

BAIL SLIP

The Petitioners/Accused/ viz., Ramakrishnan was released on bail as per the Order of this Court Dated 04/09/2008 in Crl.M.P.No.1 of 2008 in Crl.A.No.570 of 2008 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :20.06.2022

Pronounced on :28.06.2022

CORAM:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Criminal Appeal No.570 of 2008

Ramakrishnan

.. Appellant

/versus/

State by Inspector of Police,
Bhavanisagar Police Station,
(Crime No.68/2006)

.. Respondent

Prayer: Criminal Appeal has been filed under Section 374(2) of Cr.P.C., against the judgment of the learned Assistant Sessions Court (Principal Sub Court), Gobichettipalayam in S.C.No.36 of 2007 dated 04.04.2008.

For Appellant :Mr.A.K.Kumarasamy,
Senior Counsel for
Mr.S.Kaithamalai Kumaran

For Respondent :Mr.S.Udaya Kumar
Govt.Advocate (Crl.Side)

JUDGMENT

The trial in S.C.No.36 of 2007 before the Principal Assistant Sessions Judge, Gopichettipalayam was against 7 accused. The appellant herein is the first accused. On the base of the material placed, the trial Court framed the following charges:-

First Charge against Accused 2 to 7: On 12/05/2006, night at

about 7.15 p.m., A-2 to A-7 along with A-1, gathered together with Yamaha motorcycle bearing Registration Number TN 33 Z 4477, Bajaj Pulsar bearing Registration No:TN 37 F 7467 and TVS Star City on Bhavanisagar - Mettupalayam Road near Sreerangarayan Bridge, with an intention to commit dacoity. When the defacto complainant passed through the road, they restrained him and extorted Rs.1350/-, a Nokia cell phone worth about Rs.20,000/-, a ladies watch and 8 gold coins. Thereby committed offence punishable under Section 395 IPC.

Second charge against Accused 1: In the course of the transaction mentioned above, for extorting the properties mentioned above, A-1 showed a country made gun and threatened to kill the defacto complainant, thereby committed offence under Section 395 r/w 397 IPC.

Third Charge against Accused 1 and 4: A-4 possessed the country gun without license and in the course of the above transaction, A-1 took the country gun from A-4 and used it to put the defacto complainant under fear of death and thereby, A-1 and A-4 committed offence punishable under Section 25 (1B)(a) of Arms Act, 1959.

2. The prosecution examined 10 witnesses. 30 documents and 8 material objects were marked as prosecution side exhibits and material objects respectively.

3. The trial Court, based on the deposition of the defacto complainant, their confession leading to recovery of the stolen goods from the possession of the accused persons, identification parade and the corroboration of independent witnesses, held the charges proved and sentenced A-1 (the appellant herein) to undergo imprisonment for 8 years Rigorous Imprisonment for the offence under Section 395 r/w 397 IPC; sentenced to undergo one year Rigorous Imprisonment for the offence under Section 25 (1-B) (a) of Arms Act, 1959. The period of imprisonment was ordered to run concurrently and the period of imprisonment already undergone was ordered to be set off under Section 428 of Cr.PC.

4. The other accused [A-2 to A-7], who were found guilty of the charge under Section 395 were sentenced to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default, to undergo 6 months Simple Imprisonment; and for the offence under Section 25 (1-B)(a) of Arms Act, 1959, A-4, was sentenced to undergo one year Rigorous Imprisonment.

5. The appeal by the first accused challenging the conviction and sentences is based on the following grounds:

(a)The crime alleged to have taken place on 12/05/2006 at about 7.15 pm. The written complaint [Ex.P-1] was given by PW-1 (Madhu), the victim of the crime only on the next day (i.e) 13/05/2006 at 18.30 hrs and the delay of 22 hours in lodging the

complaint is not satisfactorily explained by PW-1. In his cross examination, PW-1 admits that on his way to the house at Mettupalayam from the alleged place of occurrence, there were three police stations but he did not give complaint .

(b)PW-1 admits in the cross examination that when he went to the police station, he saw 3 or 4 accused under custody of the police. Thus, it is obvious that the complaint [Ex P-1] was obtained only after securing the accused persons.

(c)The alleged confession statements of the accused is not admissible, since it was obtained after taking them into custody. The trial Court failed to see that the confession leading to recovery of M.O's are cooked up by the prosecution.

(d) The prosecution case that the accused persons were arrested on 14/05/2006 and on 16/05/2006 and they gave confession leading to recovery is falsified by the evidence of PW-1, who admits he saw the accused persons in the Police Station on 13/05/2006 at 18.30 hrs when he went to the police station to give his complaint.

(e)The Identification Parade conducted by PW-8 in respect of A-1 is a farce exercise, since A-1 was shown to the witness [PW-1] on 13/5/2006 in the police station.

6. The learned Senior Counsel appearing for the appellant to substantiate the above grounds read through the relevant portion of the depositions and documents.

7. Regarding delay in lodging the complaint(Ex.P1), PW-1 has been put to cross examination extensively. The delay of 22 hours in filing the First Information Report is a fact borne by record. When PW-1/the defacto complainant was subjected to cross examination, it has been elucidated that from the scene of occurrence, one can reach the Bhavanisagar Police Station within 15 minutes. PW-1 has not reported the incident to the Bhavanisagar Police Station or Mettupalayam Police Station or Serumugai Police Station, which are all on the way to his residence at Mettupalayam. The defacto complainant has explained in the cross examination that he informed the matter to his employer (PW-2) over phone. The next day, he went to the company at 10.00 a.m., his employer came to his office at 12.00 noon and thereafter, at 06.30 p.m., he went to the police station to report.

8. It is the case, where PW-1 was waylaid by the accused persons at gun point, from PW-1, a cell phone, cash, a ladies watch, four gold coins weighing each two grams and four gold coins weighing each one gram were extorted. The gold coins were meant for distribution to the dealer of PW-2 company. PW-2 the owner of the Automobile Company and sole distributor of SMO oil had deposed that on 12.05.2006 at about 09.30 p.m., PW-1 informed about the occurrence and he instructed him to give

police complaint. The gold coins, which were robbed from PW-1 belong to PW-2 company. The prosecution has examined one Gobinathan (PW-3), who is a friend of PW-1, accompanied with PW-1 to the police station for lodging the complaint. He in the cross examination, has been elucidated that he along with PW-1 went to the police station, 3 or 4 accused were present, who were those accused have not been further elucidated. Thus, from these evidence, there is some plausible explanation by the prosecution for the delay in lodging the complaint and further there is also material evidence to show that the accused persons were detained in connection with the another case under Section 399 of IPC by the respondent police, when PW-1 and PW-3 went to the police station to lodge the complaint. In the light of the above fact, the other evidence of the prosecution has to be analysed to ascertain whether the prosecution has proved the guilt of the accused beyond reasonable doubt.

9. As far as the Identity of this appellant, who is arrayed as A1 is concerned, there is nothing to show that he was present in the police station when PW-1 and PW-3 went to the police station to lodge the complaint marked as Ex.P1. The Identification Parade of the accused had been conducted by PW-8-Judicial Magistrate No.1, Sangari. The Identification Parade has been conducted on 07.06.2006 in Kovai, Central Prison. The accused has been identified by the witness correctly during the identification parade. Thus, it is proved through PW-8 and his report marked as Ex.P23. In the cross examination, PW8 has admitted that before conducting Identification Parade, the accused informed her that they were shown to the witness, when they were produced before the Court. Therefore, from the cross examination of PW-1, PW-2 and PW-8, it is suggested generally that the accused were shown to the witnesses prior to test Identification Parade either in the police station or in the Court. However, the answer of the prosecution witness is not specified to any particular accused. This piece of answer elucidated in the cross examination will not be in favour of the accused persons in the absence of the date on which the accused and which accused was shown to the witness prior to the identification parade.

10. Regarding the recovery, the accused was arrested on 15.05.2006 and on that date between 07.00 a.m and 09.00 a.m., in the morning, based on the information given by A1, one TVS Star City Bike and 2 ½ feet yellow rope have been recovered in the presence of Village Administrative Officer (Smt.Raja Rajeswari) and the Village Assistant (Tr.Ganesan) followed by that recovery at about 11.15 am., was recovered a cement colour Nokia Cell phone from the house of the first accused. The appellant/accused is involved in two cases along with other accused both cases are similar in nature. One case is registered in Crime No.69 of 2006 under Section 399 IPC and

another case in Crime No.68 of 2006 under Section 397 of IPC and Section 25(1)(A) of the Indian Arms Act, 1959. The Nokia cell phone, which was recovered under Mahazar [Ex.P10] pertains to the offence in Crime No.68 of 2006 under Section 397 IPC and Section 25(1)(a) of Arms Act, 1959, which is the subject matter of the present appeal. Smt.Rajarajeswari, the Village Administrative Officer has been examined as PW-6 and she has spoken about the recovery mahazar and the confession statement leading to recovery. Her evidence has not been impeached in the cross examination.

11. The victim witness(PW-1) had deposed that the cash, cell phone, watch and gold coins were extorted from him at gunpoint. One among the accused showed the gun and threatened him. Though in the identification parade, PW-1 has identified the first accused/appellant herein, who is the one of seven members in the gang, he has not identified him as a person, who showed the gun and threatened him. It is only based on the confession of the accused persons, the charge for the offence under Section 395 r/w 397 of IPC has been exclusively framed against this appellant/A1.

12. The countrymade gun has been recovered from A4 under mahazar [Ex.P14]. This was recovered in different Crime No.69 of 2006 registered for offence under Section 399 of IPC. This was recovered on 15.05.2006 at 08.00 a.m, near Srirangarayangadu the concealed in a thorn bush. The charge against this appellant is that he was showing the gun and threatened the defacto complainant that if he refused to give the money, he will kill him. However, PW-1 has not specifically identified the appellant as a person, who was holding the gun and threatened him.

13. Section 397 IPC reads as below:-

397. Robbery or dacoity, with attempt to cause death or grievous hurt:-

If at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

14. From the evidence of PW-1, it is not clear, who among seven accused used deadly weapon (countrymade gun) at the time of committing the offence of dacoity. Section 397 of IPC deals with the individual liability not constructive liability. Whereas the definition of dacoity under Section 391 of IPC clearly states that when five or more persons conjointly commit

or attempt to commit a robbery, every person so committing or attempting or aiding is said to commit "dacoity".

15. Section 391 of IPC for reference:

391. Dacoity:- When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

16. In the said circumstances, while considering the evidence on the whole, this Court holds that the prosecution has proved the charge of dacoity against this accused, but not proved that A1 used deadly weapon in the course of committing the dacoity. The countrymade gun marked as M.O.5 was recovered from A4(Senthilkumar). Though the trial Court has charged the accused/petitioner for offence under Section 25(1B)(a) of Arms Act, 1959 stating that this appellant took the gun from A4 in the course of committing dacoity and threatened the victim, but to prove the said charge, the victim witness has failed to depose about the overt act of A1 as found in the charge.

17. Therefore, the appellant is guilty of offence under Section 395 IPC alone. The conviction under Section 395 r/w 397 IPC is altered into Section 395 of IPC. As far as sentence imposed under Section 25 (1B)(a) of the Arms Act, the same is confirmed.

18. In the result, the appellant is sentenced to undergo 4 years Rigorous imprisonment and to pay a fine of Rs.10,000/- in default, to undergo 6 months Simple Imprisonment. The conviction and sentence imposed on the appellant under Section 25(1B)(a) of Arms Act, 1959 is set aside. Suspension of sentence, if any, already granted is cancelled. The trial Court is directed to secure the appellant and remand him to the judicial custody to undergo the remaining period of sentence. Bail bond, if any, executed by the appellant stands cancelled.

19. With the above modification, this Criminal Appeal is partly allowed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To:

1. The Assistant Sessions Court (Principal Sub Court),
Gobichettipalayam.
2. The Inspector of Police,
Bhavanisagar Police Station.
3. The Judicial Magistrate, Sathyamangalam.
4. The Chief Judicial Magistrate, Erode.
5. The Superintendent, Central Prison, Coimbatore.
6. The Public Prosecutor
High Court, Madras - 104.

+lcc to Mr.S.Kaithamalai Kumaran, Advocate, S.R.No.40132

Cr1.A.No.570 of 2008

KV(CO)
CT/08/07/2022