police attached to the respondent Police Station, conducted a portion of investigation and recorded the statements.

24. P.W.16/Kesavamurthy is the Doctor, who gave treatment to

P.W.2. According to him, in the alleged occurrence, P.W.2/Ramya sustained grievous injury.

25. P.W.17/Ramesh, is the Inspector of Police, who conducted investigation, arrested the accused, recovered M.Os. and after completion of investigation, he laid a charge sheet against the accused.

26. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false, however, he did not choose to examine any witnesses nor did he mark any documents on his side.

27. Having considered all the above, the learned Additional District and Sessions Judge (Fast Track Court No.5), Coimbatore at Tiruppur, Tiruppur District, found the appellant guilty for the offences under Sections 451, 392, 394, 392 r/w 397 IPC and in turn the accused was convicted and sentenced as detailed in the first paragraph of this judgment. Challenging the said conviction and sentence, the appellant/ accused is now before this Court with the present Criminal Appeal.

28. We have heard Mr.V.Murugesan, learned counsel appearing for the appellant, Mrs.M.Prabhavathi, learned Additional Public Prosecutor appearing for the respondent and also perused the records carefully.

29. The learned counsel appearing on behalf of appellant would contend that before the trial Court, PW2, who is the injured in this case, did not say anything about the identity of the accused. She has merely mentioned that she know the accused and otherwise, no test identification parade has been conducted to prove the identity of the accused. Accordingly, the evidence given by PW2 in respect to the accused is no way helpful to accept the case of the prosecution. He would further contend that there are lot of contradictions in the evidences given by PW7-receiver, PW8 and PW9, who are the witnesses attested the recovery Mahazar. Hence, believing their evidence for accepting the case of the prosecution is against the principles of law. According to him, since the accused was involved in some minor offences, the police foisted a false case against him.

30. Per contra, the learned Additional Public Prosecutor, would contend that the minor discrepancies found in the evidence of PW7, PW8 and PW9 would materially not affect the case of the prosecution. Since the valuable properties alleged to be stolen away from the house of PW2, were recovered, based on the disclosure statement given by him, it is his duty to explain under what circumstances, the said property came into his hands. But in this case, on the side of the accused, there was no

suggestion put forth before the prosecution witnesses as the property recovered through the accused belongs to the accused. Therefore, it is a clear case that the prosecution has proved their case beyond reasonable doubt.

31. On considering the rival submissions made by learned counsel on either side, before the trial Court, though 17 witnesses have been examined on the side of the prosecution, none of the witnesses except PW7 to PW9 and PW17, had stated about the nexus between the accused with the alleged crime. In otherwise, PW2, who is the injured has stated in her evidence about the injuries sustained by her, due to the attack made by the person who wrongfully entered into her house. The said evidence was corroborated through the evidence of PW3 and PW16, who are the doctors treated PW2 after the occurrence. As per the certificate [Ex.P12] issued by PW16, PW2, sustained grievous injuries. In otherwise, in respect to the nature of injuries sustained by PW2, there was no denial on the side of the accused.

32. It is the case of the prosecution that PW2-injured already know about the accused. Though, she has stated as above, the case of the prosecution before the trial Court is that during the time of occurrence, one unknown person entered into the house of PW2 and committed the offence. Therefore, to prove the identity of the accused, it is necessary for the prosecution to conduct the test identification parade by utilising the services of PW2. But in this case, no such parade has been conducted on the side of the prosecution. Therefore, we are of the considered opinion that the prosecution has not proved their case through the eye witness.

33. Secondly, on going through the evidence given by the investigation officer, in respect to the recovery, the said evidence was corroborated through the evidences of PW7 to PW9. PW7, who is a financier, running a bank in the name of Manickam Finance, has clearly identified the accused and stated that after pledging bangles, he received loan for three times. Further, he has identified the receipts which were marked as M.O.45 that the same were issued by him. On the other hand, no relevant evidence is available in the cross examination of PW7 to impeach the credibility of the said evidence. In otherwise, in respect to the arrest and recovery of M.O.3 to M.O.42, the evidence given by the investigation officer was fully corroborated through the evidence of PW8.

34. Further in respect to the recovery of MO1 and M.O.2, the evidence given by PW9, is clearly in a way to support the evidence given by the investigation officer. Their evidence reveals the fact that only based on the disclosure statement given by the accused, the property [45 sovereigns of gold] worth

about nearly Rs.13.5 Lakhs, were recovered by the investigation officer. So, in the said circumstances, the duty is cast upon the accused to tell the fact that under what circumstances the said valuable property came to his hands. In this connection it is necessary and useful to see Section 106 of Indian Evidence Act, which reads as under:

"Burden of proving fact especially within knowledge.—
When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

35. So, applying the said section to the circumstances found in this case, the accused only has to explain the manner of receiving the stolen property. But, on going through the entire cross examination made on behalf of the accused, before PW7 to PW9 and before the investigation officer, there was no suggestion put forth on the side of the accused as the property recovered during the time of investigation belongs to him. Therefore, on culling out the entire evidence let in by the prosecution witnesses, reveals the fact that only the accused has committed the offence.

36. More than that, before the trial Court, PW2 has clearly identified M.O.1 and M.O.2 and stated that during the time of occurrence only the said weapons were used by the accused. Similarly, PW2, has stated before the trial Court that M.O.3 to M.O.42 gold jewels belongs to her. The said circumstance is also in favour of the prosecution. The trial Court while at the time of disposing the case, has clearly analysed the above position and come to the conclusion that the accused alone committed the offence.

37. In the said circumstances, the learned counsel appearing for the appellant would contend that the trial Court has convicted the accused under Sections 451, 394 and 392 r/w 397 IPC. Since the offence under Section 397 is not a substantive offence, punishing the accused both for 394 and 392 r/w 397 IPC, is against the law and therefore, the trial Court has committed a grave error in deciding the issue. According to him, after awarding the punishment to the offence under Section 392 r/w 397, awarding the sentence under Section 394 IPC is per se illegal.

38. Now, on going through the submission made by the learned counsel appearing on behalf of the appellant/accused, the case of the prosecution before the trial Court is when at the time, PW2 was in her house, the appellant/accused, trespassed into the house belonging to PW2 for commission of an offence, punishable with imprisonment and thereafter, after causing grievous hurt to PW2, he committed an offence of robbery. Further, at the time

of committing the robbery, he used the knife and caused grievous hurt to the PW2. In the said occasion, it is necessary to refer the definition of Section 397 IPC, which reads as follows:

"397. Robbery, or dacoity, with attempt to cause death or grievous hurt – 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."

39. Further, for easy reference, it is also necessary to read the definition of Section 394 of IPC, which is as follows:

"394. Voluntarily causing hurt in committing robbery – If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

40. Now, on going through the said two offences, in the offence under Section 394, the word 'deadly weapon', is not mentioned by the legislatures. If, in the circumstances, when at the time of occurrence, a deadly weapon is used for committing robbery, only the offence under Section 397 is attracted.

41. Be that as it may, the learned Additional District and Sessions Judge, Coimbatore at Tirupur, without noticing the said aspect, awarded punishment to the appellant, under Section 394 IPC as well as under Section 392 r/w 397 IPC.

42. In this aspect, Section 392 IPC prescribes a punishment for robbery and the punishment prescribed therein is rigorous imprisonment for a term which may extend to 10 years and also fine, in otherwise, Section 397 IPC does not constitute a separate offence and it prescribes a minimum punishment of seven years imprisonment.

43. 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 shall not be less than seven years. Hence, punishment could be awarded either for the offence under Section 392 r/w 397 or Section 394 r/w 397 IPC. It is a case of robbery, allegedly committed by single person and hurt was

allegedly caused in committing such offence. Therefore, awarding punishment under Section 392 r/w 397 IPC is legally found correct and otherwise, the punishment awarded to the appellant under Section 394 IPC is legally found not correct and therefore, is liable to be set aside. In otherwise, we are of the considered opinion that except the said lapse the learned Additional District and Sessions Judge, Coimbatore at Tiruppur, did not commit any mistake.

44. Accordingly, the criminal appeal is partly allowed. The conviction and sentence awarded under Section 394 IPC alone is set aside and on the other hand the conviction and sentence awarded under Sections 451 and 392 r/w 397 IPC, is confirmed. All sentences are to run concurrently. Since the appellant/accused is in jail, he shall undergo the remaining period of sentence, if any. Fine amount, if any paid is directed to be adjusted. Further, the sentence already undergone by the accused shall be set off under Section 428 Cr.P.C. Consequently, the connected Criminal Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sri/ars

To

The Additional District and Sessions Judge
(Fast Track Court No.5),
Coimbatore at Tiruppur,
Tiruppur District.

The Judicial Magistrate No.II
Tiruppur,
Tiruppur District.

The Superintendent,
Central Prison,
Tiruchirapalli.

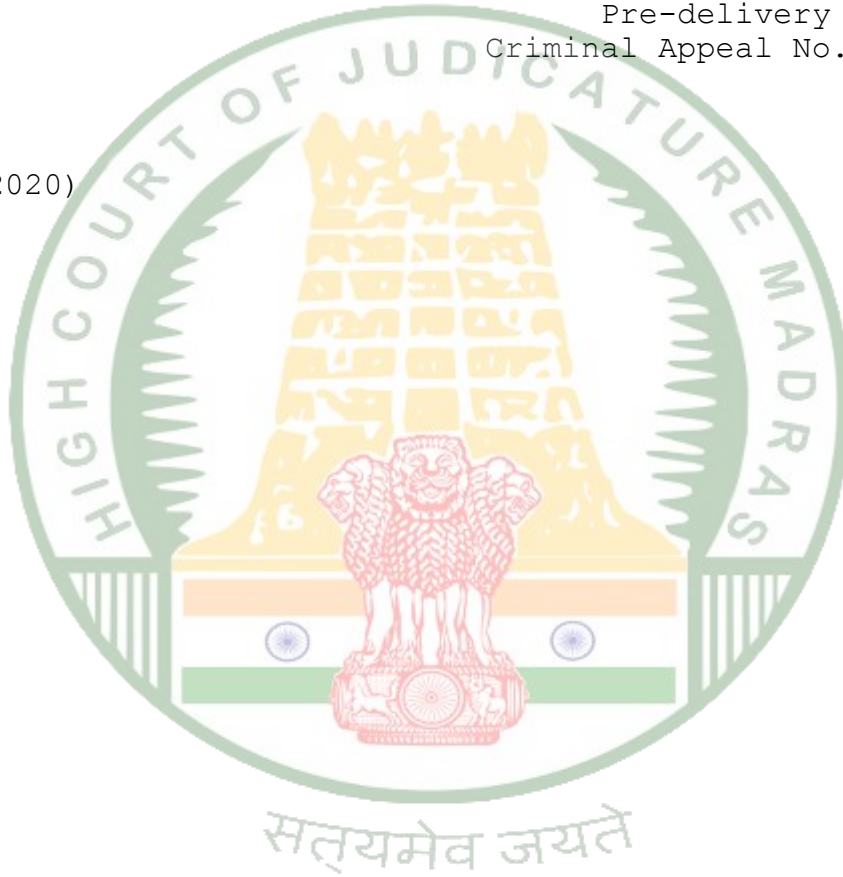
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+1cc to Mr.S.Parameswaram, Advocate, S.R.No.20820

Pre-delivery judgment in
Criminal Appeal No.589 of 2018

PP (CO)
RN (25/06/2020)



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