



BAIL SLIP

Crl.A(MD) No.91 of 2015

Subbu @ Mani, 42/14, S/o.Thankappan, Appellant/Accuse No.1 released on bail of this Court order dated 06.04.2016 made in MP(MD) No.1 of 2015 in Crl.A(MD) No.91 of 2015.

Crl.A(MD) No.322 of 2014

P.Balakrishnan, 42/14, S/o.Palaiyan, Appellant/Accuse No.2 released on bail of this Court order dated 20.01.2015 made in MP(MD) No.1 of 2014 in Crl.A(MD) No.322 of 2014.

Crl.A(MD) No.324 of 2014

Sreekanthan, 42/14, S/o.Pooradan, Appellant/Accuse No.3 released on bail of this Court order dated 23.01.2015 made in MP(MD) No.1 of 2014 in Crl.A(MD) No.324 of 2014.

Crl.A(MD) No.345 of 2015

Sabu, 42/14, S/o.Vargeesh, Appellant/Accuse No.4 released on bail of this Court order dated 29.03.2016 made in MP(MD) No.1 of 2015 in Crl.A(MD) No.345 of 2015.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 13.08.2020

Pronounced on : 11.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A(MD)Nos.322 and 324 of 2014 &

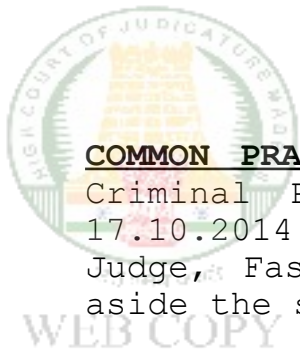
Crl.A(MD)Nos.91 and 345 of 2015

P.Balakrishnan	... Appellant in Crl.A(MD)No.322 of 2014 / Second Accused
Sreekantan	... Appellant in Crl.A(MD)No.324 of 2014 / Third Accused
Subbu @ Mani	... Appellant in Crl.A(MD)No.91 of 2015 / First Accused
Sabu	... Appellant in Crl.A(MD)No.345 of 2015 / Fourth Accused

Vs.

State represented by
the Inspector of Police,
Puthukadai Police Station,
Kanniyakumari District.

[Crime No.87 of 2004] ... Respondent/ Complainant
(in all cases)



COMMON PRAYER: Appeals filed under Section 374(2) of the Code of Criminal Procedure, to call for the records in judgment dated 17.10.2014 in S.C.No.116 of 2005 on the file of the learned Sessions Judge, Fast Track Mahila Court Kanniyakumari @ Nageroil and set aside the same and acquit the respective appellants/ accused.

For Appellant : Mr.T.Lajapathi Roy,
in Crl.A(MD)No.322 of 2014
: Mr.F.Deepak,
in Crl.A(MD)No.324 of 2014
: Mr.A.Denninson,
in Crl.A(MD)No.91 of 2015
: Mr.V.Kannan,
in Crl.A(MD)No.345 of 2015

For Respondent: Mr.Robinson, (Legal Aid Counsel)
Government Advocate (Crl Side)
in all the four appeals

COMMON JUDGMENT

These appeals are filed against the judgment of the learned Sessions Judge, Fast Track Mahalir Court Kanniyakumari @ Nagarcoil in S.C.No.116 of 2005, dated 17.10.2014.

2.Since all the appeals are arising out of one and the same judgment, they are heard together and disposed of by way of this common judgment.

3.For clarity and convenience, the parties are referred to as per their ranks before the trial Court, as follows:

'First accused :Subbu @ Mani [appellant in Crl.A(MD)No.91 of 2015];
Second accused: Balakrishnan [appellant in Crl.A(MD)No.322 of 2014];
Third accused : Srikandan [appellant in Crl.A(MD)No.324 of 2014];
Fourth accused: Sabu [appellant in Crl.A(MD)No.345 of 2015]'.
'

4.The first accused was tried before the trial Court for the offence under Sections 454 and 397 of Indian Penal Code and the second, third and fourth accused were tried for the offence under Sections 454, 397 r/w 34 of Indian Penal Code [in short IPC'].

5.In conclusion, the trial Court by its judgment dated 17.10.2014 found these appellants/accused guilty, convicted and sentenced them as follows:

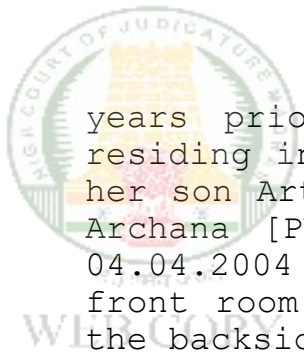
Accused Rank	Section of Law	Sentence of imprisonment	Fine amount
First Accused	454 I.P.C.	To undergo rigorous imprisonment for seven years.	Rs.10,000/- in default, to undergo rigorous imprisonment for one year.
	397 I.P.C.	To undergo rigorous imprisonment for Ten years.	Rs.10,000/- in default, to undergo rigorous imprisonment for one year.
Second Accused	454 I.P.C.	To undergo rigorous imprisonment for seven years.	Rs.10,000/- in default, to undergo rigorous imprisonment for one year.
	397 r/w 34 I.P.C.	To undergo rigorous imprisonment for Ten years.	Rs.10,000/- in default, to undergo rigorous imprisonment for one year.
Third Accused	454 I.P.C.	To undergo rigorous imprisonment for seven years.	Rs.10,000/- in default, to undergo rigorous imprisonment for one year.
	397 r/w 34 I.P.C.	To undergo rigorous imprisonment for Ten years.	Rs.10,000/- in default, to undergo rigorous imprisonment for one year.
Fourth Accused	454 I.P.C.	To undergo rigorous imprisonment for seven years.	Rs.10,000/- in default, to undergo rigorous imprisonment for one year.
	397 r/w 34 I.P.C.	To undergo rigorous imprisonment for Ten years.	Rs.10,000/- in default, to undergo rigorous imprisonment for one year.

The sentences were ordered to run concurrently.

6.Aggrrieved over the judgment of the trial Court, the appellants/accused have preferred these appeals as mentioned in paragraph No.3.

7.The case of the prosecution in nutshell is as follows:

[i]The defacto complainant Vanitha [PW1] a widow, is working as a Teacher in a Government High School at Unnamalaikadai. Her husband Santhosh Kumar was running a pawn broker shop and he passed away two



years prior to the occurrence. The defacto complainant PW1 was residing in her house at Pudukadai Thengaipattinam Road, along with her son Arthick Santhosh [PW2] aged about 14 years and her daughter Archana [PW3] aged about 16 years on the date of occurrence. On 04.04.2004 at about 00.30 hours, PW1 was watching television in the front room of her house. At that time, she heard some sound from the backside of her house. So when she attempted to verify the same, four persons entered into the house by breaking open the backdoor. The first accused caught hold of PW1, second accused caught hold of her son PW2 and third accused caught hold of her daughter PW3. The first accused also snatched away the gold chain worn by her and by her daughter at that time. The first accused also directed PW1 to open the bureau and when she opened it, from the almirah, the first accused had also taken the jewels, which were not redeemed in her husband's pawn shop. Subsequently, the first accused intimidated PW2 with a knife [MO37] and all the four accused left her house through backdoor. Subsequently, PW1 along with her son [PW2] went to the Puthukadai Police Station, lodged a complaint [Exp1] around 2.00am on the same day and the complaint was received by Krishnan [PW8], Head Constable of Puthukadai Police Station and registered the same in Crime No.87 of 2004, under Section 393 IPC and the First Information Report is marked as Exp3.

[ii] On receipt of the complaint in Crime No.87 of 2004, Santhalingam [PW12], Inspector of Police went to the place of occurrence around 3.00am on 04.04.2004, prepared an observation mahazar [Exp2] and a rough sketch [Exp15] in the presence of Murali [PW5] and Sivadas [PW6], examined the witnesses from the place of occurrence. He also made a request to Finger Print Experts for taking finger prints and requested for a sniffer dog squad. During the investigation, the Investigation Officer [PW12] arrested Subbu @ Mani [First Accused], Balakrishnan [Second Accused] and Sabu [Fourth Accused] on 10.04.2004 at about 4.00am in front of Kaliyakavilai bus stop in the presence of one Gopalakrishnan [PW9] and another and recorded the voluntary confession statement of the accused. The admissible portion of the confession statement of the first accused Subbu @ Mani leading to the recovery from him is marked as Exp17 and the signature of Gopalakrishnan [PW9] is marked as Exp4. Pursuant to his confession statement, a steel knife [MO37] engraved as 'SING SS STEEL' was recovered under a cover of mahazar in Exp18 in the presence of PW9. Thirty four gold ornaments MO2 to MO35 [such as, chain, ear ring, ring] were also recovered under a cover of mahazar Exp19.

[iii] The Investigation Officer has also recorded the voluntary confession statement from the second accused Balakrishnan. Pursuant to his confession statement a gold chain [MO1] was recovered under a cover of Mahazar Exp22. The admissible portion of the confession statement leading to the recovery from the second accused is marked as Exp21.



[iv] The Investigation Officer has also recorded the confession statement from the fourth accused Sabu and pursuant to his confession statement a gold watch with chain [MO36] was recovered from a bush, behind the Government Bus Depot, in the house of the fourth accused's brother-in-law. The admissible portion of his confession statement leading to the recovery is marked as Exp16. All these three accused have also identified the house of PW1 to the Investigation Officer and thereafter, they were remanded to judicial custody.

[v] The Investigation officer, on 13.04.2014, made a request to the learned Chief Judicial Magistrate, Nagercoil, to conduct an identification parade of the arrested accused. Pursuant to the orders of the learned Chief Judicial Magistrate, Nagercoil, Mr.Thangavel, the then learned Judicial Magistrate No.1 Nagercoil [PW11] conducted the identification parade on those arrested accused at Central Prison, Palayamkottai on 20.04.2004. In the said identification parade, PW1 to PW3 have identified all the three accused in all the three times, even though the accused had changed their dresses and standing orders. The report of the learned Magistrate [PW11] is marked as Exp13.

[vi] Thereafter, on 13.02.2005 around 4.00pm, the Investigation Officer arrested the third accused in front of Hotel Archana at Marthandam in the presence of Ramasamy [PW10] and another. PW12 also recorded the confession statement of the third accused and pursuant to his confession statement a gold watch chain engraved as 'NSK' and another portion of watch chain was recovered from a cave behind the Uthukuli Kavadinmulai Sri Narayanapathi Temple in Exp12 in the presence of PW10 and another.

[vii] Subsequently, the Investigation officer, on 17.02.2005, made a request to the learned Chief Judicial Magistrate, Nagercoil, to conduct identification parade with regard to the third accused and pursuant to the orders of the learned Chief Judicial Magistrate, Nagercoil, Mr.Thangavel, the then learned Judicial Magistrate No.1 Nagercoil [PW11] conducted the identification parade on the arrested accused at Central Prison, Palayamkottai on 25.02.2005 at about 4.45pm. All the three witnesses PW1 to PW3 were present and they identified the third accused in all the three times, even though the accused changed his dress and his standing order. The report of the learned Magistrate No.1, Nagercoil, [PW11] is marked as Exp14.

[viii] The Investigation Officer, after examination of the witnesses and after completion of the investigation, filed his final report before the learned Judicial Magistrate No.II, Kuzhithurai and the same was taken on file in PRC No.5 of 2005 and committed to the Court of Sessions. However, Based on the orders of this Court in



Sessions Judge, Fast Track Mahila Court, Kankiyakumari District @ Nagercoil in S.C.No.116 of 2005.

8.During the trial, on the side of the prosecution 12 witnesses were examined and 22 documents were marked, besides 36 material objects were produced.

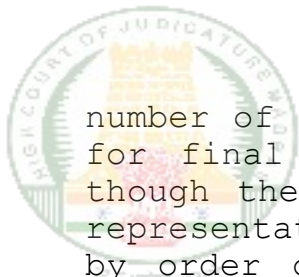
9.PW1 Vanitha is the defacto complainant/victim; PW2 and PW3 are the son and daughter of PW1, who were also present at time of occurrence; All the three witnesses have stated about the occurrence and they have also identified the accused; PW4 is the hearsay witness; PW5 and PW6 are the witnesses to the observation mahazar [Exp2] and rough sketch [Exp15]; PW7 is the then Head Constable at Puthukadai Police Station, who sent the FIR to the Court concerned and his higher officials; PW8 is the then Head Constable at Puthukadai Police station, who registered the complaint Exp1 in crime No.87 of 2004; PW9 Gopalakrishnan is the witness to the arrest of the first, second and fourth accused and to the recovery made from them; PW10 is the witness to the arrest of the third accused and recovery made from him; PW11 is the then learned Judicial Magistrate No.1, Nagercoil, who conducted the identification parade for all the four accused at Central Prison, Palayamkottai; and PW12 is the Investigation Officer, who filed the final report;

10.The incriminating materials from the prosecution's case were put to the accused under Section 313 CrPC and all the accused have denied the same.

11.On behalf of the second accused, DWs1 and 2 were examined. DW1 Justin is the friend of the second accused and according to him, he was running a tea stall along with DW2 in the village festival and through Srikala [DW2] wife of the second accused, he came to know that the second accused was taken to the Puthukadai Police Station in the night hours on 07.04.2004. In this regard, according to Srikala [DW2] wife of the second accused was also examined and she also narrated the same that her husband was working in the DW1's shop at that time and on 07.04.2004 at about 11.45pm her husband was sleeping in her house, he was taken by the Police under the guise of enquiry, but he did not return and therefore, she gave a telegram along with her brother Murugesan to the District Collector and the District Superintendent of Police and others.

12.In conclusion of the trial, the trial Court found these appellants/accused guilty, convicted and sentenced them as stated in paragraph No.5. As against the conviction and sentence imposed on the appellants/accused, they have preferred the present appeals as mentioned above.

13.These appeals of the year 2015 are pending before this Court for the past five years. Except few appeals, all other appeals of the year 2015 are disposed of. But these appeals though listed for



number of times, for final disposal, the same could not be taken up for final hearing one way or the other. Even before this Court though the appeals were listed on for several times, there was no representation for the fourth accused Sabu and therefore, this Court by order dated 13.07.2020 recorded that this Court would proceed with the appeal by appointing a Legal Aid Counsel. Even then there is no representation for the appellant when the matter was taken up for hearing on 21.07.2020. Therefore, this Court by order dated 21.07.2020 appointed Mr.V.Kannan, Advocate, who is having practice of more than 15 years in the criminal side, as Legal Aid Counsel, to represent the fourth accused Sabu / appellant in Crl.A[MD]No.345 of 2015.

14.Heard Mr.Dennison, learned Counsel for the first accused [appellant in Crl.A(MD)No.91 of 2015], Mr.Lajapathy Roy learned Counsel for the Second accused [appellant in Crl.A(MD)No.322 of 2014], Mr.Deepak, learned Counsel for the third accused [appellant in Crl.A(MD)No.324 of 2014], Mr.V.Kanan, Legal Aid Counsel for fourth accused [appellant in Crl.A(MD)No.345 of 2015] and Mr.Robinson, learned Government Advocate (Crl Side) appearing for the State.

15.Mr.Denninson, learned Counsel for the first accused would submit that the defacto complainant [PW1] stated that it is the first accused, who had intimidated her with a knife and also snatched away the chains. However, PW1 referred the name of the first accused as Sabu, whereas, one Sabu is also an accused in this case and arrayed as fourth accused. The first accused is said to have been arrested by the Investigation Officer about 4.00pm, opposite to the Hotel Ashoka at Kaliyakavilai bus stop. According to him, there is no Hotel in the name of Ashoka at Kaliyakavilai bus stop. Though the knife [M037] was recovered from the first accused, there is no reference about this knife in the complaint ExP1. He further submitted that though finger prints were lifted from the place of occurrence, they were not sent for the opinion of the finger print experts along with the finger prints of the accused to fix the accused scientifically. By referring the judgment in Ayub Vs State reported in [2002] 2 LW Crl 579, he submitted that the identification parade is not a conclusive proof and therefore, the conviction, on the basis of the identification during the trial cannot be sustained in the eye of law.

16.Mr.Lajapathy Roy, learned Counsel for the second accused submitted that this second accused's name is not even mentioned in the complaint ExP1 and in the FIR. Only at the time of filing the final report alone, this appellant has been arrayed as an accused. The arrest of the second accused is not proved in this case. He further submitted that according to the Investigation Officer [PW12], he arrested the second accused in the presence of witness PW9, but the PW9 has not stated anything about this second accused



accused. Therefore, the very arrest of this second accused as claimed by the prosecution is doubtful. It is the case of the prosecution that the accused had entered into the house by breaking open the door, but no such broken lock of the door has been placed before the Court.

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17.The learned Counsel also submitted that the prosecution claims that the finger prints were taken from the place of occurrence. But those finger prints taken from the place of occurrence, were not sent to the Experts for comparison and opinion. Therefore, it is fatal to the prosecution case. He also submitted that the recoveries were made from the back side of the house of one Murugan, brother-in-law of the fourth accused, but the said Murugan is not examined in this case. He also placed reliance on the following judgments in support of his contention:

1.Sukhwant Sing Vs State of Punjab, reported in [1995] 3 SCC 367;

2.Matru Alias Girish Chandra Vs State of Uttar Pradesh reported in [1971] 2 SCC 75;

3.Santhosh Sing Vs Izhar Hussain and another, reported in [1973] 2 SCC 406;

4.Mulla and another Vs State of Uttar Pradesh reported in [2010] 3 SCC 508;

18.Mr.Deepak, learned Counsel for the third accused [appellant in Crl.A(MD)No.324 of 2014] has submitted that there is no mention about the identification features of this accused in the complaint so as to fix this accused. He further submitted that there are contradictions between the evidence of the PW1 and PW3 in respect of this accused holding PW3. PW3 in her evidence has stated that the accused had closed her mouth with his hands, whereas, PW1 stated that the accused had caught hold of PW3. He further submitted that the knife [MO37] was recovered from the first accused alone and there is no reference, in the complaint that the third accused had also intimidated PW1. Therefore, the offence under Section 397 IPC is not made out as against this accused. He also submitted that the finger prints said to have been taken from the place of occurrence, were not sent for Experts opinion.

19.Mr.V.Kannan, Legal Aid Counsel for fourth accused [appellant in Crl.A(MD)No.345 of 2015] has submitted that there is a contradiction with regard to the manner of the complaint lodged, since PW1 in her cross examination stated that the complaint was written by one unnamed person, but in her cross examination, she has stated that the complaint was written by her. He further submitted that according to PW1, she went to the Police station along with her son [PW2] to lodge the complaint, whereas, PW8 Head constable has



stated that PW1 came along with her son [PW2] and daughter [PW3]. He further submitted that the finger prints said to have been taken from the place of occurrence, were not sent for Experts opinion.

20.Per contra, Mr.Robinson, learned Government Advocate [Crl Side] submitted that the recoveries are proved in this case through witnesses PW9 and PW12. The witness PW9 has admitted his signature in the recovery mahazar and in the confession statements of the accused. The recovery of knife [MO37] from first accused is proved through ExP8 and ExP19 and the recovery of a gold chain [MO1] from the second accused is proved through ExP22, the recovery of a gold watch chain engraved as NSK and another portion of watch chain from the third accused is proved through ExP12. Insofar as the contention raised by the learned Counsel for the first accused that PW1 mentioned as first accused Sabu is concerned, the occurrence in this case took place in the year 2004, the final report was filed in the year 2005 and the trial was conducted in the year 2013. Since the trial was conducted nearly after a decade from the date of occurrence, such mentioning by the PW1 cannot be given weightage and it cannot affect the prosecution case. He also placed reliance on the following judgments in support of this arguments;

- 1.Suresh and others vs State of Uttar Pradesh, reported in (2001) 3 SS 673;
- 2.Lallan Rai and others Vs State of Bihar, reported in (2003) 1 SCC 268;
- 3.Mohamed Aslam Vs State of Maharastra, reported in (2001) 9 SCC 362;
- 4.Modan Singh Vs State of Rajasthan, reported in (1978) 4 SCC 435;
- 5.Anter Singh Vs State of Rajasthan, reported in (2004) 10 SCC 657.

Therefore, according to the learned Government Advocate [Crl Side] the prosecution has proved its case beyond any reasonable doubt and accordingly, the trial Court has also convicted these appellants/accused.

21.This Court has paid its anxious consideration to the rival submissions made on either side and perused the materials placed on record.

22.In this case, the occurrence has taken place in the small hours at 00.30 hours on 04.04.2004, in the house of a widow [PW1] and she was residing with her son and daughter in her house. All the four accused gained entry into the house of PW1 by breaking open the back door and each of the accused caught hold of PW1 to PW3 and the first accused intimidated PW1 with knife [MO37] and snatched the chains worn by PW1 and PW3. The first accused also directed PW1 to open the almirah and has taken away gold ornaments weighing several



two hours from the time of occurrence, PW1 reported the incident to the Police Station and PW8 Krishnan, Head Constable registered a case in Crime No.87 of 2004. On the date of occurrence, a temple festival was conducted in that area and therefore, Police personnel were deployed for bandobust to the festival.

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23. During the course of investigation, the Investigaiton Officer [PW12] arrested the first, second and fourth accused on 10.04.2004 at about 4.00am, recorded their voluntary confession statements separately. The respective recovery mahazars and the respective admissible portion of the confession statements leading to the recoveries were marked before the trial Court. Pursuant to their confession statements, the gold ornaments MO1, MO3 to MO35 and a knife [MO37] were recovered from various places and those jewels were also identified by PW1 during the trial before the trial Court. The Investigation Officer has also made arragnments for identification parade and in the identification parade, conducted on 20.04.2004 the witnesses PW1 to PW3 have identified the accused in all the three times. The third accused was also arrested on 13.02.2005 in the presence of PW10 Ramasamy and MO36 a Gold watch with letters NSK was also recovered from him.

24. Insofar as the submission made by Mr. Dennison, learned Counsel for the first accused that PW1 has stated the overt act of intimidation only as against one Sabu, who is also an accused in this case and PW1 admitted that she knew the first accused Subbu @ Mani, who is also a resident of her village and therefore, the evidence of PW1 cannot be taken as against the first accused. Though PW1 refered the name of the accused Sabu, she mentioned this overt act of intimidation with knife is only by the first accused. Generally, during the trial the accused would appear according to their rank for the purpose of identification. By identifying the accused, who were present in the Court, PW1 gave her evidence that first accused Sabu had intimidated. It is true Sabu is accused No.4. The accused cannot take advantage of PW1's evidence, when there are other material evidence connecting this accused to the commission of offence. Moreover, thirty five items of jewels were recovered pursuant to the confession of the first accused. The recovery witness [PW9] and the Investigation Officer [PW12] in their evidence have stated this recovery of MO37 knife and other items of jewels recovered from this first accused Subbu @ Mani. During the trial, when PW1 had identified this accused and pointed out, although as first accused, but named as Sabu, the first accused cannot take advantage of the same to have an order of acquittal. Mr. Denninson, learned Counsel has also raised an objection with regard to the arrest and recovery from the first accused that PW9 witness for arrest and recovery, in his evidence had stated that the arrest was effected at Kaliyakavilai Bus stop at 4.00am, but PW12 the Investigation Officer, in his evidence, stated the place of arrest as opposite to the Kaliyakavilai Bus Stop opposite to Hotel Ashoka. According to the learned Counsel Mr. Denninson, there is no Hotel in



the name of Ashoka in the Kaliyakavilai bus stop and the Hotel Ashoka was not referred to by PW9 in his evidence and on this contradiction also the arrest and recovery cannot be believed.

25.This Court is unable to understand the argument of the learned Counsel, since PW9 in his evidence, in whose presence, the arrest and recovery was made has clearly stated about the date and time of the arrest of the accused and his voluntary confession statement recorded by the Investigation Officer and the recoveries made pursuant to their confession statements, thirty five gold ornaments were recovered besides MO.37 a Knife. It is not the case of the first accused, before the trial Court when PW9 and PW12 were examined on the place of arrest and moreover, not even a suggestion was made to those witnesses in this regard.

26.Mr.Denninson, learned Counsel has also raised a ground that this knife [MO37] is not mentioned in the complaint ExP1. But it appears that he made his submission without even reading the complaint ExP1. In the complaint [ExP1] itself, the defacto complainant PW1 clearly mentioned that one of the accused had intimidated with knife and snatched away two chains from her and her daughter PW3. During the trial also PW1 has stated about the intimidation made by the first accused with knife.

27.All the respective learned Counsel for the respective appellants have raised a common ground that though the Investigation Officer is claimed to have lifted the finger prints from the place of occurrence, the finger prints of these accused / appellants were not compared with the finger prints lifted from the place of occurrence and therefore, the entire case of the prosecution is doubtful.

28.In this regard, a careful reading of the evidence of PW2, it shows that he made a request for a sniffer dog squad and for the finger prints experts. But he has not mentioned in his evidence that the finger prints experts have lifted any finger prints from the place of occurrence. In the absence of any such specific evidence and materials that the finger prints experts have collected finger prints from the place of occurrence, I cannot accept this plea in favour of the appellants/accused.

29.As pointed out by the learned Government Advocate [Crl Side], the accused cannot take advantage of the lapses occurred on the part of the investigation agency. In this case, even according to the prosecution, the accused broke open the back door, entered into the house, caught hold of PW1 to PW3, snatched away the chains. More particularly, the accused made PW1 to open the almirah and took the jewels and as such there is no scope for the finger prints experts to lift any finger prints in this case, we cannot find fault with the investigation. Around 50 sovereigns of gold jewels were



taken by the accused and these jewels were also recovered pursuant to the confession statement recorded from these appellants/accused.

30.Mr.Lajapahty Roy, learned Counsel for the second accused contended that the accused cannot be fixed in a case of robbery and dacoity. In this case though accused are stated to be arrested on 10.04.2004 in the presence of PW9, the witness Gopalakrisnan [PW9] did not refer the name of the second accused in his evidence. PW9 made only reference of first and fourth accused, but no doubt, the witness PW9 admitted the signature found in ExP22 recovery mahazar with regard to the second accused. Therefore, the evidence of PW9 cannot be disbelieved. In this regard, the learned Government Advocate [Crl Side] relied on the following judgment of the Hon'ble Supreme Court:

1.In the case of **Mohamed Aslam Vs State of Maharashtra**, reported in **(2001) 9 SCC 362**, it has been held as follows:

"7. Regarding A-1 - Mohmed Aslam (@ Sheru Mohd. Hasan), the only evidence for possession of the forbidden lethal weapon is the testimony of PW-34 (Nagesh Shivdas Lohar, Asstt. Commissioner of Police, CID Intelligence, Mumbai). Learned Counsel contended that two Panch witnesses who were cited to support the recovery turned hostile and therefore, the evidence of PW-34 became unsupported. We cannot agree with the said contention. If Panch witnesses turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. Nor do we agree with the contention that his testimony is unsupported or uncorroborated. The very fact that PW-34 produced in the court lethal weapons recovered is a very formidable circumstance to support his evidence. Learned Counsel made an attempt to show that the recovery in fact was not effected from the said flat in which A-1 - Mohmed Aslam (@ Sheru Mohd. Hasan) was residing. It is admitted that A-1's wife and children were residing in that flat. If no such recovery was made from such flat why nobody was examined on the defence side at least to suggest that no police officer effected any recovery from there. As the trial court has chosen to believe the testimony of PW-34 and on a further scrutiny we too have no reason to reject the same, we are emboldened to accept the testimony of that witness."

2.In the case of **Anter Singh Vs State of Rajasthan**, reported in **(2004) 10 SCC 657**, it has been held as follows:

" We shall first deal with the plea as to whether evidence relating to recovery is acceptable when non-



official witnesses did not support the recovery and made departure from the statements made during investigation. In *Modan Singh v. State of Rajsathan* (1978 (4) SCC 435) it was observed that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was taken in *Mohd. Aslam v. State of Maharashtra* (2001 (9) SCC 362). It was held even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. But the crucial question which needs to be considered in this case is whether the prosecution has been able to show that the pistol recovered was the one which was used for commission of the offence. As rightly contended by learned counsel for the appellant there are several circumstances which affects credibility of the prosecution version. Firstly, the so- called information was recorded by the IO (PW-16), and he does not even indicate that the gun to which reference was allegedly made was the weapon of assault. Further the custody of empty cartridges purported to have been recovered from the spot has not been established. In fact, the claim is that on 11.4.1979 empty cartridges were recovered. They were sent to the forensic science laboratory on 12.5.1979. It has not been explained as to where the empty cartridges were till then lying and with whom. Similar is the situation with the two bullets claimed to have been extracted from the dead body by the doctor. It has been accepted by PW-36 that the empty cartridges and the bullets were not deposited with the ballistic expert prior to the recovery of the pistol claimed to have been made on 29.4.1979. Significantly, though the witnesses claimed that the moulds, chappals found at the spot, the empty cartridges, the two bullets extracted and the pistol were sealed before being sent to the expert for examination and that they were sealed on the date they were recovered, but PW-23 who claimed to have taken the parcel to the laboratory categorically admitted that the packets were sealed in the Kotwali in his presence on the date he had taken for deposit with the laboratory i.e. 11.5.1979 and, in fact, the articles were deposited on 12.5.1979. Though the witness stated that different seals were used, a bare perusal of the materials on record clearly shows that only one seal was used. Additionally, PW-31 who took major part in the investigation had categorically admitted that the particular type of pistol which was allegedly seized could not have ejected any



empty cartridges till all the six shots were fired and otherwise it could not be possible. In Exhibits 51 and 51A i.e. the spot map and the circumstances memo reference is made to the moulds. This was not possible because Exhibits 51 and 51A were prepared at about 9.30 a.m., while admittedly the moulds were taken much after as stated by the witnesses. Significantly in neither Exhibits 51 and 51A, reference is made to the recovery of any empty cartridges which was supposed to have been found near the dead body though reference was made to the moulds which were yet to come into existence. There was no evidence led as to when the bullets were handed over to the police by the doctor or where they were kept and in what condition. Though recovery from an open space may not always render it vulnerable, it would depend upon factual situation in a given case and the truthfulness or otherwise of such claim. In the case at hand the recovery was made from an open space visible from the place where the dead body was lying and at a close proximity. It is not clear from evidence that it was hidden in such a way so as making it difficult to be noticed. The evidence tendered is totally silent as to in whose custody were the bullets, empty cartridges and the pistol. The effect of such non- explanation was considered by this Court in *Santa Singh v. State of Punjab* (AIR 1956 SC 526). The Constitution Bench, inter alia, observed as follows:

"There is another element in the case which creates even greater difficulty. An empty cartridge case is alleged to have been recovered from the place of occurrence by the police on the 10th of September when they went there for investigation after receipt of the first information from Uttam Singh (P.W. 16); so also some blood-stained earth.

They were carefully packed and sealed in two separate packets and dispatched to the Police Station. The sealed parcel of the earth was sent to the Chemical Examiner at Kasauli on the 11th October, 1954, and the sealed parcel of the empty cartridge case was sent to Dr. Goyle as late as the 27th October, 1954.

Even if we accept the explanation given by the Sub-Inspector of Police that the empty cartridge case had to be kept at the police station till the rifle used was recovered so that both might be sent to the expert for his opinion, nothing has been stated why after the rifle was recovered on the 28th September, 1954, along with 24 cartridges from the house of the



accused, it was incumbent for the Police to retain the parcels of rifle and empty cartridge case with them till the 11th October, 1954.

Naturally this inordinate delay raises much suspicion and has given rise to the suggestion on the part of the accused made in the course of the cross-examination of the Sub-Inspector that the empty cartridge case ultimately sent to the expert relates to a cartridge that was fired by them at the Police Station and is not the one recovered at the spot."

31.In this case, the admissible portion of the confession statements leading to the recovery have been marked as Exp21 and the mahazar for the recovery is also marked as Exp22 through PW12 and pursuant to the confession statement gold chain watch was also recovered as MO36 through this second accused. Even assuming that the recovery witness PW9 did not mention about the name of the second accused, the investigation officer's evidence can be given effect as held by the Hon'ble Supreme Court in the above cited judgments and as such this ground is not acceptable.

32.In addition Mr.Lajapathy Roy also raised a doubt with regard to the date of occurrence by referring the evidence of DW1 and DW2. He also referred the evidence of PW12, where PW12 admitted that he received a telegram on 10.04.2004 from DW2 SriKala, wife of the second accused. According to Mr.Lajapathy Roy, learned Counsel, the second accused Balakrishnan was arrested by the Police on 07.04.2004 itself, but the arrest is shown on 10.04.2004 and DW2 SriKala wife of the second accused has sent a telegram as against the illegal detention of her husband, which fact has been elicited through the evidence of DW1 and DW2 and PW12. It is true that PW12 admitted that the wife of the second accused has sent a telegram on 10.04.2004 that her husband was arrested on 07.04.2004. DW1 friend of the second accused as well as his wife DW2 SriKala were also examined to establish this fact. But neither the copy of the telegram nor the receipt of the telegram was marked during their examination. They have entered the box and simply stated that the second accused was taken to the Police custody on 10.04.2004 at about 11.45pm and therefore, they sent a telegram on 10.04.2004. Even according to the prosecution the accused was arrested only on 10.04.2004 at about 4.00am, at Kaliyakavilai bus stop, and if any telegram is made pursuant to the arrest of this accused, it cannot be a ground to disbelieve the case of the prosecution on the arrest of the second accused. This defence theory cannot be accepted, because though the second accused was arrested on 07.02.2004 itself, it is not known why they have waited till 10.04.2004 to send a telegram. Moreover, neither the telegram nor the receipt for the said telegram



has been placed before the Court and in the absence such material, this ground raised by the appellant/second accused cannot be accepted.

33.Mr.Deepak, learned Counsel for the third accused has raised a ground that in the complaint ExP1, the identification features of the accused were not mentioned. But in this case, the witnesses PW1 to PW3 have admitted that the accused were also belonging to their village but they did not know the names of the accused at the time of occurrence and they have also identified all the four accused in all the three times in the identification parade conducted by the learned Judicial Magistrate [PW11]. The complaint is not an encyclopedia, where all the minute details can be expected to be mentioned and more over, the occurrence has taken place at 00.30 hours and the complaint was lodged within 1 ½ hours from the time of occurrence. Therefore, the non mentioning of the identification features of the accused in the complaint cannot be taken as a ground in favour of the accused, when the witnesses PW1 to PW3 have clearly identified the accused, during the Test Identification Parade and also before the Court.

34.Mr.Deepak, learned Counsel also raised a ground that the overt act as against the third accused, even according to the prosecution case is that he gagged the mouth of PW3 and he was not having any knife and has not intimidated anybody and even in this overt act itself contradicted by the eye witnesses PW1 and PW3, where PW1 stated that he gagged the mouth of PW3, but PW3 says that he only caught hold of her. This ground raised by the learned Counsel is of no use, when the charges have been framed for the offence under Sections 454, 397 r/w 34 IPC. The first accused alone is convicted for the offence under Section 397 IPC and the other accused were found guilty for the offence under Section 454, 397 r/w 34 IPC.

35.Though the overt act of intimidation with knife is attributed only as against the first accused and all these accused with a common intention entered into the house of PW1 on 04.04.2004 in the mid night and snatched away the jewels at knife point. The knife M037 was also recovered from the first accused, pursuant to the confession statement. In this regard, the learned Government Advocate relied on the following judgments:

1.In the case of **Suresh and others vs State of Uttar Pradesh**, reported in **(2001) 3 SCC 673**, it has been held as follows:

"Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule



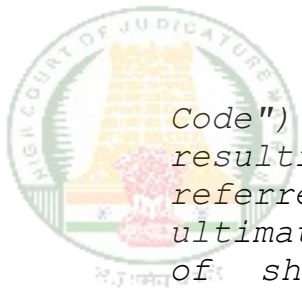
of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case."

2. In the case of **Lallan Rai and others Vs State of Bihar**, reported in **(2003) 1 SCC 268**, it has been held as follows:

Four decades later, however, a Three-Judge Bench of this Court in Suresh (Suresh & Anr. v. State of U.P. 2001 (3) SCC (673) had the following to state pertaining to Section 34 of the Indian Penal Code.

"Section 34 of the Indian Penal Code recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The Section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the



Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Satrughan Patar v. Emperor* (AIR 1919 Pat 111) held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied."

36.The facts and circumstances of this case that all the accused had entered in the house of PW1 with a common intention and all the accused were present in the place of occurrence at the time of occurrence and facilitated the first accused by gagging the mouth of the witness, shared the stolen articles after the commission of the offence, which would fall under Section 34 of IPC and as such, the contention of the accused that the no case under Section 34 IPC is made is not acceptable.

37.This Court is of the view that the prosecution has proved its case beyond reasonable doubt and therefore, the appeals are liable to be dismissed.



38.In view of the foregoing discussion,

i) All these four appeals are dismissed;

ii) The conviction and sentence imposed on these accused in judgment dated 17.10.2014 in S.C.No.116 of 2005 by learned Sessions Judge, Fast Track Mahila Court Kanniyakumari @ Nageroil are confirmed;

iii) The trial Court is directed to secure these appellants and confine them to prison to undergo the remaining period of sentence. Bail bonds, if any executed by the accused, shall stand terminated.

39.This Court places its appreciation on record to Mr.V.Kannan, learned Legal Aid Counsel and the Legal Services Authority is directed to pay a sum of Rs.10,000/- to the learned Counsel.

Sd/-

Assistant Registrar (Per.Admn)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

dsk

NOTE: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The Sessions Judge,
Fast Track Mahila Court
Kanniyakumari @ Nageroil.
- 2.The Inspector of Police,
Puthukadai Police Station,
Kanniyakumari District.
- 3.The Superintendent,
Central Prison,
Palayamkottai.



- 4.The Chief Judicial Magistrate,
Kanyakumari @ Nagercoil.
- 5.The Judicial Magistrate No.II,
Kuzhithurai.
- 6.The Officer-in-charge,
Legal Aid Services Authority,
Madurai Bench of Madras High Court,
Madurai.

Copy to:

- 1.The Record Keeper (2 copies)
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.
- 2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 3.Mr.V.Kannan, Advocate,
Legal Aid Counsel,
Madurai Bench of Madras High Court,
Madurai.

CrI.A(MD)Nos.322 and 324 of 2014
and
CrI.A(MD)Nos.91 and 345 of 2015
11.09.2020

GC(27.09.2021) 20P 10C