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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.03.2021

CORAM

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Cr1.RC.No.1208 of 2014
and
M.P.No.1 of 2015

Arunachalam
S/o. Kora Lakshmanan

... Petitioner

Vs

State rep. by the
(Crime No.90 of 2005)
Inspector of Police
Thanipadi Police Station
Thiruvannamalai District

... Respondent

Prayer: This Criminal Revision Petition filed, under Section 397 r/w Section 401 Cr.PC, to set aside the conviction and sentence made in Criminal Appeal No.7 of 2009 dated 06.03.2014 on the file of the Sessions Judge, Thiruvannamalai in confirming the judgment made in S.C.No.27 of 2007 dated 29.07.2009 on the file of the Additional Assistant Sessions Court, Thiruvannamalai, Thiruvannamalai District by allowing the criminal revision.

For Petitioner : Mr.D.Veerasekaran

For Respondent : Mr.T.Shunmugarajeswaran,
Government Advocate (Cr1.Side)

ORDER

(The case has been heard through video conference)

The Criminal Revision has been filed by the Petitioner/Accused to set aside the conviction and sentence made in Criminal Appeal No.7 of 2009 dated 06.03.2014 on the file of the Sessions Judge, Thiruvannamalai in confirming the judgment made in S.C.No.27 of 2007 dated 29.07.2009 on the file of the Additional Assistant Sessions Court, Thiruvannamalai, Thiruvannamalai District.

2.The case of the prosecution in brief:

P.W.1 viz. Md.Kasim was residing at Saidapet Village,



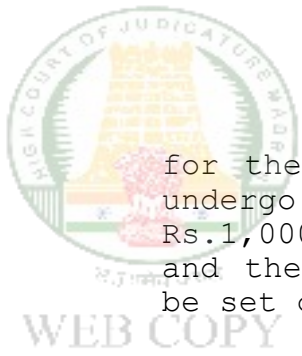
Chengam Taluk and was engaged in Agricultural work. He was earlier working in Saudi Arabia and had returned to India and that on 16.02.2005 when he was sleeping in his house at about 1.00 a.m. three persons armed with wooden logs had trespassed into his house by breaking the lock of the front grill gate and snatched the fUfkdp jhyp from the neck of his wife P.W.2 viz. Hajemonisha and when she had raised alarm, P.W.1 woke up from the sleep and had seen the occurrence and attempted to prevent the same. At that time, the 1st accused viz. Arunachalam, the Revision petitioner herein attacked him by hitting him with wooden log (Uruttukattai) on his head, due to the assault, P.W.1 sustained grievous injuries on his head, forehead and mouth and he had also lost two of his teeth. The 1st accused then started to attack P.W.2 using the same wooden log on her back and the accused had snatched two gold rings, one CISCO Watch, Quartz Wall Clock and also removed Rs.2,000/- from the pocket of the P.W.1 and ran away with the stolen gold jewels, cash and other articles. When P.W.1 raised alarm, one Basheer, Askar Ali, Babajan viz. P.W.3 came to their house and took P.W.1 and P.W.2 to the hospital and when the victims were in the hospital, they gave a complaint before the respondent police, which has been marked as Ex.P1.

3. Based on the complaint, one R.K.Chellapandian viz. P.W.9 registered a case in C.C.No.90 of 2005, which has been marked as Ex.P2. Thereafter, P.W.10 viz. Rajkumar, the then Inspector of Police, took up the case for investigation and visited the place of occurrence viz. the house of P.W.1 and prepared observation mahazar viz. Ex.P5, in the presence of witnesses viz. Ravanan & Masjid and seized the broken lock (M.O.1), blood stained bed cover (M.O.2), broken teeth (M.O.3) and other material objects. Thereafter, he examined P.W.1 and P.W.2, the victims herein and the witnesses Ansar Ali, Bhasheer, Sheik Basha, Syed Babu, Kathija, Mariyan, Ravanan, Syed Masjid and their statements were recorded. Further, during the course of investigation, on suspicion, he arrested the 1st accused on 12.04.2005 and examined him, recorded his voluntary confession statement in the presence of witnesses viz. Devaraj and Thansilal and based on the confession, thali and accessories (10 black beads and 10 gold gundu) M.O.4 were recovered under the observation mahazar Ex.P4 and thereafter he prepared Rough Sketch, which has been marked as Ex.P13 and on the same day at 10.30 a.m. he had collected the blood stained bed sheet and 10 other material objects, which has been marked as Ex.P5. Thereafter, he proceeded to Thanipadi Government Hospital and recorded Ex.P1 and Ex.P2 and thereafter he recorded statements from the witnesses. On 12.04.2005 at 6.00 a.m., he arrested the 1st accused on suspicion and during enquiry, he had confessed about the commission of offence and gave a confession statement. The confession was recorded in the presence of the witnesses on the same day at 7.30 a.m. The



admitted portion of the confession statement has been marked as Ex.P6, during that time, Muslim chain and thali with 10 black beads weighing two sovereigns were recovered under recovery mahazar viz. Ex.P7. Thereafter, the Inspector brought the accused to the police station and after completing formalities, sent the accused to the Court for remand along with the recovered items. On 07.06.2005, the respondent police arrested the 2nd accused at 9.00 a.m. near Thanipadi bus stand. The 2nd accused confessed to the offence and gave a confession statement in the presence of witnesses and the admitted portion of the confession statement has been marked as Ex.P8 and based on the confession, one gold ring has been recovered under recovery mahazar and the same was marked as Ex.P15. After completion of the formalities, the 2nd accused was produced before the Court on 13.06.2005 and the Investigating Officer also had given a request to the learned Chief Judicial Magistrate, Tiruvannamalai to conduct test identification parade and the said request has been marked as Ex.P16 and thereafter the test identification parade was conducted by the learned Judicial Magistrate No.2, Thiruvannamalai at Vellore Central Prison and after completion of the test identification parade, the report was sent to the learned Chief Judicial Magistrate, Thiruvannamalai. Thereafter, he had examined the Doctor viz. P.W.4, who treated the victims viz. P.W.1 and P.W.2 and obtained their statements and thereafter obtained the opinion of the Additional Public Prosecutor and filed the final report against the accused for the offence u/s.394 r/w 397 IPC and filled in Form-95, along with the material objects were sent to the Court, which have been marked as Ex.P17 to Ex.P19. Thereafter, the case was taken up in P.R.C.No.14 of 2005 and summons were issued to the accused and on their appearance, copies were furnished under Section 207 Cr.P.C.

4. Thereafter, the case was committed to the Court of Sessions and made over to the learned Additional Assistant Sessions Judge, Thiruvannamalai for trial in S.C.No.27 of 2007 and after initial questioning, charges were framed against the accused u/s.394 r/w 397 IPC. The Petitioner/Accused pleaded not guilty and sought to be tried. In order to prove the case of the prosecution, P.W.1 to P.W.11 were examined and documents Ex.P1 to Ex.P20 and M.O.1 to M.O.12 were marked. When the incriminating materials were put forth to the accused, they denied the charges. However, they did not let in any oral or documentary evidence to defend the case. The Courts below, after hearing both sides, found the 1st accused guilty for the offence u/s.394 r/w 397 IPC and convicted and sentenced him to undergo seven years Rigorous Imprisonment and to pay a fine of Rs.1,000/- in default to undergo one month Rigorous Imprisonment and the period already undergone by the accused was ordered to be set off u/s.428 Cr.P.C.. The 2nd accused was found guilty



for the offence u/s.394 IPC and convicted and sentenced him to undergo two years Rigorous Imprisonment and to pay a fine of Rs.1,000/- in default to undergo one month Rigorous Imprisonment and the period already undergone by the accused was ordered to be set off u/s.428 Cr.P.C.

5. Against the said conviction and sentence, the 1st Accused / Revision Petitioner herein preferred an appeal in C.A.No.7 of 2009 and the 2nd accused preferred C.A.No.6 of 2009. Both the appeals were dismissed by the common judgment dated 06.03.2014 by the learned Sessions Judge, Thiruvannamalai and the conviction and sentence passed by the trial Court was confirmed. Against which, the present Criminal Revision has been filed by the 1st accused.

6. Mr.D.Veerasekaran, the learned counsel appearing for the Revision Petitioner/Accused would submit that the prosecution has failed to prove the case beyond all reasonable doubt. The Courts below without properly analysing and appreciating the evidence and materials on record have erred in holding that the prosecution has proved its case beyond all reasonable doubt and erred in convicting the petitioner / accused. He would submit that it is an admitted case of the prosecution that the accused are strangers to P.W.1 and P.W.2. Further, as per the prosecution, three persons stated to have trespassed into the house of P.W.1 at 1.00 a.m. on 16.02.2005, however, in this case, no identification or description of the accused are stated in the complaint. Further, in this case, the petitioner / accused is stated to have been arrested on 12.04.2005 and the 2nd accused had been arrested on 07.06.2005. Strangely, in this case, test identification parade was conducted only in respect of the 2nd accused who had been identified. Though, the petitioner / accused was arrested much earlier on 12.04.2005, the respondent did not take any steps to conduct the test identification parade. Though the test identification parade is only a substantive piece of evidence, as far as this case is concerned, when the accused being strangers and when no identification or description of the accused have been stated by the witnesses in the complaint, conducting of test identification parade assumes much significance. When the respondent has wilfully evaded from conducting the test identification parade in respect of the petitioner / accused, it causes grave suspicion in the prosecution case.

7. Admittedly, in this case, fingerprint expert has visited the scene of occurrence immediately after the occurrence and he is stated to have collected the fingerprints from the scene of occurrence, however, no steps have been taken by the prosecution to match the fingerprints of the petitioner with the fingerprints that were lifted from the scene of occurrence, so



as to confirm that the petitioner is the person who is involved in the offence.

8. The case of the prosecution with regard to arrest, recovery and confession are doubtful when especially the details of the jewels have not been stated at the time of complaint. P.W.6 V.A.O. is a stock witness and his evidence is also not believable.

9. Though non conducting of test identification parade is not fatal, the identification of the petitioner by P.W.1 and P.W.2 for the 1st time in the Court after a period of three years is highly doubtful. Further, P.W.2 had admitted that she had seen the petitioner / accused for about 4 or 5 times in the Court before her evidence in Court and thereby she had identified the petitioner and the other accused. Though P.W.1 had stated that the neighbours have seen the petitioner and the other accused running away from the scene of occurrence, they have not been called to identify the petitioner / accused as the person who along with the other accused had entered into the house of P.W.1 and P.W.2.

10. The evidence of the prosecution is not clear as to which accused attacked whom and what was the weapon used in the occurrence. There is a discrepancy with regard to the weapon in Ex.P2 and Ex.P3, the Accident Registers in respect of P.W.1 and P.W.2 who are stated to have sustained injuries in the same occurrence. In Ex.P2 it had been stated that the accused persons have used the wooden log, whereas in Ex.P3 it has been stated that the accused used iron rods. When such being the case, the Courts below without properly appreciating the evidence had convicted the 2nd accused for the offence u/s.394 IPC alone and sentenced him to undergo two years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, whereas, the Courts below convicted the petitioner / accused for the offence u/s.394 and 397 IPC and to undergo seven years Rigorous Imprisonment, when especially the absconding accused is yet to be arrested.

11. Learned counsel would further submit that during the course of cross examination, P.W.10, Investigating Officer was directed to produce the CD file containing the photographs of other suspected accused and it was pointed out to the Court that there were photos of several other suspected accused in this case, thereby, proving that the petitioner was arrested only on suspicion. Further when no other evidence has been elicited by the prosecution to prove the basis on which the petitioner was fixed in this case and arrested, it creates doubt in the entire prosecution case. He would further reiterate though admittedly the Fingerprint Expert has visited the scene of occurrence and



collected the fingerprints, no further investigation was done to match the fingerprints recovered at the scene of occurrence and the Fingerprint Expert was not examined and the report was buried by the prosecution, which creates grave suspicion. The learned counsel would submit that both Courts below without any legal materials have rendered a perverse finding holding that the prosecution has proved its case beyond doubt.

12. In support of his contentions, the learned counsel for the petitioner placed reliance on the following decisions of the Hon'ble Supreme Court:

(i) Noorahammad & others V. State of Karnataka reported in (2016) 3 SCC 325;

(ii) Hari Om @ Hero V. State of U.P. Reported in (2021) 1 MLJ (CRL) 241 SC 402 (in Crl.A.No.1256 of 2017 dated 05.01.2021) ;

(iii) Mohd. Abdul Hafeez V. State of Andhra Pradesh reported in (1983) 1 SCC 143;

(iv) Raj Kumar Singh @ Raju @ Batya V. State of Rajasthan reported in (2013) 5 SCC 722.

13. Learned counsel would further submit that the prosecution has failed to prove the case beyond reasonable doubt and the Courts below erred in convicting the accused and thereby he would seek to set aside the judgement and orders passed by the Courts below.

14. Per contra, Mr. T. Shunmugarajeswaran, the learned Government Advocate (Crl. Side) would submit that P.W.1 is husband and P.W.2 is wife. The Revision petitioner along with two other accused had entered into the house of the victims, assaulted them and also committed robbery. More particularly this Revision Petitioner assaulted P.W.1 with wooden log and caused grievous injury, due to which, he had lost two of his teeth. The neighbours P.W.3 and others have seen the accused persons escaping from the place. Thereafter, P.W.3 took the injured persons to the hospital. P.W.4 is the Doctor and she has spoken about the injuries. P.W.5 is the Village Administrative Officer (V.A.O.) and P.W.6 is a resident of that village and they have witnessed the arrest, recovery and confession and they have also supported the prosecution case. Based on the confession, the accused was arrested on 12.04.2005 and in the presence of V.A.O. the accused had confessed to have committed the crime. Based on his confession M.O.4 series viz. Jewels and thali and accessories were recovered and Ex.P7 has been marked and further the admitted portion of the Revision Petitioner's confession has been marked as Ex.P6. He would further submit that though the accused was arrested on 12.04.2005, non-conducting of test identification parade will not be a fatal to the case of the prosecution, since P.W.1 and P.W.2 have identified the Revision petitioner in the Court



during the trial. Both the courts below have rightly convicted the petitioner / accused for having assaulted the victims with wooden log and caused grievous injury. The witnesses have deposed cogently and evidences were corroborated.

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15. Now what is to be seen is whether the Courts below have rightly appreciated the evidence on record and whether the Courts below are right in convicting the accused based on the available evidence.

16. This Court is aware and not oblivious to the legal position that the revisional Court cannot re-appreciate the evidence like an Appellate Court, however, when there is wrong appreciation of facts and when the Courts below have not properly analysed the materials and evidence, the power of this Court to go into the evidence has been preserved by Section 397 & 401 of Cr.P.C., so far as satisfying itself as to the correctness, legality or propriety of any finding. This Court carefully perused the evidence and materials on record.

17. Admittedly, in this case, the accused are the strangers to the victims viz. P.W.1 and P.W.2. The accused are stated to have trespassed into the house of the P.W.1 at 1.00 a.m. on 16.02.2005 and broke open the lock and assaulted P.W.1 and P.W.2 with wooden logs and robbed gold jewels, watch and cash of Rs.2,000/- from P.W.1 and P.W.2 and in the course of the act, they have also assaulted P.W.1 with wooden log, causing grievous injury to P.W.1. However, no identification or description of the accused had been stated in the complaint. It is a case of the prosecution that the 1st accused / the revision petitioner was arrested on 12.04.2005 at 6.00 a.m. and that he is stated to have given a confession in the presence of P.W.6 viz. Devaraj, the V.A.O. and yet another person Thanisilal who was stated to have witnessed the arrest and confession has not been examined. Though the petitioner was arrested as early as on 12.04.2005, no identification parade had been conducted by the prosecution. It is a case of the prosecution that he was arrested on suspicion. During the course of cross examination, the victim has brought to the notice of the Court that two other photographs of the other suspected accused were also found in the CD file and the same has also been noted down by the Court. Further in this case, the evidence of P.W.6 in respect of the arrest, recovery and confession are highly doubtful. As stated by the learned counsel for the petitioner, though the petitioner is the first one to be arrested on 12.04.2005, the respondent police had not taken steps to conduct the test identification parade when especially no description or identification marks of the accused had been stated in the complaint. No reason has been stated by the prosecution for not having conducted the test identification parade. Further, as per the Investigating Officer P.W.10 in



this case, the Fingerprint Expert has visited the scene of occurrence and lifted fingerprints from the scene of occurrence and it is the admitted case of the prosecution that some persons in the locality were detained on suspicion. In this case, the prosecution after the arrest of the petitioner had not taken any steps to compare the fingerprints of the petitioner with that of the fingerprints lifted from the scene of occurrence and further, the prosecution has failed to examine the Fingerprint Expert and the report of the Fingerprint Expert has been buried by the prosecution. Though the test identification parade is not a substantiated piece of evidence, in this case, the identity of the petitioner in the Court after two years of the occurrence and that too when the witness had admitted that she had seen the accused three or four times in the Court before giving evidence, makes the case of the prosecution with regard to identification of the accused highly doubtful.

18. At this juncture, it is apposite to refer to the judgment of the Hon'ble Apex Court in Noorahammad & others V. State of Karnataka reported in (2016) 3 SCC 325:

"26. Another important fact which the High Court has failed to appreciate is that the prosecution witness identified the appellant-accused in court for the first time, during trial, in the year 1997-1998 and the incident occurred in the year 1995. Thus after considering some undisputed facts like occurrence of incident at night, at a place with improper lighting and all the appellant-accused were not known to the forest officers, except one present at the place of incident, there should have been TIP conducted at the instance of the investigating officer. Therefore, the identification of the appellant - accused by the prosecution witness for the first time after a gap of more than 2 years from the date of incident is not beyond reasonable doubt, the same should be seen with suspicion.

19. Further, in Hari Om @ Hero V. State of U.P. Reported in (2021) 1 MLJ(CRL) 241 SC 402, in Criminal Appeal No.1256 of 2017 dated 05.01.2021, the Hon'ble Apex Court has held;

"35. It must be stated that both Sanjay @ Sonu and Saurabh @ Sanju were unknown faces to PW5 Ujjwal, and were not subjected to any Test Identification. Apart from identification by PW5 Ujjwal in Court for the first time, there is no other material to establish their presence. Thus, even if we accept that fingerprints lifted from the house of the deceased could be associated with the said two accused, that by itself, in the absence of any substantive piece of evidence, cannot be made the basis of their



conviction."

20. Further, the Hon'ble Apex Court in Mohd. Abdul Hafeez vs State of Andhra Pradesh reported in (1983) 1 SCC 143 held that when the identification marks or description of the accused persons are not given in the FIR and that no identification parade held and that the accused were identified only before the Court after four months of the occurrence, such identification cannot be reliable in connecting the accused to the crime.

21. In Raj Kumar Singh @ Raju @ Batya vs State Of Rajasthan reported in (2013) 5SCC 722, the Hon'ble Apex Court has held that if the circumstances proved in a case are inconsistent either with the innocence of the accused, or with his guilt, then the accused is entitled to the benefit of doubt. When it is held that a certain fact has been proved, then the question that arises is whether such a fact leads to the inference of guilt on the part of the accused person or not, and in dealing with this aspect of the problem, benefit of doubt must be given to the accused and a final inference of guilt against him must be drawn only if the proved fact is wholly inconsistent with the innocence of the accused, and is entirely consistent with his guilt.

22. Admittedly, in this case, the incident had happened on 16.02.2005 at 1.00 a.m. in the wee hours, the petitioner is stated to have been arrested on 12.04.2005 at 6.00 a.m. No test identification parade (TIP) was conducted and the petitioner had been identified for the first time by P.W.1 on 20.10.2008 and by P.W.2 on 03.11.2008 in the Court. Other than the identification of the petitioner / accused for the first time in the Court after 3½ years no other substantive piece of evidence has been let in by the prosecution. Further, the evidence regarding arrest, confession and recovery is also highly doubtful. There is also confusion with regard to the weapon used and by whom it was used. In such circumstances, this Court is of the opinion that the prosecution has not proved the case beyond reasonable doubt and the Courts below without properly appreciating the evidence have found the petitioner guilty and convicted him.

23. In the result, the Criminal Revision is allowed. The conviction and sentence made in C.A.No.7 of 2009 dated 06.03.2014 on the file of the Sessions Judge, Thiruvannamalai, confirming the Judgment of conviction and sentence vide order dated 29.07.2009 in S.C.No.27 of 2007, passed by the Additional Assistant Sessions Court, Thiruvannamalai, Thiruvannamalai District are set aside. The Revision petitioner is acquitted from the charges framed against him. The fine amount paid by the petitioner if any is to be refunded to him. The bail bonds stand



cancelled. Registry shall return the records to the respective Courts. Consequently the connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

KAS

To:

1. The Sessions Judge
Thiruvannamalai.
2. The Additional Assistant Sessions Court
Thiruvannamalai
Thiruvannamalai District
3. Inspector of Police
Thanipadi Police Station
Thiruvannamalai District
4. The Public Prosecutor,
High Court of Madras,
Chennai 600 104.
5. The Section Officer,
Criminal Section(Records)
High Court, Madras.

+1cc to Mr.D.Veerasekaran, Advocate, S.R.No.18848

Cr1.RC.No.1208 of 2014
and
M.P.No.1 of 2015

GP(CO)
BE(16/07/2021)