



BAIL SLIP

The Appellants / Accused 1 to 4 namely,

- 1.Prabu, S/o.Kasinathan
- 2.Thamizhmani, S/o.Pandiyan
- 3.Suresh, S/o.Veerappan
- 4.Krishnamoorthy, S/o.Maari

were directed to be released on bail vide order dated 27.10.2017 made in CrI.M.P.No.9132 of 2017 and CrI.M.P.No.10838 of 2016 in CrI.A.No.426 of 2014.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Order 10.08.2021	Date of Pronouncing Order 17.11.2021
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CORAM

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

CrI.A.No.426 of 2014

- 1.Prabu, S/o.Kasinathan
- 2.Thamizhmani, S/o.Pandiyan
- 3.Suresh, S/o.Veerappan
- 4.Krishnamoorthy, S/o.Maari

.. Appellants/Accused 1 to 4

Vs.

The State rep.by
Station House Officer,
Gingee Police Station.
(Crime No.115 of 2011

.. Respondent

PRAYER : Criminal Appeal is filed under Section 374 of Criminal Procedure Code, to set aside the judgment of the learned Assistant Sessions Judge, Gingee, Villupur District made in



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S.C.No.185 of 2011 dated 01.08.2014 and acquit the accused/appellant herein from the charge.

For Appellants : Mr. V.R. Appaswame, for A1, A3 & A4

Mr. A.P. Satyamurthy, for A2

For Respondent: Mr. R. Vinoth Raja,
Government Advocate

J U D G M E N T

The matter is heard through "Video Conference".

2. Convicted A1 to A4 are the appellants herein.

3. This criminal appeal is filed against the order dated 01.08.2014 passed by the learned Assistant Sessions Judge, Gingee, Villupur District, in S.C.No.185 of 2011, convicting the accused under Section 395 r/w 398 of IPC and sentencing them to undergo 10 years rigorous imprisonment with fine of Rs.2,000/- each, in default, to undergo rigorous imprisonment for a period of one month.

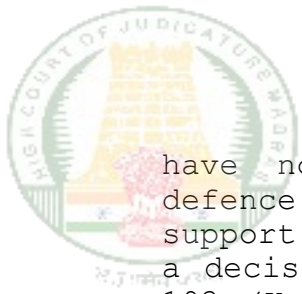
4. The respondent/police has filed a charge sheet against the five accused. A5/Siva died during trial and the trial was conducted as against the four accused, for the alleged offence under Section 395 r/w 398 of IPC.

5. The trial Court framed charges for the offence under Section 395 r/w 398 of IPC against the accused and the accused denied the same. In order to prove the charges, on the side of the prosecution, P.W.1 to P.W.16 were examined, Exs.P.1 to P.38 were marked and material objects MO.1 to MO.14 were produced.

6. After trial, by judgment dated 01.08.2015, the learned Assistant Sessions Judge, laid the conviction and sentence as stated supra.

7. Aggrieved over the said judgment of the conviction and sentence passed against the accused, they have preferred an appeal and they were also granted bail, in the year, 2017.

8. The learned counsel for the appellants would contend that the prosecution witnesses P.W.1, P.W.2 and P.W.4 to P.W.9



have not supported the prosecution case and supported the defence case and they have not declared as hostile witnesses. In support of his contention, the learned counsel also relied upon a decision of the Hon'ble Supreme Court reported in 2004(9) SCC 193 (Kunju Mohammed Vs. State of Kerala), wherein, the Hon'ble Supreme Court has held as follows:-

"In Criminal trial, while Prosecution Witness is not treated hostile, but his evidence helping the defense, the benefit of such evidence should go to the accused and not to the prosecution."

9. The learned Government Advocate (Crl.side) appearing for the State would contend that all the prosecution witnesses were examined and there was no cross examination at the first instance. After completion of 313 proceedings, by way of recalling, P.W.1 and other prosecution witnesses mentioned by the counsel for the defence were recalled for cross-examination. After nearly 2 years, they have not supported the case of the prosecution and hence, they are won over by the defence and made submissions in support of the judgment of the trial Court.

10. Heard both sides and perused the records.

11. The defacto complainant namely, Senthilkumar was examined as P.W.1 and his wife Vijayasanthi was examined as P.W.2. P.W.3/S.Prakash, learned Judicial Magistrate, Tindivanam, who has conducted the identification parade, has submitted the Identification parade report under Ex.P2. While P.W.4 is the Village Administrative Officer (revenue witness) attested in the various seizure mahazar, P.W.5/Sundarajan is the Pawn Broker. P.W.6/Vijay, is the person, who pledged the jewels with P.W.5/Pawn Broker. P.W.7 and P.W.8 are the persons, who helped and withdrawn money through ATM from the account of the father-in-law of P.W.1. The another Village Administrative Officer, who is the attestor of the observation mahazar and seizure mahazar, was examined as P.W.10. P.W.11 is the private witness, who had also attested the observation mahazar and seizure mahazar. P.W.12/Elumalai, is the photographer, who took photos from the Bank CCTV footage. P.W.13/Harinath is the Branch Manager of the Indian Bank and P.W.14/Radhakrishnan, is the another Branch Manager of the State Bank of India. P.W.15/Dr.Uma, is the Assistant Surgeon, who has given treatment for P.W.1 and P.W.2. P.W.16/Singaravelu, is the Investigation Officer.

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

12(a) on 09.03.2011 at about 2.30 pm, in the afternoon, Senthikumar (P.W.1) along with his wife Vijaysanthi (P.W.2) were on the way to visit Gingee Fort from Melmalayanur Temple. On



their way, the appellants namely Siva (A5), Krishnamoorthy (A4) and Suresh (A3) threatened the victims Senthilkumar and his wife at knife point. The accused persons Tamilmani (A2) and Krishnamoorthy (A4) grabbed cell phones from the victims. At around 5.00 pm, the Prabhu (A1) directed the other accused persons to kill the victims (P.W.1 and 2) after extracting everything from them. Further, the A3 Suresh armed Senthilkumar (P.W.1) on the back of his neck using butcher knife and punched Vijaysanthi on her face demanding to handover all the gold ornaments and cash. An ATM card issued by the State Bank of India, a sum of Rs.250/-, Thalesaradu weighing 24 grams, Gold chain weighing 4.75 grams and gold thodu weighing 2.22 milligrams were forcibly taken over by the accused from the victims. Moreover, A1-Prabhu withdrew a sum of Rs.9,000/- using the SBI ATM card. Further case of the prosecution is that the appellants handed over only Rs.100 and the mobile phones to the victims namely P.W.1 & 2 and threatened them not to go to police station otherwise they will kill them.

12(b) Further, the case of the prosecution is that on that day, P.W.1 & P.W.2 went to their house. After that, on 11.03.2011 only, P.W.1 lodged a complaint before the respondent police. Based on the complaint, a case in Crime No.115/2011 was registered by the respondent police against some unknown persons for the offence punishable under Section 395 of IPC.

13. The trial Court has rejected the similar contention of the defence counsel on the ground that the cross examination in respect of some of the prosecution witnesses are kept intact, supported the case of the prosecution and only after 2 years, when P.W.1, P.W.2, P.W.7 and P.W.8 were recalled for further cross examination after 313 questioning and they have not supported the case of the prosecution and accordingly, the second cross examination, after recall petition has been eschewed from the consideration by the learned Sessions Judge and hence, I find that the approach adopted by the learned Sessions Judge cannot be found fault with for more reasons, as discussed infra.

14. This Court has given its anxious consideration to the submissions made by the learned counsel for the appellants/accused and the citations relied on by them.

15. In this case, originally, final report was filed against five persons and pending trial in S.C.No.185/2011, 5th accused/Siva died and hence, charge against him was abated. A1 to A4 were directed to face the trial for the charge under Section 395 r/w 398 of IPC.

16. On a perusal of trial Court records, it is seen that



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the chief examination was conducted on 05.03.2012 and no cross examination was conducted. After one year and six months, an application was filed for recalling P.W.1 and other witnesses and after the said recall petition was allowed, P.W.1 was examined on 18.11.2013 i.e., nearly after two years. So also P.W.2. In respect of P.W.3, cross examination was not conducted at the first instance. Thereafter, cross examination was conducted only on 14.02.2014. In respect of P.W.3-VAO, chief examination was conducted on 16.03.2011 and cross examination was not conducted, at the first instance. On an application, P.W.3 was recalled and cross examination was recorded on 22.04.2013. So also the witnesses P.W.4 to P.W.10. In respect of P.W.1, there was no cross examination. So also the witnesses P.Ws.12, 13, 14 and 15.

17. In other words, the private prosecution witnesses were not cross examined at the first instance. After completion of 313 questioning, it appears that the defence counsel filed an application for recall. After recall, they have been cross examined, after two years and some of the witnesses were cross examined, after 2 and half years. After 2 1/2 years, their version is not in support of the prosecution case. This Court, taking note of the fact that much water has flown under the bridge, in the two years gap, as submitted by the learned Government Advocate, it appears that the private prosecution witnesses have been won over by the accused.

18. Section 33 of the Indian Evidence Act, is also taken note of the evidence of the prosecution witnesses. The evidence of the defacto complainant is totally in support of the prosecution case. The investigation officer P.W.16 has made break through in the investigation, after getting the photographs from the State Bank of India. The Branch Manager of SBI/P.W.14, deposed about the handing over of the images from the CCTV Camera fixed in the ATM centre and the report given by P.W.14 was marked as Ex.P22. The said printout has been enlarged by P.W.12/Photographer, who made the images from the CCTV Camera, ATM of the Indian Bank and the State Bank. The withdrawal of the amount, on the date of occurrence, has been clearly proved by the prosecution from the witnesses P.W.13 and P.W.14, Branch Managers of Indian Bank and SBI Bank respectively and the ATM card belongs to P.W.1 and P.W.2. The images clearly show that two accused, who were convicted, are standing next to P.W.1 and the face appearance of P.W.1 is very clear that he was subjected to criminal assault. Withdrawal of money on the said date, from the account of P.W.2's father has been clearly spoken to by P.W.2. P.W.1 along with the accused were found in the photographs developed from the camera fixed at ATM Booth, as would be seen from MO4.



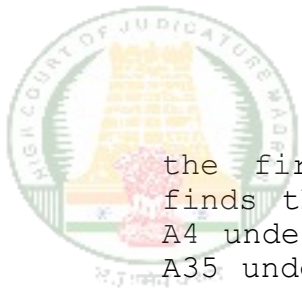
19. The evidence of P.W.1 and P.W.2, at the first instance, are to the effect that they clearly deposed that after marriage, they went to Thiruvannamalai and on the way back, they visited Gingee Fort (Kotai) from Melmalaiyur Temple at that time, the accused hold the victim Senthilkumar/P.W.1 and his wife P.W.2 at the knife point, and the accused person A2 and A4 grabbed the cell phone from the victim. Around 5.00 pm, the first accused/Prabu on the knife point, directed the other accused to kill P.W.1 and P.W.2, after extracting money in their deposit from ATM card and A3 armed P.W.1 with cookery knife on the neck and also gave punch to Vijaysanthi and also asked ATM card issued by the State Bank of India and Thalesaradu (Gold Mangala Sutra) weighing 24 grams, Gold chain weighing 4.75 grams and gold thodu (Ear ring) weighing 2.22 milligrams from P.W.1 and P.W.2. Using SBI ATM Card of P.W.1, A1-Prabhu withdrew a sum of Rs.9,000/-.

20. On a combined evidence of P.W.1 and P.W.2, recorded at the first instance along with the unchallenged version of P.W.13 and P.W.14 Branch Managers and photographer P.W.12, I find that the version of P.W.1 and P.W.2, at the first instance, totally proves the charge beyond reasonable doubt and the answer subsequently, given by P.W.1 and P.W.2 prosecution after more than 2 years, after recall petition (which is filed after 313 questioning) appears to have been supporting the submission of the learned Government Advocate that these prosecution witnesses have been won over by the defence.

20(a). Yet another point is that P.W.15/Pawn Broker have clearly deposed that P.W.6 and P.W.9 came along with the accused and pledged the jewels and taken the money from him which remains unchallenged, assumes significance.

21. It remains to be stated that P.W.10 Elangovan is the attester of the Seizure Mahazar so also P.W.11. It remains to be stated that the admissible portion of the confession statement of A2 in Ex.A29 leading to the discovery of materials, MO8 and MO9 that was seized under Ex.A13 Seizure Mahazar. So also the admissible portion of the confession statement of A1 being marked as Ex.P13 and leading to the discovery of MO10 and MO12 that was seized under Ex.P32. So also the admissible portion of confession statement of A3, leading to the discovery of MO12 which was seized under MO34 and admissible portion of confession statement of A4 namely Ex.P13 and lead the discovery of MO13 which was seized in the seizure mahazars A36 and A37 respectively.

22. In this regard, the attester of the respective confessions statement namely P.W.4 under Exs.A10, A11, A12, A13 and A14 were remained unchallenged in the cross examination at



the first instance, assumes significance. Thus, this Court finds that the confession statement of respective accused A1 to A4 under the above said admissible portion under A29, A31, A33, A35 under which has led to the discovery of MO6 to MO13 and the same was seized under Exs.A30, A32, A34, A36 and A37 respectively goes to show that based upon the admissible portion, confession statement of the accused A1 to A4 have led to the discovery of MO6 to MO13, are found to be gold articles of P.W.2 which is recovered from the P.W.5/Pawn Broker and thus, insofar as their respective witnesses, chief examination was remained unchallenged at the first instance also assumes significance.

23. With regard to the involvement of the accused, Ex.P2/Identification Parade Report marked through the learned Judicial Magistrate, P.W.3, who have conducted the Identification Parade appears to be without any error and hence, at the earliest instance, P.W.1 and P.W.2 has clearly identified the accused A1 to A4, as could be seen from Ex.P2/Identification Parade P.W.3/Judicial Magistrate. Based upon the admissible portion confession statement, A1 to A4, as stated supra leading to the discovery of MO6 to MO12, which belongs to P.W.2. The prosecution has proved the charge beyond reasonable doubt.

24. Though a similar point of objection was raised before the learned Assistant Sessions Judge, answer in cross examination has to be taken into consideration. The learned Assistant Sessions Judge, is of the view that after 313 questioning, it appears that the private prosecution witnesses have been won over by the defence and after 2 1/2 years of the chief examination, they have made a statement inconsistent with the statement made before the Court before two years. Accordingly, laid the conviction. The questioning under 313 Cr.P.C., has been conducted on 02.09.2013, assumes significance.

25. After perusing the chief and cross examination of private prosecution witnesses, P.W.1 to P.W.5, I find that chief examination have been conducted on 05.03.2012. Questioning under Section 313 of Cr.P.C., was conducted on 02.09.2013. Thereafter, application under Section 311 of Cr.P.C., to recall the prosecution witnesses (private), for cross examination was filed and allowed and they have been examined on 08.11.2013 and some of the witnesses as are much later, and thereafter. Records reveal that none of the private prosecution witnesses were cross examined at the instance and now so, till prosecution side was closed and questioning under 313 of Cr.P.C., is also over and thereafter, matter was posted and pending for argument and NBW against the accused was pending for years.

26. During the cross examination of P.W.7/Vijayprabakaran



and P.W.8/Ashiq, though suggestions were made only at the instance of Senthilkumar, defacto complainant/P.W.1, they came and assisted for withdrawing the amount for P.W.1 from the ATM card.

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27. It remains to be stated that on a close perusal of the cross examination of P.W.1, no such question has been confronted with P.W.1, assumes significance and hence, the answer elicited in the cross examination of P.W.7/Vijayprabakaran and P.W.8/Ashiq, defence of accused stands exposed that only at the instance of A2, P.W.1, went to ATM and hence, I find that involvement of A2 is proved by the prosecution in the manner known to law.

28. Yet another point is that the said witness Vijayprabakaran has given statement under Section 164 of Cr.P.C., recorded by learned Magistrate on 24.05.2011, which is marked as Ex.P3. Ashiq's 164 statement was recorded on 24.05.2011, which is marked under Ex.P6 and hence, in view of the overwhelming evidence of the P.W.7 and P.W.8, coupled with Ex.P3 and Ex.P6, (their respective 164 statements before the learned Magistrate) supports the prosecution theory.

28(a) Moreover, no such suggestion has been made to the prosecution witnesses namely P.W.1 and thus, I find that the evidence of P.W.7 and P.W.8 as discussed supra only support the case of the prosecution and not as that of the defence theory and hence, in view of the instigation given by the accused P.W.7 and P.W.8 went along with the accused for drawing the money from ATM Card of P.W.1 and P.W.2. Besides, P.W.1 and P.W.2 has identified the accused in the Identification Parade conducted by Judicial Magistrate/P.W.3, under Ex.P2/Identification Parade Report.

29. The confession statement of respective accused and their admissible portion and the discovery made thereon and seizure of the articles from P.W.5/Pawn Broker, which are belonged to P.W.2 and recovered articles identified by her thereby clearly lends support of the case of the prosecution. Thus, this Court finds that by using the ATM card of the father of P.W.2, (father-in-law of P.W.1), Rs.9,000/- was drawn on 09.03.2011. It is duly supported by MO14/Photographs downloaded from the CCTV Camera and on 11.03.2011, a complaint has been lodged and on the very same day, the first accused has withdrawn Rs.9,000/- from the said card also assumes significance.

30. Based upon the confession statement of the accused, the material objects namely knife, aruval, which is marked as MO11 and MO12, also recovered and identified by P.W.1 goes to show that the charge of Section 395 r/w 398 of IPC has been proved by the prosecution beyond reasonable doubt.



31. Merely because the P.W.1 and P.W.2 had deposed differently in their cross examination, after two years of chief examination on recall, their evidence given in the examination in chief, cannot be brushed aside.

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32. At the risk of repetition, for the sake of clarity, chief examination of P.W.1 was conducted on 05.03.2012, whereas, the cross examination was conducted on 18.11.2013, in between, there is every chance of influencing P.W.1 from the side of the accused. Merely, because P.W.1 and P.W.2 had deposed the cross examination against the prosecution theory, the entire evidence of prosecution including the chief examination of P.W.1 and P.W.2, cannot be discarded since there is a big time gap between the chief and cross examination.

33. I find that the Sessions Judge has rightly rejected the contention of the defence counsel. Such reasons of trial Court is found to be in accordance with sound principle of application of evidence and the same is well considered and well merited does not warrant any interference in the appeal.

34. Accordingly, the finding rendered by the trial Court and the conviction and sentence awarded therefor, are hereby confirmed.

35. On the of quantum of sentence, after hearing both the parties, taking into the consideration the nature and gravity of proved charges and material objects produced by the prosecution, I find that the period of sentence granted by the Sessions Judge cannot be termed as excessive. Accordingly, this petition is liable to be dismissed.

36. Accordingly, this criminal appeal stands dismissed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

AT

To

1. The Assistant Sessions Judge, Gingee,
Villupur District.



2. Do Through,
The Chief Judicial Magistrate,
Gingee.

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3. The Judicial Magistrate,
Gingee.

4. Do Through,
The Chief Judicial Magistrate,
Villupuram.

5. The Station House Officer,
Gingee Police Station.

6. The Superintendent,
Central Prison,
Cuddalore.

7. The Public Prosecutor,
High Court of Madras.

Crl.A.No.426 of 2014

RSI(CO)
SU(08/12/2021)